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17
18
19
20



A TREATISE
ON
Appellate Procedure

AND
Trial Practice Incident to Appeal

BY BYRON K. ELLIOTT

AND

WILLIAM F. ELLIOTT,

AUTHORS OF "THE WORK OF THE ADVOCATE" AND "A T
TISE ON THE LAW OF ROADS AND STREETS."

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TABLE OF CONTENTS.

PART I.

APPELLATE TRIBUNALS, JURISDICTION AND PRACTICE.

CHAPTER I.

APPELLATE TRIBUNALS.

- | | |
|---|--|
| § 1. Judicial power—Definition. | § 6. Inherent powers of constitutional courts. |
| 2. Rule where constitution defines the jurisdiction. | 7. Power to frame rules. |
| 3. Only judicial duties can be imposed on courts. | 8. Where judicial power resides. |
| 4. Courts not required to give opinions to the legislature. | 9. Amplifying jurisdiction. |
| 5. Where the ultimate superior jurisdiction is vested. | 10. Influence of the common law. |
| | 11. Supplying statutory omissions |

CHAPTER II.

APPELLATE JURISDICTION.

- | | |
|---|---|
| § 12. Jurisdiction—Definition. | § 19. Statutory mode of review exclusive. |
| 13. Consent can not confer jurisdiction of the subject. | 20. Incidents of appellate jurisdiction. |
| 14. Fictitious cases. | 21. Power of appellate tribunals to frame judgments. |
| 15. Appeal defined. | 22. Grant of appellate jurisdiction. |
| 16. Appellate jurisdiction defined. | 23. Determination of the question of the right of appeal. |
| 17. Appellate jurisdiction one of review. | 24. Blending of legal and equitable jurisdiction. |
| 18. Jurisdiction for one purpose retained for all. | |

CHAPTER III.

THE SUPREME COURT.

- | | |
|--|--|
| § 25. The rank of the Supreme Court. | § 28. Mode of procedure. |
| 26. The repository of appellate jurisdiction. | 29. Trial of questions of fact. |
| 27. Can not be transformed into a <i>nisi prius</i> court. | 30. No right to trial by jury on appeal. |
| | 31. Territorial jurisdiction. |

TABLE OF CONTENTS.

- | | |
|--|---|
| § 32. Constitutional questions. | § 39. Foreclosure of liens on property. |
| 33. How constitutional questions must appear. | 40. Title to land—Cases involving. |
| 34. Statutory jurisdiction. | 41. Prosecutions for felony. |
| 35. Classes of cases taken from the jurisdiction of the Supreme Court. | 42. Actions to recover statutory penalties. |
| 36. Incidents of a class go with it. | 43. Municipal ordinances. |
| 37. Equity cases. | 44. Where the principal appellate jurisdiction is vested. |
| 38. What are considered equity cases | 45. Inherent powers. |
| | 46. Opinions—Constitutional requirements. |

CHAPTER IV.

THE APPELLATE COURT.

- | | |
|---|---|
| § 47. Jurisdictional clause of the act creating the Appellate Court | § 61. Interest and costs which accrue subsequent to the appeal. |
| 48. Entire case goes to one court. | 62. <i>Remittitur</i> —Effect on question of jurisdiction. |
| 49. Appellate Court has no jurisdiction of constitutional questions. | 63. Counter-claim as affecting jurisdiction. |
| 50. No definite system of classification adopted. | 64. Counter-claim—Change of the character of case by. |
| 51. Actions originating before a justice of the peace. | 65. Actions for the recovery of personal property. |
| 52. Actions involving title to real estate. | 66. Value of property in controversy not material. |
| 53. Amount in controversy before justice of the peace determines jurisdiction. | 67. Exceptional cases involving title to personal property. |
| 54. Amount in controversy in trial court—General rule. | 68. Actions between landlord and tenant. |
| 55. Amount—Exceptional cases. | 69. Rule where title is put in issue. |
| 56. Jurisdiction as dependent upon amount. | 70. Decedents' estates—Claims against. |
| 57. Money recoveries only. | 71. Rules of practice. |
| 58. Effect of the limiting words of the statute. | 72. Supreme Court decisions control. |
| 59. Determination of the amount in controversy. | 73. Transfer of cases. |
| 60. Effect of judgment in the trial court upon the question of the amount in controversy. | 74. Disqualifications of one judge—Jurisdiction not ousted. |

CHAPTER V.

WHAT MAY BE APPEALED FROM.

- | | |
|--|---|
| § 75. Appeal—Right of. | § 78. Only judicial questions considered on appeal. |
| 76. Appeal is part of the remedy. | 79. Appeals lie from judgments or decrees only. |
| 77. Appellate Jurisdiction conferred by law. | |

- § 50. Appeals lie only from final judgments—General rule.
- 51. What is a final judgment.
- 52. Difference between intermediate decisions and final judgments.
- 53. Final judgment disposes of entire case.
- 54. Object and scope of the rule.
- 55. Requisites of a final judgment.
- 56. Distinct actions.
- 57. Appeal from judgment of review.
- 58. Order setting aside execution.
- 59. Removal of case to Federal Court.
- 60. Material issues must be determined.
- 91. Rights of all parties must be adjudicated.
- 92. Judgment may be final, although an order may be required for its enforcement.
- 93. Decree in partition proceeding.
- 94. Form of judgment not important.
- 95. Independent issues not affecting all parties.
- 96. Record must show final judgment.
- § 97. Limitation of appeals to designated classes of cases controls jurisdiction
- 98. Distinct and independent claims.
- 99. Appeal of part of a cause—Exceptional cases.
- 100. Interlocutory order appointing a receiver.
- 101. Interlocutory order for payment of money.
- 102. Order directing execution of a written instrument.
- 103. Order requiring delivery of property.
- 104. Order requiring assignment of instruments.
- 105. Order compelling execution of instrument of writing.
- 106. Order granting or denying an injunction.
- 107. Interlocutory order in *Habeas Corpus* proceedings.
- 108. Effect of an appeal from an interlocutory order.
- 109. Mode of appealing from interlocutory orders.
- 110. Void judgments—appeals from.

CHAPTER VI.

THE TIME WITHIN WHICH AN APPEAL MAY BE TAKEN.

- § 111. Limitation of time is jurisdictional.
- 112. Time can not be enlarged.
- 113. Cases regarded as exceptions—Peculiar features of.
- 114. Time not extended to the party in fault.
- 115. Diligence exacted.
- 116. Petition for leave to appeal after the expiration of the time limited.
- 117. Rule where the delay is caused by the act of the court.
- 118. When the time begins to run.
- 119. Final judgment and entry—Time begins to run from.
- 120. Independent actions.
- 121. When the right of appeal matures.
- § 122. Computation of time—The beginning.
- 123. Collateral and independent matters.
- 124. How the date of the final judgment is ascertained.
- 125. Day the judgment is entered excluded.
- 126. The meaning of the words months and years.
- 127. Non-judicial days.
- 128. The appeal must be fully perfected within the time prescribed.
- 129. Bar, by limitation, of part of the appellants.
- 130. Parties under disabilities.

CHAPTER VII.

PARTIES.

- | | |
|--|--|
| <p>§ 131. Right of appeal generally.</p> <p>132. Only parties or privies can appeal—General rule.</p> <p>133. Appealable interest.</p> <p>134. Cases in which there is no appealable interest.</p> <p>135. Substantial interest requisite.</p> <p>136. Exceptional cases.</p> <p>137. Succession—Substitution.</p> <p>138. Joint parties.</p> <p>139. Co-parties generally.</p> <p>140. Necessary parties.</p> <p>141. Parties to the record not always parties to the judgment.</p> <p>142. Persons not affected by the appeal not necessary parties.</p> <p>143. Rule requiring necessary parties not technical.</p> <p>144. Notice to co-parties jurisdictional.</p> <p>145. Failure to give notice to co-parties—Waiver of objection.</p> <p>146. Waiver of notice.</p> <p>147. Successful party can not prosecute an appeal.</p> <p>148. Actual controversy must exist.</p> <p>149. Suit for review cuts off appeal.</p> <p>150. Waiver and estoppel by accepting benefit of judgment appealed from.</p> <p>151. Exceptions to the general rule.</p> <p>152. Payment by defendant not a waiver nor an estoppel.</p> | <p>§ 153. Against whom an appeal may be prosecuted.</p> <p>154. Appellees—Who should be—General rules.</p> <p>155. Persons united in interest—Rights of.</p> <p>156. How persons originally co-parties may become adversaries.</p> <p>157. Termination or change of interest—Effect of.</p> <p>158. Influence of the chancery element of code procedure.</p> <p>159. Relation of parties in trial court generally continues on appeal.</p> <p>160. Appealable interest—How shown.</p> <p>161. Effect of change of the positions of parties.</p> <p>162. Within what time parties must be brought in.</p> <p>163. Effect of the appeal upon co-parties who decline to join.</p> <p>164. Effect of notice to one who is a party but not a co-party.</p> <p>165. Death of party before appeal—Effect of.</p> <p>166. Death of party after the appeal.</p> <p>167. Death of one of several appellants—Effect of.</p> <p>168. Appeals by and against representatives and privies.</p> <p>169. Abatement by death.</p> |
|--|--|

CHAPTER VIII.

PROCESS.

- | | |
|--|--|
| <p>§ 170. Notice—Object of—Sufficiency.</p> <p>171. Test of sufficiency.</p> <p>172. Written notice required.</p> <p>173. Notice as essential to jurisdiction.</p> <p>174. Time where there is no fixed rule must be reasonable.</p> <p>175. Notice not given in time when ineffective—Waiver.</p> <p>176. Upon whom process may be served.</p> <p>177. Service on the attorney of record.</p> | <p>§ 178. Service on one of several attorneys.</p> <p>179. Proof of service.</p> <p>180. Filing of notice and proof of service.</p> <p>181. Service of notice on co-parties.</p> <p>182. Objections to process.</p> <p>183. Constructive notice.</p> <p>184. Proof of publication.</p> <p>185. Amendment of the proof of notice.</p> |
|--|--|

CHAPTER IX.

THE RECORD AND TRANSCRIPT.

- | | |
|--|--|
| <p>§ 186. Appeals are tried by the record.</p> <p>187. Record can not be made by agreement.</p> <p>188. Remedying defects in the transcript by agreement.</p> <p>189. The difference between the record and the transcript.</p> <p>190. The record of the trial court.</p> <p>191. Direct and collateral motions.</p> <p>192. Adding to the intrinsic record by special order.</p> <p>193. Special cases—Default, questions upon instructions.</p> <p>194. The record on appeal.</p> <p>195. Transcript—Requisites of.</p> | <p>§ 196. What the transcript should contain—Generally.</p> <p>197. Independent cases can not be included in one transcript.</p> <p>198. Matters embraced in an appeal.</p> <p>199. Practice where transcript contains improper matter.</p> <p>200. Directions to the clerk—<i>Precede</i>.</p> <p>201. Authentication of the transcript.</p> <p>202. Constituent parts of the record as prescribed by the statute.</p> <p>203. Authority of the appellate tribunal over the transcript.</p> <p>204. Marginal notes.</p> |
|--|--|

CHAPTER X.

CORRECTING AND AMENDING THE RECORD AND TRANSCRIPT.

- | | |
|--|---|
| <p>§ 205. The record below and the record on appeal.</p> <p>206. Amendments and corrections of the trial court record.</p> <p>207. Effect of an amendment of the record of the trial court.</p> <p>208. Amendments not allowed after the decision on appeal.</p> <p>209. Entries <i>nunc pro tunc</i>.</p> <p>210. The application to correct the trial court record.</p> <p>211. By whom the motion may be made.</p> <p>212. Notice of the motion.</p> <p>213. Evidence on the hearing of the motion.</p> | <p>§ 214. Appeal from the ruling on application for <i>nunc pro tunc</i> entry.</p> <p>215. Presenting the ruling on appeal.</p> <p>216. <i>Certiorari</i>.</p> <p>217. Duty of party to apply for <i>certiorari</i>.</p> <p>218. Who may obtain a <i>certiorari</i>.</p> <p>219. Time of making the application.</p> <p>220. Requisites of an application for a <i>certiorari</i>.</p> <p>221. Notice of the application.</p> <p>222. Submitting the motion for hearing.</p> |
|--|---|

CHAPTER XI.

AGREED CASE.

- | | |
|---|--|
| <p>§ 223. Agreed cases—Jurisdiction.</p> <p>224. Agreed statement of facts does not make an agreed case.</p> <p>225. The distinctive features of an agreed case.</p> <p>226. No presumptions, indulged in favor of the judgment of the trial court.</p> | <p>§ 227. The affidavit.</p> <p>228. Requisites of the statement of facts.</p> <p>229. Office of the statement of facts.</p> <p>230. Effect of the statement.</p> <p>231. Mistake in the statement of facts.</p> <p>232. The record.</p> |
|---|--|

TABLE OF CONTENTS.

CHAPTER XII.

RESERVED QUESTIONS OF LAW.

- | | |
|---|---|
| § 233. Object of the statute. | § 239. Exceptions to the rulings upon which questions are reserved necessary. |
| 234. The case must be made up under the statute. | 240. Bill of exceptions required. |
| 235. Notifying the court of the intention to reserve questions. | 241. Office of the bill of exceptions. |
| 236. Only questions of law can be reserved. | 242. A motion for new trial necessary. |
| 237. On what rulings questions may be reserved. | 243. Appeal before final judgment not authorized. |
| 238. Questions of fact must be excluded by the record. | 244. Supersedeas. |

CHAPTER XIII.

MODES OF APPEAL IN CIVIL ACTIONS.

- | | |
|---|--|
| § 245. The different modes of appeal. | § 250. Appeal after term. |
| 246. Appeals in term. | 251. Classes of appeals after term. |
| 247. Requisites of an appeal in term. | 252. Civil actions—Definition. |
| 248. A bond essential to an appeal in term. | 253. What cases are appealable as civil actions. |
| 249. Ineffectual attempt to appeal in term. | |

CHAPTER XIV.

APPEALS IN MATTERS CONNECTED WITH DECEDENTS' ESTATES.

- | | |
|--|--|
| § 254. The special statute does not create an entirely independent system. | § 261. Time for appealing. |
| 255. What cases are governed by the statute respecting decedents' estates. | 262. What the appellant must do to perfect the appeal. |
| 256. Cases held not to be within the special statute. | 263. Extension of time. |
| 257. Cases within the statute. | 264. Steps essential to secure an extension of time. |
| 258. The conflict in the decisions. | 265. Notice of the application for an extension of time. |
| 259. Construction of the statute. | 266. Briefs on the application. |
| 260. Effect of the construction suggested. | 267. Bond must be filed within the time limited. |
| | 268. Intermediate decisions and interlocutory orders. |

CHAPTER XV.

APPEALS IN CRIMINAL CASES.

- | | |
|---|---|
| § 269. Statutory remedy exclusive. | § 272. Appeals by the State. |
| 270. Appeals can not be taken under the statute providing for appeals in civil actions. | 273. When an appeal will not lie from a denial of a motion in arrest. |
| 271. Classes of appeals. | 274. The State can present only questions of law. |

- § 275. Preparation of the record.
- 276. Bill of exceptions—When necessary.
- 277. Exceptions must be reserved—Motion for new trial not required.
- 278. The State has no general right of appeal.
- 279. How questions of law may arise.
- 280. What the record must show.
- 281. Defective record.
- 282. The initial step—Notice.
- 283. Notice is merely one step towards perfecting the appeal.
- 284. Time within which the State must perfect the appeal.
- 285. Time—Waiver.
- 286. Appeal by defendant.
- § 287. Defendants given a general right of appeal—What must be done to perfect an appeal.
- 288. Appeal by one of several defendants.
- 289. Waiver of the right of appeal.
- 290. Waiver of errors.
- 291. Presumptions.
- 292. Record must show prejudicial error.
- 293. Objections must be made in the trial court.
- 294. The record.
- 295. Bill of exceptions—When necessary.
- 296. The bill of exceptions—Matters of practice.
- 297. Appeal does not vacate the judgment.
- 298. Effect of an appeal by the State.

CHAPTER XVI.

THE ASSIGNMENT OF ERRORS.

- § 299. The office and form of the assignment of errors.
- 300. The assignment of errors is the complaint of the appellee.
- 301. The assignment of errors presents questions of law.
- 302. Leave to amend may precede the assignment of errors.
- 303. Assignment of errors essential to complete jurisdiction.
- 304. Relief where failure to assign errors is caused by accident or fraud.
- 305. Preliminary steps may precede the assignment of error in exceptional cases.
- 306. Specifications of error.
- 307. Statutory provisions.
- 308. Concerning the rule that the assignment shall be specific.
- 309. Each specification must be complete in itself.
- 310. Appeals from the Marion Superior Court.
- § 311. By whom errors must be assigned.
- 312. Intervenors.
- 313. Incidental issues.
- 314. Only injured parties can assign error.
- 315. Parties privies may assign error.
- 316. The assignment can not contradict the record.
- 317. A favorable ruling can not be assigned as error.
- 318. Joint assignments.
- 319. Exception to the general rule.
- 320. Curing defects in the assignment.
- 321. Correcting the assignment of errors as to parties.
- 322. Naming parties.
- 323. Exceptions to the rule requiring names of parties.
- 324. Groundwork of the assignment.
- 325. Distinction between resembling classes of cases.

- § 326. Specifications of error defective because too general.
- 327. Meaning of the rule requiring specific assignments.
- 328. Errors respecting jurisdiction of the person.
- 329. Defective trial court process.
- 330. Application to trial court where process or service is defective.
- 331. The difference between cases where there is no jurisdiction and cases where the notice is defective.
- 332. Cases where is no service.
- 333. Writs running beyond the term.
- 334. Judgments by default.
- 335. Failure to obey a rule to plead.
- 336. Rulings on pleadings—Generally.
- 337. Rulings on demurrers.
- 338. Interrogatories to parties.
- 339. *Habeas corpus* cases.
- 340. Identifying the ruling complained of.
- § 341. Objections to the mode of impaneling the jury.
- 342. Rulings on verdicts.
- 343. Specifications in cases of rulings on verdicts.
- 344. Rulings on judgments.
- 345. Mode of objecting to judgments.
- 346. Original objections to judgments.
- 347. Causes for a new trial not assignable as error.
- 348. What matters are not assignable as reasons for a new trial.
- 349. What should be made independent specifications of error.
- 350. Independent specifications—When proper.
- 351. Specifications of the motion for a new trial.
- 352. Trial where issues of law are undecided.
- 353. Amendment of the assignment of errors.

CHAPTER XVII.

APPEAL BONDS.

- § 354. Power to exact a bond.
- 355. Nature of appeal bonds.
- 356. The bond is statutory.
- 357. Rule where there is no jurisdiction of the matter in which the bond is executed.
- 358. The bond is aided by the statute.
- 359. Construction of appeal bonds—General rule.
- 360. Recovery limited by the penalty.
- 361. Interest beyond the penalty.
- 362. The obligation of the bond.
- 363. Mode of executing the bond.
- 364. Form and substance of the bond.
- 365. Right of appellee to require a well framed and properly executed bond.
- 366. Authority of trial court to fix the penalty and approve the sureties—Conclusiveness of the order of approval.
- § 367. Demanding a new bond—Practice.
- 368. Estoppel of the sureties.
- 369. By whom the bond should be approved.
- 370. Informal or irregular approvals.
- 371. Approval may be implied.
- 372. Effect of the approval.
- 373. Evidence of filing and approval.
- 374. The bond as essential to the effectiveness of an appeal.
- 375. Bond not ordinarily essential to jurisdiction.
- 376. Appearing without objecting—Waiver.
- 377. Amending defective bonds.
- 378. Motion to dismiss because of defective bond.
- 379. Promptness required in asking leave to amend.
- 380. Enforcement of the bond.

- § 381. What will release sureties. § 383. Measure of recovery.
 382. Surety's right of subrogation.

CHAPTER XVIII.

STAY OF PROCEEDINGS—SUPERSEDEAS.

- § 384. Bond required to secure stay of proceedings.
 385. Effect of an appeal in term.
 386. Stay by order of appellate tribunal.
 387. Supersedeas—Definition.
 388. Application for a supersedeas—Brief.
 389. Effect of a supersedeas—Generally.
 390. Stay obtained by one of several appellants—Effect of.
 391. Supersedeas does not confer a right to do what decree forbids.
 392. Effect of a supersedeas upon self-executing judgments.
 § 393. Effect of a supersedeas where the judgment is self-executing in part.
 394. Duration of the stay in appeals from final judgments.
 395. Duration of the stay in appeals from interlocutory orders.
 396. Sureties on a supersedeas bond.
 397. No liability where there is no injury, and no promise to pay the judgment.
 398. Trial court can not control a supersedeas.
 399. Setting aside a supersedeas—Practice.
 400. Motions to dismiss an appeal and motions to vacate a supersedeas.

CHAPTER XIX.

PLEADINGS OF THE APPELLEE.

- § 401. Demurrer to the assignment of errors.
 402. Ill-assigned errors disregarded.
 403. Classification of pleas or answers.
 404. Joinder in error.
 405. The common joinder admits the record.
 406. Waiver by common joinder.
 407. Special pleas or answers.
 408. What must be specially pleaded.
 409. Election of remedies.
 410. Presenting matter in bar by motion.
 411. Verification of the motion.
 412. Notice of the plea or motion.
 413. Demurrer to the special plea.
 414. Reply to the special plea.
 415. Cross-errors.
 § 416. Assignment of cross-errors—When necessary.
 417. Nature of the assignment of cross-errors.
 418. Object of the assignment of cross-errors.
 419. Effect of the assignment of cross-errors.
 420. Groundwork of the assignment of cross-errors.
 421. Transcript.
 422. Notice of the assignment of cross-errors not required when filed within the time limited.
 423. Time within which cross-errors may be assigned.
 424. Answer to the assignment of cross-errors not required.

CHAPTER XX.

SUBMISSION.

- | | |
|--|--|
| § 425. Submission by agreement. | § 432. Nature of the notice required in cases where the appeal is in term. |
| 426. Effect of a submission by agreement. | 433. Submission in cases appealed upon notice under act of 1885. |
| 427. Rights not waived by an agreement submitting the cause. | 434. Submission upon the application of the appellee. |
| 428. Forced submission. | 435. Notice under the act of 1885. |
| 429. Submission on call. | 436. Objecting to submission. |
| 430. Importance of the submission. | 437. Setting aside the submission. |
| 431. Submission of appeals in term. | |

CHAPTER XXI.

BRIEFS AND ARGUMENTS.

- | | |
|---|--|
| § 438. Briefs—Definition. | § 449. Time within which the appellant's brief must be filed. |
| 439. General frame of the brief. | 450. Brief on cross-errors—Time of filing. |
| 440. Showing the manner in which the questions arise. | 451. Appellee's brief on the appellant's assignment of errors. |
| 441. Stating the facts. | 452. Extension of the time for filing briefs. |
| 442. Method of stating the facts. | 453. Oral arguments. |
| 443. Correcting erroneous statements of fact. | 454. Application for oral arguments. |
| 444. Making the points. | 455. Limitation of oral arguments. |
| 445. Showing rulings to be wrong. | 456. Statement of propositions for argument. |
| 446. Stating propositions of law. | 457. Interchange of points for argument. |
| 447. Citing authorities. | |
| 448. Waiver of preliminary motions by filing brief. | |

CHAPTER XXII.

THE ORDER OF DOCKETING AND HEARING APPEALS.

- | | |
|---|---|
| § 458. Docketing appeals. | § 464. Cases can not be advanced by agreement. |
| 459. Exceptions to the general rule. | 465. The application for advancement. |
| 460. Filing of the transcript is generally essential to jurisdiction. | 466. What must precede application. |
| 461. Order of hearing. | 467. Notice of the application. |
| 462. Authority of the court to change the order of hearing. | 468. Hearing the motion to advance. |
| 463. Advancement of cases. | 469. Questions for decision on a motion to advance. |

CHAPTER XXIII.

QUESTIONS THAT MAY BE FIRST MADE ON APPEAL.

- | | |
|---|---|
| § 470. Objections not presented to the trial court not considered on appeal—General rule. | § 471. Objections to the complaint. |
| | 472. Assailing a complaint on the assignment of errors. |

TABLE OF CONTENTS.

xv

- | | |
|---|--|
| <p>473. What defects are fatal upon an original attack on appeal.</p> <p>474. One good paragraph will save the complaint.</p> <p>475. Judgment by default—Requisites of the complaint.</p> <p>476. Answer can not be attacked for the first time on appeal.</p> <p>477. Cross-complaint or counter-claim.</p> <p>478. Requisites of a counter-claim.</p> <p>479. Reply.</p> | <p>§ 480. The doctrine applicable to answers and replies.</p> <p>481. The reason of the rule.</p> <p>482. Rendering judgment on the pleadings.</p> <p>483. Set-off.</p> <p>484. The rule where a bad answer is proved.</p> <p>485. Effect of the rule respecting the proving of a bad answer.</p> <p>486. Effect of proving a bad answer.</p> <p>487. Anomalous cases.</p> <p>488. Criminal cases.</p> |
|---|--|

CHAPTER XXIV.

HOLDING PARTIES TO TRIAL COURT THEORIES.

- | | |
|--|---|
| <p>489. The cardinal principle.</p> <p>490. Adherence to theory.</p> <p>491. Illustrative cases.</p> <p>492. Instances of the application of the general doctrine.</p> <p>493. The rule as applied to cases involving constitutional questions.</p> <p>494. The theory as outlined by the pleadings.</p> <p>495. Requiring adherence to the opening statement.</p> <p>496. The doctrine of election.</p> | <p>§ 497. Limitations of the rule.</p> <p>498. Exceptions to the rule.</p> <p>499. The rule as affecting jurisdictional questions.</p> <p>500. Special cases.</p> <p>501. Nature of jurisdictional questions.</p> <p>502. Original objections to jurisdiction.</p> <p>503. Jurisdiction of the subject not the same thing as jurisdiction of the particular case.</p> |
|--|---|

CHAPTER XXV.

AUXILIARY PROCEEDINGS.

- | | |
|--|--|
| <p>§ 504. Auxiliary power of appellate tribunals.</p> <p>505. The nature of auxiliary jurisdiction.</p> <p>506. The principal classes of auxiliary proceedings.</p> <p>507. Appeal must be pending to authorize the exercise of the auxiliary jurisdiction—General rule.</p> <p>508. Exceptions to the rule requiring the transcript to be filed before asking assistance.</p> <p>509. The application for assistance.</p> | <p>§ 510. Statutory provisions—Injunctions.</p> <p>511. Statutory provisions—Mandamus and prohibition.</p> <p>512. Injunctions.</p> <p>513. Injunctions—Matters of practice.</p> <p>514. Mandamus—Power to issue.</p> <p>515. Mandamus—Cases in which it will not issue.</p> <p>516. Mandamus—Cases in which it will issue.</p> <p>517. Mandamus—Matters of practice.</p> <p>518. Prohibition.</p> |
|--|--|

CHAPTER XXVI.

DISMISSAL AND REINSTATEMENT.

- | | |
|---|---|
| <p>§ 519. The motion to dismiss the appeal is generally a preliminary motion.</p> <p>520. The court may dismiss on its own motion.</p> <p>521. Second motion to dismiss not entertained.</p> <p>522. Merits not considered on the motion to dismiss.</p> <p>523. Failure to comply with the rules of the court.</p> <p>524. Failure to perfect the appeal within the time prescribed.</p> <p>525. Failure to give notice.</p> <p>526. No appealable interest.</p> <p>527. Failure to file a bond.</p> | <p>§ 528. Two appeals.</p> <p>529. Appeal from judgment rendered in obedience to the mandate remanding the case.</p> <p>530. Bill of review.</p> <p>531. Parties to the motion to dismiss.</p> <p>532. Requisites of the motion.</p> <p>533. Notice of the motion to dismiss.</p> <p>534. Dismissal by the appellant.</p> <p>535. Effect of a dismissal.</p> <p>536. Withdrawing the transcript.</p> <p>537. Reinstatement—The power to order.</p> <p>538. Cause must be shown.</p> <p>539. Notice of the motion to reinstate.</p> <p>540. Practice on motion to reinstate.</p> |
|---|---|

CHAPTER XXVII.

THE EFFECT OF AN APPEAL.

- | | |
|--|---|
| <p>§ 541. An appeal removes the case from the jurisdiction of the trial court.</p> <p>542. Appeal from an interlocutory order does not completely oust jurisdiction.</p> <p>543. Illustrative cases.</p> <p>544. What the appeal covers.</p> | <p>§ 545. Collateral or supplemental matters not covered by the appeal.</p> <p>546. The judgment effective notwithstanding the appeal.</p> <p>547. Action upon the judgment not barred by the appeal.</p> <p>548. Supplying omissions and correcting the record after appeal.</p> <p>549. A new record can not be made.</p> |
|--|---|

CHAPTER XXVIII.

REHEARING.

- | | |
|---|--|
| <p>§ 550. Statutory provisions.</p> <p>551. Effect of filing a petition for rehearing.</p> <p>552. Time—Computation of.</p> <p>553. All acts must be done within the time fixed by law.</p> <p>554. Who may petition for a rehearing.</p> <p>555. Office of the petition.</p> | <p>§ 556. Rehearing not granted to enable parties to secure a correction of the transcript.</p> <p>557. Original questions can not be presented by a petition for rehearing.</p> <p>558. A second petition for rehearing will not be entertained.</p> <p>559. Submitting the application.</p> <p>560. Ruling on the petition.</p> <p>561. Effect of granting the petition.</p> |
|---|--|

CHAPTER XXIX.

THE JUDGMENT ON APPEAL.

- § 562. Authority of the decisions of appellate tribunals.
- 563. Effect and characteristics of the judgment on appeal.
- 564. Remanding the case to the trial court.
- 565. Limits of the power to direct specific judgments.
- 566. Original questions of fact.
- 567. Directing a specific judgment.
- 568. Directing a new trial.
- 569. Remanding with instructions to the trial court.
- 570. Remittitur.
- 571. Directing the specific damages that shall be awarded.
- 572. Directing the amount of recovery in cases where the facts appear in special findings or special verdicts.
- 573. Costs in cases where a remittitur is entered.
- § 574. Affirming as to some of the parties and reversing as to others.
- 575. Dependent rights—Judgments.
- 576. Trial court's duty to obey mandate of the appellate tribunal.
- 577. Scope of the mandate of the appellate tribunal.
- 578. The law of the case.
- 579. Form and effect of the judgment of affirmance.
- 580. Judgment of reversal.
- 581. Costs on reversal—Apportionment of.
- 582. Effect of reversal upon the rights of *bona fide* purchasers.
- 583. Restitution.
- 584. Restitution—Practice.
- 585. Finality of the judgment on appeal.
- 586. Effect of a petition for rehearing upon the rule stated in the preceding paragraph.

PART II.

ERROR IN JUDICIAL PROCEEDINGS.

CHAPTER I.

THE NATURE OF JUDICIAL ERROR.

- § 587. Error—Definition.
- 588. Erroneous rulings.
- 589. Ruling right when made does not constitute error.
- 590. The ultimate ruling is decisive.
- 591. Presumption that the court adheres to a declared or indicated theory.
- 592. That is not error which the record does not show to be error.
- § 593. A wrong ruling not probably prejudicial is not available error.
- 594. Presumption of prejudice from an erroneous ruling.
- 595. No error where complaining party secures his rights by amendment.
- 596. Pleadings upon which error is alleged must be in the record.

CHAPTER II.

EXERCISE OF DISCRETIONARY POWER.

- | | |
|---|---|
| § 597. Judicial discretion—Definition. | § 609. Denying negligent parties leave to amend. |
| 598. Discretionary power. | 610. Amendments after verdict. |
| 599. Scope of the discretionary power. | 611. Failure of proof. |
| 600. A question of pure discretion is not a question of law. | 612. Calling a jury. |
| 601. Absolute and limited discretion. | 613. Impaneling the jury. |
| 602. Review of rulings professedly made in the exercise of discretionary power. | 614. Decisions upon the qualifications of jurors. |
| 603. Abuse of discretion. | 615. Mode of trial. |
| 604. Showing an abuse of discretion. | 616. Conduct of the trial. |
| 605. Refusal to exercise a discretionary power. | 617. Control of the delivery of evidence. |
| 606. Time to plead. | 618. Examination of witnesses. |
| 607. Allowing amendments to pleadings. | 619. Ordering a view. |
| 608. Abuse of discretion in denying amendments. | 620. Compulsory examination of the person. |
| | 621. Discharge of the jury before verdict. |
| | 622. Time for filing bills of exceptions. |

CHAPTER III.

INVITED ERROR.

- | | |
|---|---|
| § 623. The error itself as distinguished from matters of procedure required to make it available. | § 627. Implied invitation to rule erroneously. |
| 624. Making wrong rulings available as error. | 628. Opening the door to the admission of incompetent evidence. |
| 625. Conduct of the parties as affecting the right to make errors available. | 629. Admission of incompetent evidence—Effect upon the party who introduces it. |
| 626. Procuring an erroneous ruling. | 630. The doctrine of invited error founded on the principle of estoppel. |

CHAPTER IV.

HARMLESS ERROR.

- | | |
|---|---|
| § 631. Difference between decisions affecting primary rights and decisions affecting procedure. | § 635. Uninfluential error. |
| 632. Error without prejudice. | 636. Nominal damages—Failure to assess. |
| 633. Right result reached by wrong mode. | 637. Rulings on demurrer. |
| 634. Limitations of the rule that there is no available error where a right result is reached. | 638. Resorting to the evidence to avoid the effect of a wrong ruling upon demurrer. |
| | 639. Rulings on motions to strike out or reject pleadings. |

- § 640. Pleadings defective in form.
- 641. Rulings in admitting and excluding evidence.
- 642. Instructions—What errors are in general regarded as influential.
- 643. Verdict clearly right on the evidence, erroneous instructions harmless.
- 644. Instructions—Verbal inaccuracies.
- 645. Erroneous instructions are generally harmless where there is a special verdict.
- § 646. Equity cases—General instructions unnecessary.
- 647. Incomplete instructions.
- 648. Instructions—Construction of on appeal.
- 649. Erroneous rulings in selecting and impaneling the jury often harmless.
- 650. Misconduct of jurors.
- 651. Special interrogatories to jury—What rulings are harmless, although erroneous.
- 652. Erroneous rulings upon verdicts that are regarded as harmless.

CHAPTER V.

PREJUDICIAL ERROR.

- § 653. To determine whether error is prejudicial the entire record must be examined.
- 654. Rulings wherein prejudicial error may exist.
- 655. Mistaking the remedy.
- 656. Election of remedies—Waiver of torts.
- 657. Ordinary and extraordinary remedies.
- 658. Consequences of mistaking the remedy—Making the error available.
- 659. Parties to the action—Necessary and proper.
- 660. Necessary parties—Illustrative cases.
- 661. A criterion for determining who are necessary parties.
- 662. Who should be plaintiffs and who defendants—General rule.
- § 663. Joinder of parties.
- 664. A right of action must exist in all who join in a complaint.
- 665. Pleadings—Motion to make specific.
- 666. Rulings on demurrer.
- 667. A wrong ruling which operates to exclude material facts is prejudicial.
- 668. Error once effectively saved is sufficient.
- 669. The difference between overruling and sustaining a demurrer to one of several paragraphs of a pleading.
- 670. Rulings in admitting and excluding evidence.
- 671. Conduct of the trial.
- 672. Misconduct of parties and counsel.
- 673. Interrogatories to the jury.

CHAPTER VI.

WAIVER.

- § 674. Available error does not exist where there is an effective waiver.
- 675. The doctrine of waiver.
- § 676. A party does not waive a defect or irregularity of which he is excusably ignorant.
- 677. Appearance—Effect of.

- | | |
|---|--|
| § 678. Special or qualified appearance. | § 687. Motion for direction to jury to return a verdict in favor of moving party—Effect of subsequently giving evidence. |
| 679. Waiver of objections to the remedy. | 688. Waiver of objections to pleadings by demurring to the evidence. |
| 680. Waiving objections to pleadings. | 689. Effect of a demurrer upon the right to make rulings upon the evidence available. |
| 681. Failure to demur. | 690. Waiver as affecting the mode of trial. |
| 682. Failure to demand a decision upon demurrer. | 691. Rulings respecting procedure on the trial—Illustrative cases. |
| 683. Waiver of objections to decisions on demurrer. | 692. Rulings on the trial—General doctrine. |
| 684. Instances of the waiver of preliminary objections. | |
| 685. Demurrer to the evidence—Waiver of right to jury. | |
| 686. Introducing evidence after demurring—Effect of. | |

CHAPTER VII.

CURING ERROR.

- | | |
|--|--|
| § 693. Origin and nature of the power to cure error. | § 700. Withdrawal of incompetent evidence. |
| 694. Limitations of the power—Exceptional cases. | 701. Instructions to disregard incompetent evidence. |
| 695. Exercise of the power to cure errors. | 702. Exceptional cases. |
| 696. Asking for time in cases where a ruling is changed. | 703. Effect of sustaining a motion to strike out incompetent testimony. |
| 697. Rulings made during the formation of issues. | 704. When a party can not withdraw evidence over the objection of his adversary. |
| 698. Curing error in the admission of evidence by supplementing it with evidence making it competent. | 705. Curing errors in instructions. |
| 699. Proving the same facts by competent testimony sometimes obviates the error in admitting incompetent evidence. | 706. Refusal of instructions. |
| | 707. Subsequently admitting evidence once excluded. |
| | 708. Miscellaneous instances. |

CHAPTER VIII.

PRESUMPTIONS.

- | | |
|---|--|
| § 709. Resort to presumptions—What presumption will be preferred. | § 712. Record susceptible of two constructions—That which sustains the judgment will be preferred. |
| 710. Presumption in favor of the proceedings of the trial court. | 713. Presumptions will not prevail against the record. |
| 711. Nature of the presumption. | |

- 714. Court and judge.
- 715. Jurisdiction of subject—Presumption of.
- 716. Exception to the general rule—Judgment by default.
- 717. Presumption of jurisdiction is not rebutted by the silence or incompleteness of the record.
- 718. Judgment of trial court is presumed to be properly supported.
- 719. Pleadings—Presumption that judgment is within and founded on.
- 720. Presumption that rulings on pleadings were correct.
- 721. Rulings on the evidence—Presumptions respecting.
- 722. Instructions—Presumptions concerning.
- 723. Juries and jurors—Presumptions concerning.
- 724. Verdicts—Presumptions in aid of.
- 725. Miscellaneous instances.

CHAPTER IX.

REQUESTS AND OFFERS.

- 726. No ruling or no request, no error.
- 727. Refusal to rule.
- 728. Implied requests.
- 729. Time for making request.
- 730. A party basing a right on a request must himself make it.
- 731. Request must be affirmatively shown.
- 732. Request for a special finding.
- 733. Request for written instructions.
- 734. Request for an inspection of the instructions of the court.
- 735. Requesting special instructions.
- 736. Requests where instructions are correct as far as they go.
- 737. Request for the submission of interrogatories to the jury.
- 738. Request for a special verdict.
- 739. The practice in requesting special verdicts.
- 740. Request for inspection and production of documents.
- 741. When notice to produce not required.
- 742. Offers—General doctrine.
- 743. Offers of oral testimony.
- 744. Showing materiality and relevancy.
- 745. Effect of mingling competent with incompetent evidence.
- 746. Offer unaccompanied by interrogatory unavailing.
- 747. Offer not required on cross-examination.
- 748. Offer of documentary evidence.
- 749. Repeating offers.

CHAPTER X.

MOTIONS FOR JUDGMENT AND INCIDENTAL MATTERS.

- 750. Introductory.
- 751. Motions for judgment on the pleadings.
- 752. Special interrogatories to jury—Requesting judgment on the answers.
- 753. Special verdicts—Motions for judgment on.
- 754. Effect of moving for judgment.
- 755. Distinct causes of action.
- 756. Motion essential to save questions upon special verdicts.
- 757. Special finding—Characteristics and incidents.
- 758. The motion for a *venire de novo*—The general doctrine.
- 759. *Venire de novo*—The Indiana rule.

- | | |
|--|--|
| <p>§ 760. The motion for a <i>venire de novo</i> as applied to a special finding.</p> <p>761. Office of the motion for a <i>venire de novo</i>.</p> <p>762. Time of filing the motion.</p> <p>763. Requisites of the motion.</p> <p>764. Special finding—Motion to strike out.</p> <p>765. Special finding—Particular facts outside of the issues.</p> | <p>§ 766. The difference between cases where only particular facts are outside of the issues and cases where the whole finding is outside.</p> <p>767. Finding wholly outside of the issues.</p> <p>768. Practice where the judgment does not follow the finding or verdict.</p> |
|--|--|

CHAPTER XI.

OBJECTIONS.

- | | |
|--|--|
| <p>§ 769. The difference between objections and exceptions.</p> <p>770. Objections must be specific.</p> <p>771. The grounds of the objection must appear of record.</p> <p>772. Objections must be seasonably interposed.</p> <p>773. The objection must come from the proper party.</p> <p>774. Practice where evidence is competent against one party but not against other parties.</p> <p>775. Grounds of objection should all be stated.</p> | <p>§ 776. Jurisdictional objections.</p> <p>777. Objections to pleadings.</p> <p>778. Objecting to jurors.</p> <p>779. Specifying objections to evidence.</p> <p>780. Separating competent from incompetent evidence.</p> <p>781. Practice where the question is proper but the answer incompetent.</p> <p>782. Specification of objections to conduct of parties and counsel.</p> |
|--|--|

CHAPTER XII.

EXCEPTIONS.

- | | |
|---|--|
| <p>§ 783. Nature and office of an exception.</p> <p>784. When an exception is required.</p> <p>785. Time of taking exceptions.</p> <p>786. The exception must immediately follow the decision.</p> <p>787. The exception must be addressed to the specific ruling.</p> <p>788. Joint exceptions.</p> <p>789. Exceptions can not be taken to several rulings in gross.</p> | <p>§ 790. A party must rely on his own exceptions.</p> <p>791. Excepting to instructions.</p> <p>792. Noting exceptions to instructions.</p> <p>793. Conclusions of law stated on a special finding of facts.</p> <p>794. Specifying error on exceptions to conclusions of law.</p> <p>795. Ruling on a motion for new trial.</p> <p>796. Questioning judgments.</p> |
|---|--|

CHAPTER XIII.

BILLS OF EXCEPTIONS.

- | | |
|--|--|
| <p>§ 797. Object of a bill of exceptions.</p> <p>798. The duty of settling a bill of exceptions is judicial.</p> | <p>§ 799. By whom the bill should be signed.</p> <p>800. Time within which the bill may be signed.</p> |
|--|--|

- | | |
|--|---|
| § 801. How the order extending time must be shown. | § 817. Instruments that may be brought into the record by a bill of exceptions. |
| 802. Presenting the bill to the judge. | 818. Making written instruments part of the bill by reference—General rule. |
| 803. Time can not be extended after the close of the term. | 819. Instruments once properly in the record need not be copied in the bill. |
| 804. Bills filed in term. | 820. Oral evidence. |
| 805. Filing after term. | 821. Stenographer's report of the evidence. |
| 806. Form of the bill. | 822. Making stenographer's report part of the bill. |
| 807. Requisites of the bill—General doctrine. | 823. The rule where all the evidence must be in the record. |
| 808. Stating the exceptions. | 824. The general recital not always controlling. |
| 809. Facts on which exceptions are based must be stated. | 825. Amendment of bills of exceptions. |
| 810. Duty of the trial judge. | 826. Application for the order to amend. |
| 811. Effect of the statements and recitals of the bill. | |
| 812. Making error apparent. | |
| 813. Rulings made in the formation of issues. | |
| 814. Collateral motions. | |
| 815. Recitals in direct motions. | |
| 816. Rejected pleadings. | |

CHAPTER XIV.

PRESENTING AN OPPORTUNITY FOR REVIEW.

- | | |
|--|--|
| § 827. The theoretical doctrine. | § 840. Requisites of the motion—Generally. |
| 828. The practical doctrine. | 841. Time of filing. |
| 829. The mode of presenting questions for review. | 842. Where filed. |
| 830. The office of a motion for a new trial. | 843. The motion ordinarily goes to the whole case. |
| 831. The office of the motion on appeal. | 844. Exceptions to the general rule. |
| 832. The motion can not precede the decision. | 845. The motion should be complete in itself. |
| 833. The motion not cut off by entry of judgment. | 846. Rulings on the pleadings and objections to the form of the judgment not assignable as causes for a new trial. |
| 834. Motion in arrest of judgment cuts off a motion for a new trial. | 847. Inconsistency between the answers of the jury to interrogatories and the general verdict. |
| 835. All causes must be embraced in one motion. | 848. Irregularity in the proceedings of the court. |
| 836. Successive motions. | 849. Irregularity of the jury or prevailing party. |
| 837. Exceptions to the rule forbidding successive motions. | 850. Abuse of discretion. |
| 838. Different classes of motions. | 851. Misconduct of the jury or prevailing party. |
| 839. Joint motions. | |

- | | |
|---|---|
| <p>§ 852. Accident or surprise.</p> <p>853. Errors of law occurring on the trial.</p> <p>854. Verdict or finding contrary to law or not sustained by sufficient evidence.</p> <p>855. Damages — Questioning the amount of recovery.</p> | <p>§ 856. Damages in actions in tort and damages in actions on contract.</p> <p>857. Newly discovered evidence.</p> <p>858. Counter-affidavits.</p> <p>859. Verification of the motion.</p> |
|---|---|

PART III.

FORMS.

CHAPTER I.

FORMS USED IN TRIAL PRACTICE INCIDENT TO APPEALS.

- | | |
|--|--|
| <p>§ 860. Caption—Title of cause—Signature.</p> <p>861. Agreed case.</p> <p>862. Reserved questions of law—Bill of exceptions.</p> <p>863. Questions of law arising on the instructions—Bill of exceptions.</p> <p>864. Motion to dismiss appeal—Bill of exceptions.</p> <p>865. Motion to make more specific—Bill of exceptions.</p> <p>866. Challenge of juror—Bill of exceptions.</p> <p>867. Bill of exceptions on the overruling of a motion for a new trial.</p> | <p>§ 868. Misconduct of jurors—Bill of exceptions.</p> <p>869. Appeal in term—Record entry.</p> <p>870. Appeal bond.</p> <p>871. Appeal after term—Notice below to party.</p> <p>872. Appeal after term—Notice to the clerk.</p> <p>873. Præcipe for transcript.</p> <p>874. Notice to co-party.</p> <p>875. Transcript—Formal parts.</p> <p>876. Transcript—Certificate of clerk where entire record is ordered.</p> <p>877. Transcript — Certificate where special directions are given.</p> |
|--|--|

CHAPTER II.

FORMS USED IN APPELLATE PRACTICE.

- | | |
|---|--|
| <p>§ 878. The assignment of errors—Ordinary form.</p> <p>879. The assignment of errors—Appeal from the Marion Superior Court.</p> | <p>§ 880. Failure to notify co-parties—Motion to dismiss.</p> <p>881. Acceptance of payment of judgment—Motion to dismiss.</p> |
|---|--|

- | | |
|---|---|
| <p>§ 882. Failure to perfect the appeal within the time prescribed—Motion to dismiss.</p> <p>§ 883. Common joinder.</p> <p>§ 884. Application for leave to amend the assignment of errors.</p> <p>§ 885. Assignment of cross-errors.</p> <p>§ 886. Petition for <i>certiorari</i>—Omission of parts of record.</p> <p>§ 887. Petition for <i>certiorari</i>—Change of record by <i>nunc pro tunc</i> entry.</p> | <p>§ 888. Petition to advance—Matter of public interest.</p> <p>§ 889. Petition to advance—Matter of private concern.</p> <p>§ 890. Motion to vacate supersedeas.</p> <p>§ 891. Notice of motion.</p> <p>§ 892. Motion to reinstate.</p> <p>§ 893. Petition for rehearing.</p> <p>§ 894. Motion to modify mandate.</p> |
|---|---|

TABLE OF CASES.

'References are to Pages.]

Abbe v. Mair, 14 Cal. 210,	396, 671	Adams v. Smith, 6 Dak. 94,	490
Abbott v. Chaffee, 83 Mich. 256,	738	v. State, 65 Ind. 565,	255, 690
v. Dwinnell, 74 Wis. 514,	574	v. State, 87 Ind. 573,	640
v. Johnson, 47 Wis. 239,	673	v. State, 25 Ohio St. 584,	746
v. Morrisette, 46 Minn. 10,	581	v. Thompson, 18 Neb. 541, 317,	326
v. Union, etc., Co., 127 Ind. 70,	599	v. Town, 3 Cal. 247,	4
v. Zeigler, 9 Ind. 511,	65, 71	v. Wilson, 60 Ind. 560,	52, 781
Abdill v. Abdill, 26 Ind. 287	282, 284	v. Woods, 8 Cal. 306,	4, 142
v. Abdill, 33 Ind. 460,	507, 609	Adamson's Appeal, 110 Pa. St. 459,	79
Abell v. Cross, 17 Ia. 17,	663	Adams County v. Hunter, 78 Ia.	
v. Riddle, 75 Ind. 345,	565, 608	328,	391, 412
Ableman v. Booth, 11 Wis. 499,	217	Adams Express Co. v. Pollock, 12	
Abney v. Kingsland, 10 Ala. 355,	699,	Ohio St. 618,	693
	700	Adderson v. Marshall, 7 Mont. 288,	155
Abraham v. Chase, 11 Ind. 513,	277	Addison v. State, 48 Ala. 478,	537
Abrams v. Lee, 14 Ill. 167,	493	Addleman v. Erwin, 6 Ind. 494,	782
v. Smith, 8 Blackf. 95,	678	Addy v. Janesville, 70 Wis. 401,	655
Abshire v. State, 52 Ind. 99,	217	Adler v. Sewell, 29 Ind. 598,	354
v. Williams, 76 Ind. 97,	677	Æmes v. Chappel, 28 Ind. 469,	248
Acheson v. Sutliff, 18 Ohio, 122,	769	Ætna Ins. Co. v. Aldrich, 38 Wis.	
Achey v. State, 64 Ind. 56, 527, 579,	619	107,	318
Acker v. Alexander, etc., Co., 84		Ætna Ins. Co. v. Baker, 71 Ind. 102,	597
Va. 648,	308	Ætna, etc., Co. v. Finch, 84 Ind.	
Acton v. Dooley, 16 Mo. App. 441,	582	301,	488, 596
Adair v. Morgenthau, 114 Ind. 303,	488,	Agate v. Morrison, 84 N. Y. 672,	535
	595	Agnew v. Adams, 26 S. C. 101,	643
Adams v. Beem, 4 Blackf. 128,	349	Ahern v. McGeary, 79 Cal. 44,	269
v. Crosby, 48 Ind. 153,	698	v. McGeary, 79 Cal. 250,	557
v. Davis, 109 Ind. 10,	402	Ahrens v. State Bank, 3 S. C. 401,	521
v. Fox, 40 N. Y. 577,	601	Aiken v. Bruen, 21 Ind. 137,	524, 638
v. Gowan, 89 Ind. 358,	647	v. Osing, 94 Ind. 507,	693
v. Harrington, 114 Ind. 66,	147	v. Short, 1 H. & N. 210,	10
v. Higgins (Fla.), 1 So. Rep.		Aimes v. Chappel, 28 Ind. 469,	350
321,	178	Akerly v. Vilas, 24 Wis. 165,	72
v. Holmes, 48 Ind. 299,	692	Alabama, etc., Co. v. Frazier (Ala.),	
v. Irving Nat. Bank, 116 N. Y.		9 So. Rep. 303,	659
606,	729	Alabama Gold, etc., Co. v. Nichols,	
v. Jeffries, 12 Ohio, 253,	21	109 U. S. 232,	51
v. Kennedy, 90 Ind. 318,	640	Alabama State Bar Asso., <i>Ex parte</i>	
v. Lamson, etc., Co., 59 Hun.		(Ala.), 8 So. Rep. 768,	439
127,	736	Albere v. Kingsland, 13 N.Y. Sup.	
v. La Rose, 75 Ind. 471,	296, 725,	794,	596
	751, 752, 768	Albert v. State, 65 Ind. 413,	589, 592
v. Lee, 82 Ind. 587,	536	Albertson v. State, 95 Ind. 370	672
v. Lockwood, 30 Kan. 373,	733	v. Williams, 23 Ind. 612,	630
v. Sage, 28 N. Y. 103,	587	Albion, etc., Co. v. Richmond, etc.,	
v. Secor, 6 Kan. 542,	635	Co., 19 Nev. 225,	518

[References are to Pages.]

Albion, Town of, v. Hetrick, 90 Ind. 545,	580	Allor v. Auditor, 43 Mich. 76,	2
Albrecht v. C. C. Foster Lumber Co. (Ind.), 26 N. E. Rep. 157, 17, 31	743	Altmayer v. Metropolitan, etc., Ry. Co., 14 N. Y. Supp. 311,	54
Alcorn v. Morgan, 77 Ind. 184,	743	Amason v. Nash, 19 Ala. 104,	67
Alexander v. Alexander, 104 N. Y. 643,	126, 350	America Central Ins. Co. v. Hathaway, 43 Kan. 399,	62
v. Bennett, 60 N. Y. 204,	4	American Express Co. v. Patterson, 73 Ind. 430,	58
v. Byrd, 85 Va. 690,	78	American Ins. Co. v. Butler, 70 Ind. 1,	48
v. Dunn, 5 Ind. 122,	527	v. Gallaher, 75 Ind. 168,	77
v. Feary, 9 Ind. 481,	672	v. Gibson, 104 Ind. 336, 287, 295,	72
v. Humber, 86 Ky. 565,	391	v. Yearick, 78 Ind. 202,	74
v. Northwestern, etc., University, 57 Ind. 466,	269	American Legion v. Rowell, 15 S. W. Rep. 217,	34
v. Oshkosh, 33 Wis. 277,	559	American White Bronze Co. v. Clark, 123 Ind. 230,	217, 78
v. Steele, 84 Ala. 332,	413	Ames v. Howard, 1 Sumnr. 482,	78
v. Stewart, 23 Ark. 18,	180	v. Lake Superior, etc., Co., 21 Minn. 241,	2
Alexandria, etc., v. McVeigh, 84 Va. 41,	492	v. New Jersey Franklinite Co., 1 Beasley (N. J.), 66,	13
v. Painter, 1 Ind. App. 587,	581	Amherst v. Hadley, 1 Pick. 38,	62
Alger v. Merritt, 16 Ia. 121,	788	Amick v. O'Hara, 6 Blackf. 258,	27
Alkan v. New Hampshire, etc., Co., 53 Wis. 136,	559	Amis v. Myers, 16 How. 492,	59
All v. Barnwell, 29 So. Car. 161, 7 S. E. Rep. 58,	143	Ammerman v. Crosby, 26 Ind. 451,	76
Alleman v. Wheeler, 101 Ind. 141,	605	v. State, 98 Ind. 165,	28
Allen v. Aldrich, 29 N. H. 63,	621	Amonett v. Montague, 63 Mo. 201,	74
v. Allen, 80 Ala. 154,	456	Amory v. Amory, 91 U. S. 356,	39
v. Bond, 112 Ind. 523,	791	v. Reilly, 9 Ind. 490,	66
v. Cerro Gordo Co., 34 Ala. 54,	62	Anderson v. Ackerman, 88 Ind. 481,	70
v. Claybrook, 58 Mo. 124,	483	v. Ames, 6 Ia. 486,	76
v. Commonwealth, 86 Ky. 642,	120	v. Anderson, 65 Ind. 196,	72
v. Commonwealth (Ky.), 12 S. W. Rep. 582,	560	v. Anderson, 128 Ind. 254,	78
v. Crary, 10 Wend. 349,	54	v. Board (Minn.), 48 N. W. Rep. 1022,	31
v. Etheridgo, 84 Ga. 550,	560	v. Brown, 9 Mo. 646,	63
v. Gann (Ind.), 29 N. E. Rep., 171	793	v. Caldwell, 91 Ind. 451,	2
v. Gillum, 16 Ind. 234,	310	v. Donnell, 66 Ind. 150, 712, 715,	72
v. Grider, 24 Ark. 271,	56	v. Dunn, 6 Wheat. 204,	7
v. Griffin, 98 N. C. 120,	62	v. Hathway (Ind.), 30 N. E. Rep. —,	79
v. Hostetter, 16 Ind. 15,	639	v. McDonaldson, 32 Ill. 404,	57
v. Mason, 17 Ill. App. 318,	589	v. Market, etc., Bank, 66 How. Pr. 8,	79
v. Randolph, 48 Ind. 496,	155	v. Mitchell, 58 Ind. 592,	97
v. Ray, 96 Mo. 542,	579	v. Neal, 88 Ind. 317,	368, 37
v. State, 61 Ga. 166,	296, 297	v. People, 28 Ill. App. 317,	18
v. State, 74 Ind. 216,	146	v. Rome, etc., Co., 54 N. Y. 334,	65
v. Strickland, 100 N. C. 225,	489	v. Sloane, 1 Col. 484,	637
v. United States, 22 Ct. of Cl. 300,	787	v. State, 28 Ind. 22,	4
Alley v. State, 76 Ind. 94,	790	v. State, 104 Ind. 467,	617, 623
Allgro v. Duncan, 24 How. Pr. 210,	120	v. Weaver, 17 Ind. 223,	300
Alling v. Ward (Ill.), 24 N. E. Rep. 551,	488, 560	v. Wilson, 100 Ind. 402,	395
v. Wenzel, 133 Ill. 264,	646	v. Wyant, 77 Ia. 498,	597
Allis v. Day, 14 Minn. 516,	401	Anderson Bridge Co. v. Applegate, 13 Ind. 339,	697
v. Gumberts, 1 Ind. 104,	573		
v. Ins. Co., 97 U. S. 144,	314		
Allison v. Gregory (Tex.), 15 S. W. Rep. 416,			

TABLE OF CASES.

xxix

[References are to Pages.]

Anderson, etc., Ass'n v. Thompson, 57 Ind. 278, 174, 462	Armstrong v. Gilchrist, 2 Johns. Cas. 424, 32
Anderson, etc., Co. v. Thompson, 58 Ind. 405, 354, 399	v. Horshman, 93 Ind. 216, 760
Anderson, City of, v. Neal, 88 Ind. 317, 374	v. Tait, 8 Ala. 635, 570
Andis v. Personett, 108 Ind. 202, 570	Arndt v. Hosford, 48 N. W. Rep. 981, 345
v. Richie, 120 Ind. 138, 781	Arnold v. Angell, 62 N. Y. 508, 724
Andre v. Frybarger, 70 Ind. 280, 628	v. Commonwealth, 80 Ky. 300, 7
Andrews v. Elliott, 6 E. & B. 338, 424	v. Engleman, 103 Ind. 512, 108
v. Hammond, 8 Blackf. 540, 640	v. Frost, 9 Benedict, 267, 337
v. Ohio, etc., R. Co., 14 Ind. 169, 156	v. Hawkins, 27 Mo. App. 476, 40
v. Runyon, 65 Cal. 629, 572	v. Waldo, 36 Vt. 204, 112
v. Steele, 7 C. E. Green (N. J.), 478, 133	Arrowsmith v. Rappelge, 19 La. Ann. 327, 112
v. United States, 16 Ct. of Cl., 265, 127	Arterburn v. Young, 14 Bush. (Ky.) 509, 224
Angevine v. Ward, 66 Ind. 460, 229	Arthurs v. Hart, 17 How. 6, 613
Angle v. Speer, 66 Ind. 488, 179	Artman v. West Point, etc., 16 Neb. 572, 70
Anon. 18 Abb. Pr. 87, 118, 270	Asch v. Wiley, 16 Neb. 41, 320
Anon. 59 N. Y. 313, 516	Ashbaugh v. Edgecomb, 13 Ind. 466, 541
Ansley v. Robinson, 16 Ala. 793, 74	Ashe v. Glenn, 33 So. Car. 606, 446, 452
Anson v. Blue Ridge, etc., Co., 23 How. 1, 324	Ashley v. Foreman, 85 Ind. 55, 572
Antoni v. Wright, 22 Gratt. 833, 28	v. Laird, 14 Ind. 222, 704
App v. State, 90 Ind. 73, 251, 517, 680	Ashmole v. Wainwright, 2 Q. B. 837, 10
Apple v. Atkinson, 34 Ind. 518, 266	Ashton v. Shepherd, 120 Ind. 69, 267, 396
Applegate v. Edwards, 45 Ind. 329, 85	Ashworth v. Kittridge, 12 Cush. 193, 535
v. White, 79 Ind. 413, 757	Askren v. State, 51 Ind. 592, 77
Application of the Senate, 10 Minn. 78, 9 Col. 623, 4	Asking v. Miles, 16 Ind. 329, 614
Arbintrode v. State, 67 Ind. 267, 249, 407	Aspinwall v. Board, 78 Ind. 372, 766
Arbuckle v. Biederman, 94 Ind. 168, 368	Associates of Jersey Co. v. Davison, 5 Dutch. 415, 267
v. McCoy, 53 Ind. 63, 299, 786	Astley v. Capron, 89 Ind. 167, 692, 785
v. Swim, 123 Ind. 208, 103, 274, 345	Atchison, etc., Co. v. Bayes, 42 Kan. 609, 620
Archer v. Heinan, 21 Ind. 29, 603	v. Benton, 42 Kan. 608, 601
Archev v. Knight, 61 Ind. 311, 34, 154, 363, 443, 448	v. Dougan, 39 Kan. 181, 100
Archibald v. Lamb, 9 Ind. 544, 671	v. Plunkett, 25 Kan. 188, 579
v. State, 122 Ind. 122, 239, 254	v. Stanford, 12 Kan. 354, 731
Architectural, etc., Co. v. Brook- lyn, 85 N. Y. 652, 325	v. Thul, 29 Kan. 466, 539
Arcia v. State, 28 Tex. App. 198, 159, 661	v. Wagner, 19 Kan. 335, 770
Argenti v. San Francisco, 30 Cal. 458, 489	Athens, etc., Works, v. Bain, 77 Ga. 72, 475
Argo v. Barthand, 80 Ind. 63, 285	Atherton v. Fowler, 91 U. S. 143, 499
Arizona, etc., Co. v. Copper Queen Co. (Ariz.), 11 Pac. 396, 469	Atkins v. Wyman, 45 Md. 399, 463
Arkansas, etc., Co. v. Canman, 52 Ark. 517, 693	Atkinson v. Dailey, 107 Ind. 117, 570, 577
Arlen v. State, 18 N. H. 563, 674	v. Gwin, 8 Ind. 376, 570
Armes v. Chappel, 28 Ind. 469, 129	v. Martin, 39 Ind. 242, 295, 752
Armijo v. Abeytra (N. M.), 25 Pac. Rep. 777, 446	v. Mott, 102 Ind. 431, 413
Armstrong v. Athens Co., 16 Pet. 281, 21	v. Olesener, 57 Hun. 592, 655
v. Caesar, 72 Ind. 280, 404	v. Taylor, 2 Wills, 117, 286
v. Clark, 17 Ohio, 495, 765	Atlantic Ins. Co. v. Lemar, 10 Paige, 505, 457
	Atlas, etc., Co. v. Byrus, 45 Ind. 133, 72
	Atlas Mining Co. v. Johnston, 23 Mich. 36, 528

[References are to Pages.]

Attorney-General v. Blossom, 1		Bagley v. Grand Lodge, etc., 131	
Wis. 317,	431	Ill. 498,	5
v. Boston, 123 Mass. 460,	433	Baggs v. Smith, 53 Cal. 88,	4
v. City of Eau Claire, 37 Wis.		Bailey v. Hervey, 135 Mass. 172,	5
400,	431	v. Lubke, 8 Mo. App. 57,	1
v. Lun, 2 Wis. 507,	8	v. Martin, 119 Ind. 103,	5
v. North Am. Life Ins. Co., 77		v. State, 39 Ind. 438,	6
N. Y. 297,	270	v. Troxell, 43 Ind. 432,	606, 6
v. Railroad Co., 35 Wis. 425,	431,	Baily, Ex parte, 2 Cow. 479,	4
	432	v. Schrader, 34 Ind. 260,	6
v. Sillem, 10 H. L. 704,	21	v. Taafe, 29 Cal. 424,	5
Atwell v. Miller, 6 Md. 10,	697	Bain v. Doran, 54 Pa. St. 124,	6
Atwood v. Welton, 57 Conn. 514,	713	v. Goss, 123 Ind. 511,	1
Auditor v. Atchison, etc., Co., 6		v. Whitehaven, etc., Co., 3 H.	
Kan. 500,	5, 18	L. Cas. 1,	7
Augusta, etc., Co. v. Randall, 85		Baird v. Gillett, 47 N. Y. 186,	6
Ga. 297,	623	v. Mayor, 74 N. Y. 382,	6
Aull Savings Bank v. Aull, 80		Baker v. Armstrong, 57 Ind. 189,	6
Mo. 199,	699	v. Ashe (Tex.), 16 S. W. Rep. 36,	6
Aultman, etc., Co. v. Weir. 134 Ill.		v. Baker, 69 Ind. 399,	6
137,	78, 79	v. Board, 53 Ind. 497,	3
Aurora, City of, v. Cobb, 21 Ind.		v. Braslin (R. I.), 18 Atl. Rep.	
493,	615	1039,	1
v. Fox, 78 Ind. 1,	562	v. Carr, 100 Ind. 330,	5
v. Johnson, 46 Ind. 315,	256, 769,	v. Chisholm, 3 Tex. 157,	
	771	v. Dessauer, 49 Ind. 28,	568, 6
v. West, 25 Ind. 148,	72	v. Dubois, 32 Mich. 92,	6
Austin v. Bainter, 40 Ill. 82,	349	v. Gordon, 23 Ind. 204,	88, 2
v. Crawford Co., 30 Ark. 578,	112	v. Griffith, 83 Ind. 411,	
v. Earhart, 88 Ind. 182, 266, 279, 709		v. Groves, 126 Ind. 593,	30,
Averil v. Dickerson, 1 Blackf. 3, 209, 318		v. Hine, 54 Ind. 542,	5
Avery v. Dougherty, 102 Ind. 443,	325	v. Horsey, 21 Ind. 246,	7
v. Pritchard, 106 N. C. 344,	446	v. Jewell, 6 Mass. 460,	6
v. Ruffin, 4 Ohio, 420,	514	v. Joseph, 16 Cal. 173,	7
v. Slack, 17 Wend. 85,	631	v. Loring, 65 Mc. 527,	1
Axte v. Chase, 83 Ind. 546,	567	v. Ludlam, 118 Ind. 87,	287, 7
Ayers v. Adams, 82 Ind. 109,	712	v. McGinnis, 22 Ind. 257,	7
v. State, 88 Ind. 275,	252	v. Moor, 84 Ga. 186,	293, 7
Ayres v. Carver, 17 How. 591,	73	v. Morris, 10 Leigh. 284,	3
Aylsworth v. Brown, 31 Ind. 270,	509	v. Smiley, 84 Ind. 212, 219, 296, 6	
Aylesworth v. Milford, 38 Ind. 226, 121,		v. Neff, 73 Ind. 68,	5
	360, 448	v. Simmons, 40 Ind. 442,	682, 7
Ayrault v. Chamberlain, 33 Barb.		v. State, 109 Ind. 47,	2
229,	617	v. Swift, 87 Ala. 530,	10
		v. Swift, 6 So. Rep. 153,	3
		v. White, 92 U. S. 514,	4
B		Baldenberg v. Worden, 14 W. Va.	
Baars v. Creary, 23 Fla. 61,	109	397,	4
Babb v. Bruere, 23 Mo. App. 604,	12	Baldridge v. Penland, 68 Tex. 441,	30
v. Missouri University, 40 Mo.			6
App. 173,	738	v. Scott, 48 Tex. 178,	10
Babcock v. People, 13 Col. 515,	528,	Baldwin v. Burrows, 95 Ind. 81, 292, 5	
	530, 578	v. Grand Trunk Ry. Co., 64 N.	
Bacas v. Smith, 33 La. Ann. 139,	444	H. 596,	6
Bacon, Ex parte, 6 Cowen, 392,	440	v. Humphrey, 75 Ind. 153, 282, 28	
v. Callendar, 6 Mass. 303,	61	v. School City of Logansport,	
v. Witherow, 110 Ind. 94,	105,	73 Ind. 346,	7
	214, 263, 333	v. Wright, 3 Gill. (Md.) 241,	7
Baddeley v. Patterson, 78 Ind. 157,	294	Bales v. Brown, 57 Ind. 282, 180, 5	
Badders v. Davis, 88 Ala. 367,	739	v. Scott, 26 Ind. 202,	39
Badger v. Daniel, 82 N. C. 468,	91		

TABLE OF CASES.

xxx

[References are to Pages.]

Baile v. Lammers, 109 Ind. 347,	73	Barnes v. Dell, 39 Ind. 328,	281
Ball v. Cox, 7 Ind. 453,	679	v. Easton, 98 N. C. 116,	8
v. Cox, 29 W. Va. 407,	508	v. Ingalls, 39 Ala. 193,	739
Ballance v. Forsythe, 21 How. 389,	134	v. Ralmer, 39 Ind. 589,	281
Barlow v. Roller, 124 Ind. 557, 488,	595	v. State, 28 Ind. 82,	291
Bauringer v. Tarbell, 16 Iowa, 491,	117,	v. Stevens, 62 Ind. 226,	635
	285	v. Wright, 39 Ind. 293,	287, 728
Baltimore, etc., Co., Ex parte, 108		Barnett v. Feary, 101 Ind. 95,	537, 562,
U. S. 566,	439	v. Harshbarger, 105 Ind. 410,	571
v. Barnum, 79 Ind. 261,	770, 774		108,
v. Johnson, 83 Ind. 57,	45	v. Leonard, 66 Ind. 422,	274
v. Johnson, 84 Ind. 420,	126		613
v. Kreiger, 90 Ind. 380,	394, 395	Barney v. Barney, 14 Iowa, 189,	144
v. McWhinney, 36 Ind. 436,	615	v. Dudley, 40 Kan. 247,	518
v. Rowan, 104 Ind. 88,	785	v. Hartford, 73 Wis. 95,	288
v. State, 69 Md. 551,	481	Barnhart v. Ford, 41 Kan. 341,	677
Blue v. Richardson, 124 Ind. 480,	766	Baron v. Korn, 127 N. Y. 224,	734
Bine v. Ward, 77 Ind. 153,	279, 296	Barr v. Hannibal, etc., Co., 30 Mo.	
Bank v. Sweeney, 1 Pet. 467,	439	App. 248,	413
Bank of America v. Fortier, 27 La.		Barren Creek, etc., v. Beck, 99 Ind.	
Ann. 243,	209	247,	592
Bank of Metropolis v. New Eng-		Barreon v. Frink, 30 Cal. 486,	671
land Bank, 6 How. 212,	661	Barret's Appeal, In re (Pa.), 13 Atl.	
Bank of Mt. Pleasant v. Sprigg, 1		Rep. 72,	86
McLean, 178,	311	Barrett v. Delano (Me.), 14 Atl.	
Bank of Pleasant Hill v. Wills, 79		Rep. 288,	663
Mo. 275,	699	Barrett v. Fisch, 76 Ia. 553,	412
Bank of U. S. v. Daniel, 12 Pet. 32,	50	Barribeau v. Blont, 17 How. 43,	115
Bank of Utica v. Mercereau, 3 Barb.		Barry v. Briggs, 22 Mich. 201,	83
Ch 528,	593	v. Edmunds, 116 U. S. 550,	49
Bank of Vincennes v. State, 1		v. Mercein, 4 How. 574,	388
Blackf. 267,	217	Barth v. Clise, 12 Wall. 400,	571, 656
Bannister v. Allen, 1 Blackf. 414,	177	v. Rosenfield, 36 Md. 604,	68
v. Jett, 83 Ind. 129,	614	Bartholomew v. Langsdale, 35 Ind.	
Banter v. Levi, 1 Chit. 713,	313	278,	345, 746, 782
Banton v. Campbell, 2 Dana, 421,	74	v. Pierson, 112 Ind. 430,	19, 371,
Baragree v. Cronkhite, 33 Ind. 192,	590		475, 713
Barber v. Briscoe, 8 Mont. 214,	639	v. Preston, 46 Ind. 286,	269
Barbon v. Searle, 1 Vern. 416,	451	Bartlett's Appeal, 82 Me. 210,	219, 314
Barbour v. McKee, 7 Mo. App. 587,	484	Bartlett v. Beadmore, 74 Wis. 485,	568
Barcus v. Evans, 14 Ind. 381,	599	v. Hoyt, 33 N. H. 151,	733
Bard v. Poole, 12 N. Y. 495,	601	v. Pittsburgh, etc., Co., 94 Md.	
Bager v. Hoover, 120 Ind. 193,	597	282,	563, 564
v. Manning, 43 Ind. 472,	116, 118	v. Smith, 11 Mees & W. 483,	701
Barker v. Barker, 39 N. H. 408,	118	v. State, 28 Ohio St. 349,	681
v. Hobbs, 6 Ind. 385,	545, 556	Bartley v. Phillips, 114 Ind. 189,	250,
v. Livingston Co. Bank, 30 Ill.		291, 293, 581, 647, 716, 791	
591,	547	v. State, 111 Ind. 358,	256, 257, 758
Barkly v. Copeland, 74 Cal. 1,	655	Bartling v. Behrends, 20 Neb. 211,	577
Barley v. Dunn, 85 Ind. 338,	774	Barton v. Kane, 17 Wis. 38,	568, 611
Barlow v. Black, 25 Ia. 308,	411	v. Long, 45 N. J. Eq. 160,	122
v. State, 2 Blackf. 114,	250, 619, 744	v. State, 67 Ga. 653,	250
Barnaby v. State, 106 Ind. 539,	256, 257,	Bascom v. Young, 7 Mo. 1,	671
	765	Basey v. Gallagher, 20 Wall. 670,	675,
Barnard v. Cox, 25 Ind. 251,	417		676
v. Graham, 14 Ind. 322,	789	Bass v. Comstock, 38 N. Y. 21,	635
Barndollar v. Colton, 5 Col. 29,	273	v. Doermer, 112 Ind. 390,	174, 378,
Barndt v. Frederick, 78 Wis. 1,	416		446, 447
Barnes v. Bell, 39 Ind. 328,	283, 394,	v. Elliott, 105 Ind. 517,	217, 748
v. Conner, 39 Ind. 294,	281		

[References are to Pages.]

Bass v. Ft. Wayne, 121 Ind. 389,	147,	Beavers v. State, 58 Ind. 530,	159, 17
	215, 284, 590		764, 7
v. Smith, 61 Ind. 72,	637	Beck v. State, 72 Ind. 250,	124, 154, 24
Bass Foundry, etc., v. Board, 115			348, 443, 7
Ind. 234,	13, 420, 670	Becker v. Lamont, 13 How. Pr. 23,	6
Bassett v. Warner, 23 Wis. 673,	488	Becknell v. Becknell, 110 Ind. 42,	8
Bateman v. Florida, etc., 26 Fla.			168, 274, 294, 395, 7
423,	592	Beckner v. Riverside, etc., Co., 65	
Bates v. Ball, 72 Ill. 108,	126	Ind. 468,	6
v. Bates, 19 Tex. 122,	528	Beckwith, In re, 87 N. Y. 503,	1
v. Bulkley, 7 Ill. 389,	773	Bedford, etc., v. Rainbolt, 99 Ind.	
v. Ryberg, 40 Cal. 465,	142		551, 300, 345, 571, 7
v. Scott, 26 Mo. App. 428, 124,	149	Bedgood v. State, 115 Ind. 275,	700, 7
v. Sheets, 64 Ind. 209,	61	Beeber v. Bevan, 80 Ind. 31,	1
v. St. Johnsburg, etc., Co., 32		Beech v. Abbott, 6 Vt. 586,	6
Fed. Rep. 628,	50	Beeks v. Odom, 70 Tex. 183,	6
Batten v. State, 80 Ind. 394,	669, 703	Beeler v. Hontsch, 5 Blackf. 594,	6
Batterson v. Chicago, etc., Co., 49		Beeman v. Banta, 113 N. Y. 615,	3
Mich. 184,	587	Beer v. Creditors, 12 La. Ann. 774,	1
Batterton v. Chiles, 12 B. Monr. 348,	599	Beeson v. Howard, 44 Ind. 413,	6
Battishill v. Humphrey, 64 Mich.		Beeswing, The, 10 L. R. P. D. 18,	3
494,	617	Begein v. Brehm, 123 Ind. 160,	4
Baughan v. Baughan, 114 Ind. 73,	293	Beggs v. State, 122 Ind. 54,	245, 24
Baughman v. Calveras, 72 Cal. 572,	460		253, 2
Bayard v. Lombard, 9 How. 530, 111,	272	Beguhl v. Swan, 39 Cal. 411,	4
v. United States, 127 U. S. 246,	440	Behrens v. Behrens, 47 Ohio St. 323,	7
Bayless v. Daniels, 8 Tex. 140,	487	Behymer v. State, 95 Ind. 140,	7
v. Glenn, 72 Ind. 5,	295, 725, 752	Beigh v. Smarr, 62 Ind. 400,	446, 4
Bays v. Hunt, 60 Ia. 251,	536	Beineke v. Wurgler, 77 Ind. 468,	2
Bazzo v. Wallace, 16 Neb. 293,	324	Beitman v. Hopkins, 109 Ind. 177,	7
Beach v. Packard, 10 Vt. 96,	273, 666	Belden v. Nicolay, 4 E. D. Smith,	
v. Zimmerman, 106 Ind. 495,	682	14,	6
Beagles v. Sefton, 7 Ind. 496,	536, 568	Belcw v. Jones, 56 Miss. 592,	
Beard v. United States, 5 Ind. 220,	392	Belk v. Meagher, 104 U. S. 279,	3
Beal v. Chase, 31 Mich. 490,	458	Belknap v. Sealey, 14 N. Y. 143,	5
v. Harrington, 116 Ill. 113,	271	Bell v. Anderson, 74 Wis. 638,	1
v. Ray, 17 Ind. 554,	592	v. Bumstead, 14 N. Y. Supp. 697,	7
v. State, 77 Ind. 231,	393, 394	v. Carley, 3 Ind. 577,	6
v. Stone, 22 Ia. 447,	789	v. Cox, 122 Ind. 153,	6
Beals v. Beals, 20 Ind. 163,	770	v. Davis, 1 Cal. 134,	6
v. Beals, 27 Ind. 77,	788	v. Dix, 49 Ind. 232,	
Beard v. First National Bank, 41		v. Golding, 27 Ind. 173,	4
Minn. 153,	656	v. Hungate, 13 Ind. 382,	6
v. First Presbyterian Church,		v. Keefe, 12 La. Ann. 340,	7
15 Ind. 490,	229	v. Kendall (Ala.), 8 So. Rep. 492,	7
v. Hand, 88 Ind. 183,	163	v. Mansfield (Ky.), 13 S. W. Rep.	
v. Lofton, 102 Ind. 408,	703	838,	2
v. Sloan, 38 Ind. 128,	571	v. Mousset, 71 Ind. 347,	2
v. State, 54 Ind. 413,	256, 768	v. State, 42 Ind. 335,	231, 6
v. State, 57 Ind. 8,	254, 288	v. Rinker, 29 Ind. 267,	7
Beardsley v. Frame, 73 Cal. 634,	156	v. Trotter, 4 Blackf. 12,	3
Beatty v. Beatty (Ky.), 5 S. W. Rep.		Belleau v. Thompson, 33 Cal. 495,	3
771,	74	Bellefontaine, etc., Co. v. Hunter,	
v. Benton, 135 U. S. 244,	17	33 Ind. 335,	510, 555, 6
v. Brown, 85 Va. 685,	402	Bellegrade v. San Francisco Bridge	
v. O'Connor, 106 Ind. 81, 282,	774	Co., 80 Cal. 61,	109, 4
Beauchamp v. State, 6 Blackf. 299,	527	Belt v. Davis, 1 Cal. 134,	70, 1
Beaulieu v. Parsons, 2 Minn. 37,	535	Belt R. Co. v. Mann, 107 Ind. 89,	56
Beaver v. Taylor, 93 U. S. 46,	746		565, 6
		Belton v. Smith, 45 Ind. 291,	129, 2

TABLE OF CASES.

xxxiii

[References are to Pages.]

Bolvin v. Richmond, 85 Va. 574,	7	Bertelson v. Bower, 81 Ind. 512,	748
Bones v. Jennings, 46 Vt. 45,	677	Bessette v. State, 101 Ind. 85,	622
Boster v. Sherwood, 21 Ind. 167,	52	Bethell v. Bethell, 92 Ind. 318, 420,	640
v. State, 26 Ind. 285,	397, 637	v. Mathews, 13 Wall. 1,	273
v. Wampler, 84 Ind. 172, 124, 154,	154	v. McCool, 46 Ind. 303,	599
222, 225, 360, 443,	774	Betson v. State, 47 Ind. 54,	729
Benedict v. Bray, 2 Cal. 251,	306	Betts v. Dimon, 3 Conn. 107,	9
v. Farlow, 1 Ind. App. 160,	59	v. Quick, 114 Ind. 165,	288
Benedict v. Aughe, 93 Ind. 401,	75, 295	v. State, 66 Ga. 508,	538
Bennold v. Fox, 21 Minn. 51,	180	Bevan v. Hayden, 13 Ia. 122,	691
Bennin v. Elmira, etc., Co., 49	489	v. Tomlinson, 25 Ind. 253,	480
Barb. 441,	489	Bever v. North, 107 Ind. 544,	520
Bennett v. Abbott, 51 Ind. 252,	675	Bewley v. Graves, 17 Ore. 274,	402
v. Alicott, 2 T. R. 166,	588	Beyer v. Soper, etc., Co., 76 Wis. 14,	581
v. Bennett, 102 Ind. 86, 219, 222,	225	Bibb v. Reid, 3 Ala. 88,	531
v. Kechn, 67 Wis. 154,	100	Bibbler v. Walker, 69 Ind. 362,	43
v. Mattingly, 110 Ind. 197, 108,	596	Bice v. Hall, 120 Ill. 597,	44
v. McIntyre, 121 Ind. 231,	588	Bickett v. Garner, 31 Ohio St. 28,	496
v. State, 22 Ind. 147,	374		497
v. Syndicate Ins. Co., 43 Minn.	639	Biddison v. Moseley, 57 Md. 89,	225
45,	639	Bidinger v. Bishop, 76 Ind. 244,	562
Brient v. Trenton, etc., Co., 3 Vr.	102	Bidwell v. Astor Mutual Ins. Co.,	
N. J. 513,	102	16 N. Y. 263,	422
Breit v. Schneider, 39 Ind. 591,	112	Biemel v. State, 71 Wis. 444,	612
142,	397	Bienenfeld v. Fresno Milling Co.,	
Brewley v. Haeberle, 20 Mo. App.	225	82 Cal. 425,	78
128,	225	Bierly v. Harrison, 123 Ind. 516,	758
Brown v. Adams, 69 Ind. 353, 101,	102	Bigelow, Ex parte, 113 U. S. 328,	504
v. Baldwin, 108 Ind. 106,	757	v. Doolittle, 36 Wis. 115,	483
v. Christian (Ind.), 16, 29, 124,	149,	v. Sickles (Wis.), 49 N. W.	
619	619	Rep. 196,	739
v. Mahoney, 6 Baxt. 304,	534	Bigler v. Waller, 12 Wall. 142,	212
v. State, 119 Ind. 488,	255, 266	Biggs, Ex parte, 64 N. C. 202,	7
Bryant v. Maupin, 86 Ky. 271,	683	Billups v. Daggs, 38 Mo. App. 367,	661
Burley v. Coyne, 4 Wall. 509,	451	Bilyea v. Smith, 18 Ore. 335,	452
v. Dunkle, 57 Ind. 374,	199	Binford v. Minor, 101 Ind. 147, 167,	666
Burley v. State, 4 Ind. 264,	301	Bingham, In re, 127 N. Y. 296,	630
Busch v. State, 13 Ind. 434,	619	v. Brumback, 24 Ill. App. 332,	445
Bushoff v. McDonald, 87 Ind. 549, 120,	120,	v. Cabot, 3 Dall. 19,	273, 477
172, 271, 511, 718,	786	v. Stage, 123 Ind. 281,	216, 416,
Burns v. Farrar, 45 Ind. 41,	757	526, 527, 585, 685,	746
Burney, etc., Co. v. Hascall, 123		v. Stumph, 48 Ind. 97,	769
Ind. 502,	293, 751	v. Walk, 128 Ind. 164,	730
Burkley v. Kober, 13 Mo. App. 502,	767	Binney v. Chesapeake, etc., Co., 8	
v. Tapp, 87 Ind. 25,	687	Pet. 214,	482
Burks County v. Jones, 21 Pa. St.		Binns v. State, 66 Ind. 428,	508, 661
413,	192	Birch v. Frantz, 77 Ind. 199,	282
v. Pile, 18 Pa. St. 493,	192	Bird v. Dansdale, 2 Binn. 80,	750
Berkshire v. Young, 45 Ind. 461,	285,	v. Lanius, 7 Ind. 615,	546, 597,
728	728	692, 693, 694	
v. Shultz, 25 Ind. 523,	604	Birmingham, etc., Co. v. Wildes,	
Berlin v. Oglesbee, 65 Ind. 308,	763,	85 Ala. 593,	675
767,	786	Bisel v. Tucker, 121 Ind. 249,	52, 488
Berry v. Taylor, 5 Hill. 577,	587	Bissel v. Drake, 19 Johns. 66,	697
Berthamer v. State, 123 Ind. 577,	533	Bish v. Van Cannon, 94 Ind. 263,	644
Berthard v. Brown, 31 Ill. 385,	465	Bishop v. Carter, 29 Ia. 165,	411
Berry v. Berry, 22 Ind. 275,	83, 208	v. Cook, 13 Barb. 326,	321
v. Grevel, 11 Ia. 135,	89	v. Empire, etc., Co., 1 J. & S.	
v. State, 10 Ga. 511,	623	(N. Y.) 17,	91
Bernard v. Taylor, 32 Ark. 470,	615	v. Moorman, 98 Ind. 1,	90, 590

[References are to Pages.]

Bishop v. Morris, 22 Ill. App. 564,	676	Blake v. Powell, 26 Kan. 320,	535, 5
v. Redmond, 83 Ind. 157,	691	v. Stewart, 29 Ind. 318,	5
v. Silver Lake, etc., Co., 62 N. H. 455,	630	Blanchard v. Bissell, 11 Ohio St. 96,	5
v. State (Ark.), 14 S. W. Rep. 88,	120	v. Jones, 101 Ind. 542,	5
v. Village of Goshen, 120 N. Y. 337,	665	Bland v. State, 2 Ind. 608,	7
v. Welch, 54 Ind. 527,	256	Blandin v. Silsby, 62 Vt. 69,	4
Bispham v. Inskeep, 1 Cox, 231,	43	Blanton v. Carroll, 86 Va. 539,	6
Bissell v. Jeffersonville, 24 How. 287,	285	Blany v. Finley, 2 Blackf. 338,	6
v. Wert, 35 Ind. 54,	199	Blasingame v. Blasingame, 24 Ind. 86,	5
Bissot v. State, 53 Ind. 408,	791	Blaisdell v. Scally, 84 Mich. 149,	6
Bitting v. Ten Eyck, 82 Ind. 421,	469	Blatchford v. Newberry, 100 Ill. 484,	4
Bittinger v. Bell, 65 Ind. 445,	596	Blazinski v. Perkins, 77 Wis. 9,	6
Bitzer v. Wagar, 83 Mich. 223, 639,	654	Blecker v. Schoff, 48 N. W. Rep. 1079,	3
Bixby v. State, 15 Ark. 395,	791	Bledsoe v. Bledsoe (Ky.), 1 S. W. Rep. 10,	6
Bixel v. Bixel, 107 Ind. 534,	215, 723	v. Irvin, 35 Ind. 293,	588, 6
Bixlie v. Wood, 24 N. Y. 607,	587	v. Nixon, 69 N. C. 81,	4
Black v. Camden, etc., Co., 45 Barb. 40,	655	v. Rader, 30 Ind. 354,	397, 4
v. Coan, 48 Ind. 385,	561	Blessing v. Blair, 45 Ind. 546,	5
v. Daggy, 13 Ind. 383,	665	Bliley v. Taylor, 84 Ga. 154,	6
v. Peters, 64 Ga. 628,	96	Blinks v. State, 48 Ind. 172,	6
v. Shaw, 20 Cal. 68,	141	Blizzard v. Applegate, 77 Ind. 516,	53
v. State, 58 Ind. 589,	308	v. Blizzard, 40 Ind. 344,	181, 7
v. Thomson, 107 Ind. 162, 419,	517, 520	v. Hayes, 46 Ind. 166,	7
v. Washington, 65 Miss. 60,	413	v. Phebus, 35 Ind. 284,	7
v. Winterstein, 6 Neb. 225,	751	v. Riley, 83 Ind. 300, 266, 713,	7
Blackberry v. People, 10 Ill. (5 Gilm.) 266,	437	Block v. Darling, 140 U. S. 234,	7
Blackburn v. Blackburn (Ky.), 11 S. W. Rep. 712,	640	v. Ebner, 54 Ind. 544,	1
v. Crowder, 110 Ind. 127, 334,	791	v. State, 100 Ind. 357,	528, 5
v. Selma, etc., Co., 2 Flippin, 525,	630	Blodgett v. Morris, 14 N. Y. 482,	6
Blacker v. Slown, 114 Ind. 322, 579,	708	Blonheim v. Moore, 11 Md. 365,	3
Blacketer v. House, 67 Ind. 414, 691,	743	Bloomfield Ry. Co. v. Burress, 82 Ind. 83,	6
Blackledge v. Benedict, 12 Ind. 389,	393	Bloomfield v. Ketcham, 5 N. Y. Civ. Pro. Rep. 407 (S. C. 95, N. Y. 657),	1
Blacklock v. Small, 127 U. S. 96,	490	Bloomfield R. R. Co. v. Van Slike, 107 Ind. 480,	402, 5
Blackwell v. Smith, 8 Mo. App. 43,	411	Blossom v. Milwaukee, etc., Co., 1 Wall, 655,	1
v. State (Tex.), 15 S. W. Rep. 597,	578	Blount v. Rick, 107 Ind. 238,	404, 7
v. McCaine, 105 N. C. 460,	66	Blumhardt v. Rohr, 70 Md. 328,	677, 6
Blair v. Davis, 9 Ind. 236, 101, 281,	282, 284	v. Rohr (Md.), 17 Atl. Rep. 266,	6
v. Hanna, 87 Ind. 298,	735	Blum v. Strong, 71 Tex. 321,	4
v. Kilpatrick, 40 Ind. 312,	312	v. Whitworth, 66 Tex. 350,	2
v. Lanning, 61 Ind. 499,	471	Board v. Armstrong, 91 Ind. 528,	5
v. Miller, 4 Dall. 21,	228	v. Arnett, 116 Ind. 478,	6
v. Shelby Co. Assn., 28 Ind. 175,	597	v. Benson, 83 Ind. 469,	162, 7
v. Smith, 114 Ind. 114,	215	v. Bond, 3 Col. 222,	1
Blake v. Broughton, 107 N. C. 220,	655, 659	v. Brown, 14 Ind. 191, 363, 453,	4
v. Griswold, 104 N. Y. 613,	141	v. Bunting, 111 Ind. 143,	58, 4
v. Hedges, 14 Ind. 566,	572	v. Center Tp., 105 Ind. 422,	177, 4
v. Lyon, 75 N. Y. 611,	326	v. Courtney, 105 Ind. 311, 647,	6
v. Lyon, etc., Co., 75 N. Y. 611,	323	v. Dombke, 94 Ind. 72,	5
		v. Embree, 7 Blackf. 461,	7

[References are to Pages.]

Board v. Eperson, 50 Ind. 275,	759	Bole v. Newberger, 81 Ind. 274,	178
v. Fuller, 118 Ind. 158,	513, 697	Bolin v. Simmons, 81 Ind. 92,	278,
v. Gorman, 19 Wall, 661,	334		289, 296, 396
v. Hall, 70 Ind. 469,	285, 470	Boling v. Howell, 93 Ind. 329,	122, 154
v. Hammond, 83 Ind. 453,	656	Bollinger v. Manning (Cal.), 21	
v. Hand, 88 Ind. 183,	768	Pac. Rep. 375,	146
v. Hicks, 2 Ind. 527,	438, 591	Bolster v. Catterlin, 10 Ind. 117,	393, 590
v. Huff, 91 Ind. 333,	567	Bomar v. Asheville, etc., Co., 30 So.	
v. Jameson, 86 Ind. 154,	597	Car. 450,	412
v. Johnson, 127 Ind. 238,	507	Bonahan v. Nebraska, 125 U. S. 692,	248
v. Karp, 90 Ind. 236,	771	Bond v. Armstrong, 88 Ind. 65,	736
v. Kimberlin, 108 Ind. 449,	736	v. Cutler, 7 Mass. 205,	793
v. Kromer, 8 Ind. 446,	692	v. Nave, 62 Ind. 505,	732
v. Legg, 93 Ind. 523,	691	v. State, 23 Ohio St. 349,	681
v. Legg, 110 Ind. 479,	486	v. Wabash, etc., Co., 67 Ia. 712,	488,
v. Legg, 115 Ind. 544,	670		784
v. Leggett, 115 Ind. 544,	13, 420	Bonds v. Hickman, 29 Cal. 460,	167
v. Logansport, etc., Co., 88		Bondurant v. Watson, 103 U. S. 281,	134
Ind. 199,	90	Bonewitz v. Wygant, 75 Ind. 41,	292,
v. Louisville, etc., Co., 109 U.			718, 719
S. 221,	125	Bonham v. Bishop, 23 So. Car. 96,	128
v. Markle, 46 Ind. 96,	12, 87, 670	v. Mills, 39 Ohio St. 534,	525
v. Mayer, 10 Ind. 400,	403	Bonnell v. Allen, 53 Ind. 130,	215, 590
v. Montgomery, 109 Ind. 69,	162,	Bonner v. Glenn, 79 Tex. 531,	638
	766, 767	Bonny v. Bonny (Ky.), 9 S. W.	
v. Newman, 35 Ind. 10, 14,	159, 748	Rep. 404,	490
v. Pearson, 120 Ind. 426,	293,	Bonsall v. Isett, 14 Ia. 309,	147, 284
	581, 715	Boody v. Watson, 64 N. H. 162,	96
v. Perche, 40 La. Ann. 201,	126	Boogher v. Insurance Co., 103 U.	
v. Pritchett, 85 Ind. 68,	491	S. 90,	681
v. Reynolds, 44 Ind. 509,	566, 687	Booker v. Goldsborough, 44 Ind.	
v. Slatter, 52 Ind. 171,	159, 161,	490,	472, 609, 635
	164, 172	Boone v. Hulsey, 71 Tex. 176,	487
v. Small, 61 Ind. 318,	766	v. Purnell, 28 Md. 607,	657, 661
v. Smith, 40 Ind. 61,	62	Boor v. Lowrey, 103 Ind. 468,	143
v. Spidler, 13 Ind. 235,	218, 442	Boorum v. Ray, 72 Ind. 151,	588, 603
v. State, 11 Ind. 205,	591	Booth v. Commonwealth, 7 Met.	
v. State, 38 Ind. 193,	591	285,	346, 492
v. Tichenor (Ind.), 29 N. E.		v. Cottingham, 126 Ind. 431,	187,
Rep. 32,	393		413
Boardman v. Griffin, 52 Ind. 101,	723	Boots v. Griffiths, 97 Ind. 241,	171, 580,
Bodentha v. Goodrich, 3 Gray, 508,	346		624, 693, 700
Bodkin v. Merritt, 102 Ind. 293, 688,	749	Borchus v. Huntington, etc., Assn.,	
Bodman v. Lake Fork, etc., Co., 132		97 Ind. 180,	736, 768
Ill. 439,	591	Borden v. State, 6 Eng. (Ark.) 519,	147,
Bogart, In re, 2 Sawy. 396,	12		284
v. Brown, 5 Pick. 18,	696	Bordentown, etc., v. Flanagan, 41	
v. New Albany, 1 Ind. 38, 36, 45,	50	N. J. L. 115,	482
Boggs v. Caldwell County, 28 Mo.		Borgalthous v. Farmers Ins., etc.,	
56,	98	Co., 36 Ia. 250,	112, 126
v. State, 8 Ind. 463,	37, 250	Borland v. Haven, 37 Fed. Rep. 394,	11
Bogle v. Gordon, 39 Kan. 31,	155	Borne v. Kansas City, 51 Mo. 454,	76
Bohannon v. State, 14 Tex. App.		Bornheimer v. Baldwin, 42 Cal. 27,	91
271,	251, 252	Bosch v. Kassing, 64 Ia. 312,	671
Bohr v. Neuenschwander, 120 Ind.		Bosley v. Ackelmire, 39 Ind. 386,	62
449,	712	v. Chesapeake, etc., Co., 3 Gill.	
Bohun v. Delessert, 2 Coop. Ch.		& J. 450,	554, 570
Cas. Pt. I. 21,	677	v. Farquar, 2 Blackf. 61,	378, 632
Boil v. Simms, 60 Ind. 162,	404	v. National, etc., Co., 123 N.	
Boker v. Chapline, 12 Ia. 204,	667	Y. 550,	732, 745

[References are to Pages.]

Bosseker v. Cramer, 18 Ind. 44,	716,	Boxley v. Collins, 4 Blackf. 320,	29
	789		71
Boston v. Hayner, 31 Cal. 107, 167, 448		Brace v. Black, 125 Ill. 33,	3
v. Tileston, 11 Mass. 467,	192	Brackett v. Griswold (N. Y.), 28 N.	
Boswell v. Boswell, 117 Ind. 599, 6, 93		E. Rep. 365,	48
v. State, 8 Ind. 489,	266, 277	Bradbury v. Cony, 62 Me. 223,	52
Bostwick, Ex parte, 1 Cow. 143,	435	Braden v. Graves, 85 Ind. 92,	46
v. Brinkerhoff, 106 U. S. 3, 72, 499		v. Leibenguth, 126 Ind. 336,	15
v. Bryant, 113 Ind. 448,	217, 597		27
Bosworth v. Barker, 65 Ind. 595,	689	v. Lemmon, 127 Ind. 9,	71
Bothwell v. Millikan, 104 Ind. 162,	506	Bradford v. Higgins (Neb.), 47 N.	
Bottoff v. Wise, 53 Ind. 32,	675	W. Rep. 749,	69, 7
Bottoff v. Shelton, 79 Ind. 98,	689	v. State, 15 Ind. 347,	531, 67
Bouknight v. Brown, 16 So. Car.		Bradley, Ex parte, 48 Ind. 548, 231,	78
155,	411, 745	v. Bank, 20 Ind. 528,	63
Boulden v. Estey Organ Co. (Ala.),		v. Bearss, 4 Ind. 186,	8
9 So. Rep. 283,	309	v. Bradley, 45 Ind. 67,	68
Boutelle v. Westchester, etc., Co.,		v. City of Frankfort, 99 Ind. 417,	64
51 Vt. 4,	168, 508	v. Clark, 1 Cush. 293,	61
Bowden v. Baiber, 101 N. C. 612,	618	v. Cramer, 66 Wis. 297,	65
Bowen v. Carolina, etc., Co. (So.		v. Galt, 5 Mackey, 317,	31
Car.), 13 S. E. Rep. 421,	545	v. Michael, 1 Ind. 551,	59
v. Fox, 99 N. C. 127,	164	v. Palen, 78 Ia. 126,	65
v. Pollard, 71 Ind. 177,	678	v. Rogers, 33 Kan. 120,	12
v. Preston, 48 Ind. 367,	669	v. Root, 5 Paige, 632,	48
v. Reed, 34 Ind. 430,	317	v. State, 31 Ind. 492,	66
v. Spears, 20 Ind. 146,	615	v. Thixton, 117 Ind. 255, 265,	36
v. Swander, 121 Ind. 164, 250, 291,		Bradshaw v. Callaghan, 8 Johns.	
624, 647, 668, 712, 716		558,	11
Bowers v. Bowers, 53 Ind. 430,	729	Bradstreet, Ex parte, 4 Pet. 102, 438,	75
v. Elwood, 45 Ind. 234,	45	Bradway v. Waddell, 95 Ind. 170,	68
v. Mayo, 32 Minn. 241,	537		75
v. McNutt, 5 Blackf. 231,	98	Bradwell v. Pittsburgh, etc., Co.,	
Bowlus v. Brier, 87 Ind. 391,	266, 756	139 Pa. St. 404,	62
Bowman v. Eppinger, 1 N. Dak. 21,	643	Brady, In re, 85 N. Y. 268,	51
v. Lewis, 101 U. S. 22,	303	v. Ball, 14 Ind. 317,	58
v. Phillips, 47 Ind. 341,	401, 785	v. Block, 57 Ind. 417,	60
v. Simpson, 68 Ind. 229,	447	v. Mayor of New York, 22 J.	
Bowrell v. Zigler, 19 Ohio, 362,	504	& S. 457,	79
Boyce v. Aubuchon, 34 Mo. App.		Bragg v. Bickford, 4 How. Pr. 21,	63
315,	621	v. Olson, 128 Ill. 540,	41
v. Graham, 91 Ind. 420,	567, 743,	v. Wetzel, 5 Blackf. 95,	61
	759, 765, 766	Brainard v. Jones, 18 N. Y. 35,	31
v. Gumdy, 6 Pet. 777,	208	Brakken v. Minneapolis, etc., Co.,	
v. Lake, 17 So. Car. 481,	616	29 Minn. 41,	51
Boyd v. Anderson, 102 Ind. 217, 732,	781	Bramblett v. McVey (Ky.), 15 S.	
v. Brown, 120 Ind. 393,	643	W. Rep. 49,	51
v. Caldwell, 95 Ind. 392,	524	Branch v. Faust, 115 Ind. 464,	31
v. Pfeifer, 95 Ind. 599,	274	Branch Bank, etc., v. Moseley, 19	
v. State, 17 Ga. 194,	657, 661	Ala. 222,	71
Boyd v. Williams, 92 N. C. 546,	449	Brand v. Longstreet, 1 South (N.	
Boyer v. Berryman, 123 Ind. 451,	504	J.), 325,	5
Boyle v. Carter, 24 Ill. 49,	483	v. Whelan, 18 Ill. App. 186,	6
v. People, 4 Col. 176,	529	Brandon v. Judah, 7 Ind. 545,	6
v. State, 105 Ind. 289,	623	v. Whitney, 54 Ind. 587,	11
Boyton v. Foster, 7 Met. 415,	456	Branger v. Buttrick, 28 Wis. 450,	32
Boynton v. Sisson, 56 Wis. 401,	524		71
Boys v. Simmons, 72 Ind. 593,	418	Branham v. Ft. Wayne, etc., Co., 7	
Box v. Bennett, 1 H. Blacks. 432,	76	Ind. 524,	1

TABLE OF CASES.

xxxvii

[References are to Pages.]

Branham v. Johnson, 62 Ind. 259, 115, 140, 142, 399	Bristol, etc., Co. v. Boyer, 67 Ind. 236, 567
v. State, 11 Ind. 553, 254, 746	Bristor v. Galvin, 62 Ind. 352, 282, 284
Braintree v. Southworth, 4 Gray, 304, 604	British Bark Latona v. McAlep, 3 Wash. Ty. 332, 146
Brannon v. Hay, 42 Ind. 92, 780	Britton v. Phillips, 24 How. Pr. 111, 497
Bransford v. Karn (Va.), 12 S. E. Rep. 404, 648	Brobst v. Brobst, 2 Wall. 96, 324
Brant v. Gallup, 117 Ill. 640, 467	v. Brock, 10 Wall. 519, 571, 573
Bratton v. Bratton, 79 Ind. 588, 299	Brock v. State, 85 Ind. 397, 774
Brasher v. Van Cortland, 2 Johns. Ch. 242, 604	Brockett v. Brockett, 2 How. 238, 98
Brasfield v. Burgess (Ky.), 10 S. W. Rep. 122, 673	Broderick's Will, 21 Wall. 503, 11
Bray v. Black, 57 Ind. 417, 599	Brooke v. Logan, 112 Ind. 183, 88
v. Franklin Co., 60 Ind. 6, 368, 370, 446, 71	Broker v. Scobey, 56 Ind. 588, 572
v. Laird, 44 Ala. 295, 535	v. Weber, 41 Ind. 426, 629, 789
Braydon v. Goulman, 1 T. B. Mon. 115, 535	Brookman v. Hamill, 43 N. Y. 554, 414
Brazil v. Peterson, 44 Minn. 212, 792	Brookover v. Forst, 31 Ind. 255, 150, 276
Brazil, Town of v. Kress, 55 Ind. 14, 393	Brooks v. Allen, 62 Ind. 401, 147, 284
Brauns v. Sterns, 1 Ore. 367, 521, 522	v. Doxey, 72 Ind. 327, 113, 114, 123, 361, 443
Braunsdorf v. Felner, 69 Wis. 334, 638	v. Dutcher, 22 Neb. 644, 568
Breckley v. Weghorn, 71 Ind. 497, 292	v. Harris, 41 Ind. 390, 334
Breden v. State, 88 Ala. 20, 679	v. Harris, 42 Ind. 177, 470
Breeding v. Shinn, 8 Ind. 125, 108	v. Norris, 11 How. 204, 104, 350
v. Shinn, 11 Ind. 547, 105, 263	v. Perry, 23 Ark. 32, 534
Breedlove v. Bundy, 96 Ind. 319, 535	Brookville v. Gagle, 73 Ind. 117, 36
Breese v. Allen, 12 Ind. 426, 632	Brookville, etc., Turnpike Co. v. McCarty, 8 Ind. 392, 592
v. State, 12 Ohio St. 146, 195	Broom, Succession of, 14 La. Ann. 67, 470
Brehm v. State, 90 Ind. 140, 771	Bronenberg v. Board, 41 Ind. 502, 86
Breidert v. Krueger, 76 Ind. 55, 45, 444	Bronson v. La Crosse, etc., Co., 1 Wall. 405, 456
Bremmerman v. Jennings, 101 Ind. 253, 567	v. Railroad Co., 2 Black, 524, 73
Brenner v. Bigelow, 8 Kan. 496, 724	Brooster v. State, 15 Ind. 190, 572
v. Chapman, 11 Kan. 118, 633	Brotherton v. Weathersby (Tex.), 11 S. W. Rep. 505, 692
v. Quick, 88 Ind. 546, 154	Brouse v. Price, 20 Ind. 216, 758
Brewington v. Lowe, 1 Ind. 21, 186, 217	Browder v. McArthur, 7 Wheat. 58, 468
Brewster v. Baxter, 2 Wash. Ty. 135, 260	Brower v. Goodyer, 88 Ind. 572, 622
v. Shelton, 24 Conn. 140, 225	Brown, Ex parte, 116 U. S. 401, 435
v. Wakefield, 22 How. 118, 119, 132	v. Anderson, 90 Ind. 93, 420, 670
Brickley v. Weghorn, 71 Ind. 497, 718, 774, 785	v. Brown, 7 Mo. 288, 763
Brickman v. South Carolina R. Co., 8 So. Car. 173, 523	v. Brown, 29 W. Va. 777, 391
Bright v. Hutton, 12 Eng. L. & E. 15, 474	v. Buzan, 24 Ind. 194, 378
v. State, 90 Ind. 343, 408, 680	v. Caldwell, 10 S. & R. 114, 273
Brighton v. White, 128 Ind. 111, 32	v. Carraway, 47 Miss. 668, 20
Briggs v. Barker, 145 Mass. 287, 224	v. Clarke, 4 How. 4, 761
v. Gleason, 27 Vt. 114, 791	v. Colie, 1 E. D. Smith, 265, 521
v. Sneghan, 45 Ind. 14, 286	v. Critchell, 110 Ind. 31, 604
Bridgman v. Dambly, 41 Minn. 526, 520	v. Desmond, 100 Mass. 267, 420
Brink v. Reid, 122 Ind. 257, 411	v. Driggers, 60 Ga. 114, 551
Brinkmayer v. Helbling, 57 Ind. 435, 736	v. Eaton, 98 Ind. 591, 704
	v. Edgerton, 14 Neb. 453, 71
	v. Evans, 34 Barb. 594, 143
	v. Freed, 43 Ind. 253, 525
	v. Gill, 49 Ga. 549, 677
	v. Goble, 97 Ind. 86, 90, 284, 422
	v. Grove, 115 Ind. 84, 217, 792
	v. Hall, 85 Va. 146, 763
	v. Hazard, 2 Wash. Ty. 464, 261

[References are to Pages.]

Brown v. Hillegas, 2 Hill, 447,	714	Bryan v. Bryan, 8 Cal. 130,	456
v. Home Savings Bank, 5 Mo.		v. Scholl, 109 Ind. 367,	462
App. 1,	412	v. State, 4 Ia. 349,	770
v. Jones, 113 Ind. 46,	19, 475	Bryant v. Bryant, 4 Abb. Pr. N. S.	
v. Jones, 125 Ind. 375,	707	138,	96
v. Keyser, 53 Ind. 85,	70, 451	v. Crosby, 40 Me. 9,	691
v. Klock, 117 N. Y. 340,	612	v. People, 71 Ill. 32,	430
v. Klock, 52 Hun. 613,	655	v. Rich, 106 Mass. 180,	72
v. Lawler, 21 Minn. 327,	646	v. Richardson, 126 Ind. 145,	671
v. Marshall, 120 Ind. 323,	535	v. State, 106 Ind. 549,	409
v. Miner, 128 Ill. 148,	269	Bryorly v. Clark, 48 Tex. 345,	781
v. Minneapolis, etc., Co., 25		Buch v. Hughes, 127 Ind. 46,	527
Minn. 461,	411	Buchanan v. Berkshire Life Ins.	
v. Mott, 22 Ohio St. 149,	194	Co., 96 Ind. 510, 81, 294, 401, 637,	728
v. Nogel, 21 Minn. 415,	646	v. Lee, 69 Ind. 117,	395
v. Nichols, etc., Co., 123 Ind. 492,	216	v. Logansport, etc., Co., 71 Ind.	
v. Osborn, 1 Blackf. 32,	182	265,	334, 463
v. Owen, 94 Ind. 31,	537, 610, 677	v. Milligan, 68 Ind. 118,	325, 326
v. Rhodes, 1 Kan. 359,	757	v. Milligan, 108 Ind. 433,	19, 475,
v. Rice, 30 Neb. 236,	633		709
v. Russell & Co., 105 Ind. 46, 32,	532	v. Milligan, 125 Ind. 332,	307, 314,
v. Searle, 104 Ind. 218,	403		318, 326
v. Smith, 24 Ill. 196,	524	v. State, 106 Ind. 251,	521, 567
v. Southern, etc., Co. (Utah),		v. Townsend (Tex.), 16 S. W.	
26 Pac. Rep. 579,	639	Rep. 315,	581, 718
v. State, 5 Eng. 607,	674	Buchart v. Burger, 115 Ind. 123,	758
v. State, 82 Ga. 224,	373	Buck v. Havens, 40 Ind. 221,	179
v. State, 70 Ind. 576,	578	Buckey v. Stanley, 5 Blackf. 162,	525
v. State, 103 Ind. 133,	622	Buckingham, In re, 57 Conn. 541,	112
v. State, 105 Ind. 385,	253	Buckland v. Shepherd, 77 Ia. 329,	78
v. State, 105 Ind. 494,	577	Bucklin v. Strickler (Neb.), 49 N.	
v. State, 111 Ind. 441,	239	W. Rep. 371,	633
v. State, 60 Miss. 447,	528	Buckman v. Whitney, 24 Cal. 267,	167
v. Stead, 5 Sims. 535,	596	Buckner v. Spaulding, 127 Ind. 229,	758
v. Union Bank, 4 How. 465,	499	Budd v. Power, 8 Mont. 380,	402, 403
v. Webber, 6 Cush. 560,	633	Buecher v. Casteen, 41 Kan. 141,	673
v. Wyncoop, 2 Blackf. 230,	598	Buell v. Sherman, 28 Ind. 464,	294
Broyles v. State, 47 Ind. 251,	509	v. State, 69 Ind. 125, 241, 243,	246
Brownfield v. Hughes, 128 Pa. St.		v. State, 72 Ind. 523,	251
194,	643	Buffalo, etc., Co. v. Delaware, etc.,	
v. Weicht, 9 Ind. 394,	420, 670	Co. (N. Y.), 29 N. E. Rep. 121,	593
Browning v. Hight, 78 Ind. 257, 680,	699	v. Phillips, 67 Wis. 129,	745
v. McCracken, 97 Ind. 279,	219,	Buffington v. Harvey, 95 U. S. 99,	451
	225, 226, 227	Buford v. Gould, 35 S. C. 265,	555
v. Wheeler, 24 Wend. 258,	648	Bugle v. Myers, 59 Ind. 73,	306
Brownlee v. Goldthait, 73 Ind. 481,	744	Bulen v. Granger, 63 Mich. 311,	619
v. Hare, 64 Ind. 311,	271, 683, 726	Bulger v. Rosa, 119 N. Y. 459,	643
v. Kenneipp, 41 Ind. 216,	788	Bulkeley v. Butler, 2 B. & C. 434,	640
Brown County v. Winona, etc., Co.,		Bulkley v. Morgan, 46 Conn. 393,	589
38 Minn. 397,	436	Bull, In re, 14 Daly, 510,	546
Bruce v. Manchester, etc., Co., 117		Bull's Appeal, 24 Pa. St. 286,	260
U. S. 514,	50, 51	Bull v. Coe, 77 Cal. 54,	411
v. Schuyler, 4 Gilm. 221,	58, 479	v. Commonwealth, 14 Gratt.	
v. Smith, 44 Ind. 1,	129	613,	731, 743
v. State, 87 Ind. 450,	256, 765	Buller v. Lenzee, 100 Mo. 95,	75
v. Tyler, 127 Ind. 468,	199	Bullock v. Cook, 28 Mo. App. 222,	454,
Brumfield v. Drook, 101 Ind. 190,	604		514
Brunner v. Brunner, 49 Ind. 98,	370	Bulwinkle v. Cramer, 30 So. Car.	
Brush Electric Co., Appeal of, 114		153,	738
Pa. St. 574,	590		

[References are to Pages.]

Bumpass v. Webb, 4 Porter (Ala.), 132	Burkhardt v. Gladish, 123 Ind. 337, 394, 395, 396
Bunce v. Gallagher, 5 Blatchf. 481, 590	Burkett v. Holman, 104 Ind. 6, 217, 393, 394, 395
Bundy v. Cunningham, 107 Ind. 360, 73, 488, 595, 738	Burleson v. Burleson, 15 Tex. 423, 483
v. Hyde, 50 N. H. 116, 537	Burnett v. Abbott, 51 Ind. 254, 123, 443
v. McClarnon, 118 Ind. 165, 237, 748	v. Curry, 42 Ind. 272, 477, 489
v. Ophir Iron Co., 35 Ohio St. 356, 358	v. Trustees, 50 Ind. 251, 435
v. Pool, 82 Ind. 502, 288	Burns v. Barenfield, 84 Ind. 43, 520
Bunker v. Rand, 19 Wis. 254, 681	v. Fox, 113 Ind. 205, 521, 524
Bunn v. Croule, 10 Johns. 239, 619	v. Harris, 66 Ind. 536, 700
Bunnell v. Board, 124 Ind. 1, 62	v. Nash, 23 Ill. App. 552, 13
v. Bunnell, 93 Ind. 595, 293	v. Singer, etc., Co., 87 Ind. 541, 116
Bunt v. Sierra, etc., Co., 138 U. S. 483, 643	v. Webster, 16 Neb. 258, 306
Buntin v. Hooper, 59 Ind. 589, 92, 349, 351, 352, 450	Burnside v. Ennis, 43 Ind. 411, 180
v. Rose, 16 Ind. 209, 624, 625	Burntrager v. McDonald, 34 Ind. 277, 162, 766
v. Weadle, 20 Ind. 449, 675	Burr v. Burr, 10 Paige, 166, 335, 462
Bunting v. Saltz, 84 Cal. 168, 453	v. Mendenhall, 49 Ind. 496, 520, 521, 522, 525
Burchard v. Cavins, 77 Tex. 365, 314	Burrall v. Vanderbilt, 1 Bosw. 643, 335, 462
Burckhalter v. Coward, 16 S. C. 435, 615	v. State, 28 N. E. Rep. 699, 665
Burckham v. Burk, 96 Ind. 270, 562	Burroughs v. Norton, 48 How. Pr. R. 152, 146
Burbank v. Dyer, 54 Ind. 392, 277	Burrows v. Mickles, 22 Fla. 577, 129
v. Rivers, 20 Nev. 159, 94	Burson v. National Park Bank, 40 Ind. 173, 72
Burdick v. Hunt, 43 Ind. 381, 769, 770	Burt v. Panjand, 99 U. S. 180, 578
Burgess v. Donoghue (Mo.), 2 S. W. Rep. 303, 456	v. Hoettinger, 28 Ind. 214, 207, 209, 213, 330, 789
v. Hitt, 21 Mo. App. 313, 462	v. Wigglesworth, 117 Mass. 302, 616
Burgett v. Bothwell, 86 Ind. 149, 34, 177	v. Reilly, 82 Mich. 251, 435
v. Burgett, 43 Ind. 78, 690	Burton v. Burton, 128 Ind. 342, 336, 461
v. Teal, 91 Ind. 260, 562	v. Driggs, 20 Wall. 125, 731
Burgoyne v. Supervisors, 5 Cal. 9, 5	v. Ferguson, 69 Ind. 486, 158
Burlingame v. Central, etc., Co., 23 Fed. Rep. 706, 581	v. Reeds, 20 Ind. 87, 462
Burlington, etc., Co. v. Simmons, 123 U. S. 52, 68	v. Wilkes, 66 N. C. 604, 619
v. Stewart, 39 Ia. 267, 127, 415	v. West Jersey, etc., Co., 114 U. S. 574, 746
Burk v. Andis, 98 Ind. 59, 520, 538, 747	Burst v. State, 88 Ind. 341, 247
v. Ayers, 19 Hun. 17, 112	Busby v. Mitchell, 29 S. C. 447, 490
v. Barnard, 4 Johns. 309, 286	Buscher v. Knapp, 107 Ind. 340, 451
v. Howard, 15 Ind. 219, 208, 318, 330, 331, 332	v. Scully, 107 Ind. 246, 623
v. Simonson, 104 Ind. 173, 122, 154, 361, 448	Buse v. Russell, 86 Mo. 209, 483
v. State, 27 Ind. 442, 231	Bush v. Bush, 46 Ind. 70, 630
Burke v. Cruger, 8 Tex. 66, 487	v. Grover, etc., Co., 48 Ind. 258, 268
v. Lee, 76 Va. 386, 643	v. Hanson, 70 Ill. 480, 12
v. Pepper, 29 Neb. 320, 445	v. Rochester Bank, 48 N. Y. 659, 129
v. Pinnell, 93 Ind. 540, 677	v. State (Miss.), 6 So. Rep. 647, 99
v. St. Paul, 35 Minn. 172, 5	Buscher v. Knapp, 107 Ind. 340, 287
v. State, 47 Ind. 528, 247, 276	Bushnell v. Crooke, etc., Co., 12 Col. 247, 618
Burkam v. McElfresh, 88 Ind. 223, 124, 162, 168, 363, 511	Butcher v. Bank, 2 Kan. 70, 421, 670
Burkham v. Beaver, 17 Ind. 367, 596	v. Taylor, 18 Kan. 558, 71
v. Burk, 96 Ind. 270, 744	Butler v. Church, etc., 14 Bush, 540, 635
	v. Glens Falls, etc., Co., 121 N. Y. 112, 530
	v. Palmer, 1 Hill, 324, 61
	v. Roberts, 118 Ind. 481, 771

[References are to Pages.]

Butler v. State, 97 Ind. 378,	231, 248,	Calvo v. Railroad (S. C.), 10 S. E.	
250, 252, 257, 415, 517,	530	Rep. 389,	9
v. Winona Mill Co., 28 Minn.		Camblos v. Butterfield, 15 Abb. Pr.	
205,	675	(N. S.) 197,	9
Butt v. Butt, 118 Ind. 31,	506	Cambuston v. United States, 95 U.	
Button v. Ferguson, 11 Ind. 314,	688	S. 287,	9
v. Fox, 39 Ind. 369,	531	Camden v. Doremus, 3 How. 515,	73
Buzzell v. Snell, 25 N. H. 474,	615	Camden, etc., Co. v. Beknap, 21	
Bybee v. State, 94 Ind. 443,	368	Wend. 354,	55
Byers v. Hickman, 36 Ind. 359,	101	Cameron v. Equitable, etc., Co., 13	
v. Rodabaugh, 17 Ia. 53,	646	Jones & Sp. 628,	17
v. State, 20 Ind. 47,	306	v. Hodges, 127 U. S. 322,	41
Byington v. Commissioners, 37		v. White, 74 Wis. 425,	65
Kan. 654,	271	Camp v. Brown, 48 Ind. 575,	614, 611
Byne v. Smith, 76 Ga. 101,	518		61
Byram v. Galbraith, 75 Ind. 134,	785	v. Smith, 117 N. Y. 354,	21
Byrne v. Clark, 31 Ill. App. 651,	754	Campbell v. Allen, 61 Mo. 581,	15
v. Prather, 14 La. Ann. 653,	463	v. Birch, 60 N. Y. 214,	40
v. Reed, 75 Cal. 277,	792	v. Board, 118 Ind. 119,	
		v. Campbell, 121 Ind. 178,	73
		v. Campbell, 22 Ill. 664,	43
		v. Coburn, 77 Cal. 36,	68
		v. Coon, 61 Ind. 516,	40
		v. Dooling, 26 Ark. 647,	67
		v. Dutch, 36 Ind. 504,	16
		v. Dwiggin, 83 Ind. 473,	14
		v. Frankem, 65 Ind. 591,	58
		v. Hayes, 77 Cal. 36,	675, 68
		v. Howard, 5 Mass. 376,	46
		v. Hunt, 104 Ind. 210,	53
		v. City of Kalamazoo, 80 Mich.	
		655,	61
		v. Kent, 3 P. & W. 72,	27
		v. Maher, 105 Ind. 583,	622, 75
		v. Mandeville, 110 N. Y. 628,	46, 7
		v. Nebeker, 58 Ind. 446,	56
		v. New England Ins. Co., 22	
		Pick. 135,	64
		v. Perkins, 8 N. Y. 430,	58
		v. Roberts, 66 Ga. 733,	61
		v. Routt, 42 Ind. 410,	398, 63
		v. Stakes, 2 Wend. 137,	58
		v. Swasey, 12 Ind. 70,	633, 73
		Candy v. Hanmore, 76 Ind. 125,	6
		Canfield v. Erie, 21 Mich. 160,	20
		Cannon v. Pratt, 99 U. S. 619,	50
		Caose Bank v. Keene, 53 Me. 103,	57
		Cape Garardeau, etc., Co. v. Hat-	
		ton, 102 Mo. 45,	56
		Capital Bank v. Armstrong, 62 Mo.	
		59,	41
		Carey v. Brown, 92 U. S. 171,	60
		v. Butler, 11 Ind. 391,	28
		Cargar v. Fee, 119 Ind. 536,	291, 64
			66
		Carlisle v. Gaar, 18 Ind. 177,	66
		v. State, 32 Ind. 55,	2
		v. Wilkinson, 72 Ind. 91,	51
		Carlow v. Aultman, 28 Neb. 672,	14
		Carlton v. Cummins, 51 Ind. 478,	18

C

Caallot v. Deetken, 113 U. S. 213,	92
Cabell v. Vaughan, 1 Wm. Saund-	
ers, 291 i, 291 k,	602
Cade v. Hatcher, 72 Ga. 359,	537
Cadman v. Markle, 76 Mich. 448,	658
Cady v. Milwaukee, etc., Co., 5 Dak.	
97,	484
Caffrey v. Dudgeon, 38 Ind. 512,	306
Cage, Ex parte, 45 Cal. 248,	519
Cain v. Goda, 94 Ind. 555,	90, 124
Cairns v. O'Bleness, 40 Wis. 469,	486
Cairo, etc., Co. v. Easterly, 89 Ill.	
156,	769
Calcraft v. Gibbs, 5 T. R. 19,	750
Calder v. Smalley, 66 Ia. 219,	674
Caldwell v. Bank of Salem, 20 Ind.	
294,	638
v. Boyd, 109 Ind. 447,	713
v. Bruggerman, 8 Minn. 286,	468,
	489
v. Colgate, 7 Barb. 253,	414
v. New Jersey, etc., Co., 47 N.	
Y. 282,	535
Caldwell v. Gilmore, 86 Ind. 428,	765
Caley v. Morgan, 114 Ind. 350,	673
Call v. Byram, 39 Ind. 499,	784
v. Palmer, 106 U. S. 39,	389
Callaghan, Estate of, 60 Cal. 232,	224
v. Portland, etc., Co., 17 Ore.	
556,	92
Callan v. Black, 2 Black, 541,	73
v. Bransford, 10 S. E. Rep. 317,	46
v. Ellison, 13 Ohio St. 446,	285
Calo v. Railroad Co., 30 S. C. 608,	109
Calumet Iron, etc., Co. v. Martin,	
115 Ill. 358,	273
Calvert v. State, 91 Ind. 473,	256, 257,
	261, 759

TABLE OF CASES.

xli

[References are to Pages.]

Carman v. Pultz, 21 N. Y. 547,	664	Carrott v. Jacksonville, 2 Ill. App.	
Carmichael v. Adams, 91 Ind. 526,	17,	481,	325
	32, 532	Carruthers v. McMurray, 75 Ia. 173,	653
v. Browder, 3 How. (Miss.) 252,	31	Carskadden v. Poorman, 10 W. &	
v. Holloway, 9 Ind. 519,	315	S. 82,	699
v. Shiel, 21 Ind. 66,	764	Carson v. Henderson, 34 Kan. 404,	791
v. Vandebur, 51 Ia. 525,	458	v. State, 80 Ga. 170,	252
Carnier v. Whitaker, 36 Ind. 509,	603	v. Steamboat Talma, 3 Ind. 194,	633
Carnahan v. Chenoweth, 1 Ind.		Carswell v. Crowther (Tex.), 16 S.	
App. 178,	781	W. Rep. 172,	444
Carne v. Truman, 103 Ill. 321,	168	Cartaguino v. Belletta (Cal.), 11	
Carnes v. Platt, 15 Abb. Pr. (N. S.)		Pac. Rep. 1097,	490
331,	700	Carter v. Bennett, 4 Fla. 283,	702, 729
Carney v. Street, 41 Ind. 396,	269	v. Carriger, 3 Yerg. 411,	140
Carothers v. Wheeler, 1 Ore. 194,	103	v. Carter, 101 Ind. 450,	622, 786
Carpenter's Est., In re, 79 Cal. 382,	612	v. Ford, etc., Co., 85 Ind. 180,	579
Carpenter v. Bristol Co., 21 Pick.		v. Pomeroy, 30 Ind. 433,	509, 571,
258,	515		572
v. County Commissioners, 21		v. Thorn, 18 B. Mon. 613,	310
Pick. 258,	433	Carthage, etc., Co. v. Andrews, 102	
v. Dame, 10 Ind. 125,	528, 531	Ind. 138,	486
v. Galloway, 73 Ind. 418,	786	Cartwright v. Howe, 1 How. 188,	125,
v. Gardiner, 29 Cal. 160,	479		444
v. Reynolds, 58 Wis. 666,	65	v. Yaw, 100 Ind. 119,	679
v. Sigler, 47 Ind. 202,	268	Carver v. Carver, 44 Ind. 265,	771
v. State, 43 Ind. 371,	573, 662, 691	v. Carver, 77 Ind. 498,	306, 307
v. Stillwell, 11 N. Y. 61,	691	v. Carver, 83 Ind. 368, 293, 581,	718
v. Vanscotten, 20 Ind. 50,	670	v. Carver, 97 Ind. 497, 187, 402, 411,	
v. Wilmot, 24 Mo. App. 589,	547	480, 567, 643, 690, 781	
Carpentier v. Thurst, 30 Cal. 123,	555	v. Carver, 115 Ind. 539,	313, 314,
Carper v. State, 27 Ohio St. 572,	252,		336, 339, 340
	681	v. Detroit, etc., Co., 61 Mich.	
Carr v. Boone, 108 Ind. 241,	732	584,	643
v. Eaton, 42 Ind. 385,	299	v. Williams, 10 Ind. 267,	632
v. Fife, 45 Fed. Rep. 209,	650	Cary v. Hotaling, 1 Hill. 311,	54
v. Gale, 1 Curt. C. C. 384,	788	v. Whitney, 48 Me. 516,	127
v. Haskett, 110 Ind. 152,	479, 532	Casad v. Hodridge, 40 Ind. 529,	397, 637
v. Hays, 110 Ind. 408,	704	Case v. Colter, 66 Ind. 336,	582
v. Moss, 87 Mo. 447,	523	v. Grim, 77 Ind. 565,	535
v. State, 81 Ind. 342,	395	v. Johnson, 70 Ind. 31,	357
v. State, 103 Ind. 548,	419	v. Kelly, 133 U. S. 21,	120, 560
v. State, 127 Ind. 204,	11 Law.	v. Ribelin, 1 J. J. Marsh. 29,	140
Rep. Ann. 370,	136, 305	v. State, 5 Ind. 1,	250
v. Thomas, 34 Ind. 292,	766, 769	v. State, 69 Ind. 46,	592
v. Townsend, 63 Pa. St. 202,	140	Case Threshing Machine Co. v.	
Carrick v. Lamar, 116 U. S. 423,	435	Haven, 65 Ia. 359,	561
Carrico v. Tarwater, 103 Ind. 86,	154	Casily v. State, 32 Ind. 62,	409
Carriger v. Sicks, 73 Ind. 76,	637	Caskey v. City of Greensburgh, 78	
Carrington v. Pacific, etc., Co., 1		Ind. 233,	590
Cal. 475,	577	Casper v. State, 27 Ohio, 572,	249
Carroll, Will of, 50 Wis. 437,	626	Cass v. Krimbill, 39 Ind. 357,	609
Carroll v. Campbell, 25 Mo. App.		Cassaday v. Detrick, 63 Ind. 485,	601
630,	481	v. Magher, 85 Ind. 228,	572
v. Dorsey, 20 How. 204,	633	v. Miller, 106 Ind. 69,	672
v. Little, 73 Wis. 52,	745	Cassard v. Himmer, 6 Duer, 695,	697
v. Peake, 2 Pet. 18,	677	Cassel v. Case, 14 Ind. 393,	179
v. Williston, 44 Minn. 287,	747	v. Cooke, 8 S. & R. 268,	570
Carrollton v. Rhomberg, 78 Mo. 547,	141	Cassidy's Succession, 40 La. Ann.	
Carrothers v. Carrothers, 107 Ind.		827,	78
530,	172, 294, 767	Cassidey, In re, 95 N. C. 225,	493

[References are to Pages.]

Castle Dome, etc., Mining Co., In re, 79 Cal. 246,	122	Chandler v. Von Roeder, 24 How.	224,	643, 700,	70
Castleman v. Griffin, 13 Wis.	535,	658	Chaney v. Hughes, 138 U. S.	403,	45
Castor v. Jones, 107 Ind.	283,	525	Chaney v. State, 118 Ind.	494,	52
Castro v. United States, 3 Wall.	46,	92,	Chapell v. Shuee, 117 Ind.	481,	13, 35
	104			420,	67
Catterlin v. City of Frankfort, 87 Ind. 45,	285, 531,	619	Chapin v. Board, 21 Ind.	12,	48
Cates v. Thayer, 93 Ind.	156,	289, 785	v. Clapp, 29 Ill.	611,	58
v. Winter, 3 T. R.	306,	696	Chapize v. Bane, 1 Bibb,	612,	64
Cauldwell v. Curry, 93 Ind.	363,	285,	Chaplin v. Commissioners of High-		
	419, 648		ways, 126 Ill.	264,	2
Cavanaugh v. Buehler, 120 Pa. St.			v. Sullivan, 128 Ind.	50, 628, 718,	77
441,	619		Chapman v. Bank, 88 Cal.	419,	44
v. Smith, 84 Ind.	380,	6	v. Barnes, 29 Ill. App.	184,	54
Cavazos v. Trevino, 6 Wall.	773,	509	v. Barney, 129 U. S.	800,	39
Caw v. People, 3 Neb.	357,	620	v. Moore, 107 Ind.	223,	73
Cecconi v. Rodden, 147 Mass.	164,	765	v. Morgan, 3 Gr. (Ia.)	374,	1
Celina, Matter of, 7 La. Ann.	162,	666	v. Sutton, 68 Wis.	657, 126, 129,	35
Center Tp. v. Board, 110 Ind.	579,	73.	Charles River Bridge v. Warren		
	282, 489,	498	Bridge, 11 Pet.	420,	10
Central Bank v. St. John, 17 Wis.			Charlestown Sch. Tp. v. Hay, 74		
157,	615		Ind. 127,	39	
Central R. R. Co. v. Bourbon			Chase v. Alley, 82 Md.	234,	64
County, 116 U. S.	538.	388	v. Arctic Ditchers, 43 Ind.	74,	78
Central Trust Co. v. Grant Loco-			v. Bates, 81 Me.	182,	9
motive Works, 135 U. S.	207, 79,	112	v. Blackstone, etc., Co.,	10	
Central Union, etc., Co. v. State,			Pick. 244,	43	
110 Ind. 203,	335, 462, 463,	774	v. Lee, 50 Mich.	237,	70
v. Andrews, 34 Kan.	563,	330	v. Scott, 33 Ia.	309,	67
Centreville, etc., Co. v. Barnett,			Chateau v. Rice, 1 Minn.	24,	7
2 Ind. 536,	590		Chateauquay Ore & Iron Co., Pe-		
Cerro Gordo v. Wright Co., 59 Ia.			titioners, 128 U. S.	544,	436, 43
485,	13		Chateaugay, etc., Co. v. Blake, 35		
Chaffee v. McIntosh, 36 La. Ann.			Fed. Rep. 804,	31	
824,	93		Chattanooga, etc., Co. v. Jackson,		
Chamberlain v. Applegate, 2 Hun.			86 Ga. 676,	67	
510,	338		Cheatam v. State, 67 Miss.	335,	68
v. Chamberlain, 116 Ill.	480,	573	Check v. Glass, 3 Ind.	286,	50
v. Porter, 9 Minn.	260,	663	Cheek v. City of Aurora, 92 Ind.	107,	57
v. Reid, 49 Ind.	332,	788	v. State, 35 Ind.	492,	619, 78
Chambers v. Butcher, 82 Ind.	508,	301,	v. State, 37 Ind.	533,	255, 78
	397, 767		Cheever v. Minton (Col.), 21 Pac.		
v. Hoover, 3 Wash. Ty.	20,	99	Rep. 710,	49	
v. Kyle, 87 Ind.	83,	162,	Cherry Tp. v. Marion Tp., 96 Pa.		
v. Lewis, 11 Alb. Pr.	206,	589	St. 528,	9	
v. Lewis, 2 Hilt. (N. Y.)	591,	587	Chesapeake, etc., Co. v. Barlow, 86		
v. Meaut, 66 Miss.	625,	574	Tenn. 537,	61	
v. Nicholson, 30 Ind.	349,	596	v. Heath, 87 Ky.	651,	63
Chamble v. Tribbling, 16 S. C.	165,	411	v. Higgins, 85 Tenn.	620,	17
Chamin v. Portland, 19 Ore.	512,	319	v. Mackenzie (Md.), 21 Atl.		
Chamley v. Lord Dunsaney, 2 Schf.			Rep. 690,	73	
& Lef. 690, 710.	134		v. Patton, 9 W. Va.	648,	67
Chamness v. Chamness, 53 Ind.	301,	608	Chesround v. Cunningham, 3 Blackf.		
Champ v. Kendrick (Ind.), 30 N. E.			82,	59	
Rep. —,	783		Chesley v. Chesley, 37 N. H.	229,	61
Chance v. Indianapolis, etc., Co., 32			Chester v. Bower, 55 Cal.	46,	53
Ind. 472,	619, 680		Chestnutt v. Pollard, 77 Tex.	86,	46
Chandler v. Nash, 5 Mich.	400,	7-9		665, 68	
			Chicago, etc., Co. v. Abilene, etc.,		
			Co., 42 Kan.	104,	12

TABLE OF CASES.

xliii

[References are to Pages.]

Chicago, etc., Co. v. Aldrich, 134 Ill. 9,	679	Chubbuck v. Cleveland, 37 Minn. 466,	633
v. Barnes, 116 Ind. 126,	506	Church v. Drummond, 7 Ind. 17,	628,
v. Bills, 104 Ind. 13,	587		763
v. Boggs, 101 Ind. 522,	570	v. Knightstown, 35 Ind. 177	62
v. Burger, 124 Ind. 275,	624, 708	Churchill v. Lee, 77 N. C. 341,	615
v. Cameron, 120 Ill. 447,	271	v. Welsh, 47 Wis. 39,	519
v. Chamberlain, 84 Ill. 333,	286	Churchman v. City of Indianapolis,	
v. Dey, 76 Ia. 278,	124, 125	110 Ind. 259,	589
v. Dey, 41 N. W. Rep. 17,	14	Chute v. Slate, 19 Minn. 271,	539
v. Dunleary, 27 Ill. App. 438,	624	Cahall v. Citizens, etc., Association, 74 Ala. 539,	339
v. Fietsam, 123 Ill. 518,	623	Cicero v. Williamson, 91 Ind. 541,	285
v. Goyette, 32 Ill. App. 574,	708	Cicero, Town of, v. Clifford, 53 Ind. 191,	724
v. Greer, 9 Wall. 726,	509	Cicero Tp. v. Picken, 122 Ind. 260,	504,
v. Graney (Ill.), 25 N. E. Rep. 798,	628		713
v. Harper, 128 Ill. 384,	770	v. Shirk, 122 Ind. 572,	146
v. Holland, 122 Ill. 461,	618	Cincinnati, etc., Co. v. Belle Centre (Ohio), 27 N. E. Rep. 464,	630
v. Hull, 24 Neb. 740,	492	v. Bunnell, 61 Ind. 183,	524, 525
v. Hunter, 128 Ind. 213,	521, 570	v. Calvert, 13 Ind. 489,	282, 771
v. Johnson, 34 Ill. App. 351,	756	v. Case, 122 Ind. 310,	301, 780
v. Jones, 103 Ind. 386,	521, 522	v. Clifford, 113 Ind. 460,	592, 707,
v. Linard, 94 Ind. 319,	598		718, 770
v. Modesitt, 124 Ind. 212,	397	v. Gaines, 104 Ind. 526,	562, 712
v. Nix (Ill.), 27 N. E. Rep. 81,	729	v. Heim, 97 Ind. 525,	165
v. Ostrander, 116 Ind. 259,	579, 707	v. Huncheon, 16 Ind. 436,	85, 86
v. Peck, 112 Ill. 408,	356	v. Leviston, 97 Ind. 488,	743, 748
v. Powell, 40 Ind. 37,	571	v. McDade, 111 Ind. 26,	45, 46
v. President, etc., 104 Ill. 91,	208	v. McFarland, 22 Ind. 459,	300, 764
v. Snyder, 128 Ill. 655,	546, 547	v. Rodgers, 24 Ind. 103,	554
v. Sullivan (Ill.), 17 N. E. Rep. 460,	623	v. Rowe, 17 Ind. 568,	669
v. Summers, 113 Ind. 10,	265, 364,	v. Smith, 127 Ind. 461,	505
	566	v. Washburn, 25 Ind. 259,	297, 718
v. Watson, 105 Ill. 217,	33	Citizens' Bank v. Bolen, 121 Ind. 301,	637, 673, 712, 716
v. Whitton, 13 Wall. 270,	574	Citizens' Ins. Co. v. Harris, 108 Ind. 392,	187, 193, 769
v. Wilcox (Ill.), 24 N. E. Rep. 419,	661	Citizens', etc., Co. v. Shenango Natural Gas Co., 138 Pa. St. 22,	635
v. Yando, 127 Ill. 214,	164, 348	Citizens' State Bank v. Adams, 91 Ind. 280,	517, 520, 567
Chicago, City of, v. Wood, 24 Ill. App. 40,	637	Claffin v. Dawson, 58 Ind. 408,	296
Chicester v. Cande, 3 Cow. 59,	178	v. Dunne, 129 Ill. 241,	176
Chickering v. Failes, 29 Ill. 294,	493	v. Farmer's Bank, 36 Barb. 540,	115,
Child v. Swain, 69 Ind. 230,	520, 521		547
Childress v. Callender, 108 Ind. 394,	747	v. Meyer, 75 N. Y. 260,	643
Chisham v. Way, 73 Ind. 362,	511	Clair v. Terhune, 35 N. J. Eq. 336,	459
Chissom v. Barbour, 100 Ind. 1,	178, 181	Clandy v. Caldwell, 106 Ind. 256,	282
v. Lamcool, 9 Ind. 530,	54	Clanin v. Fagan, 124 Ind. 304,	577, 703
Chittenden v. Brewster, 2 Wall. 191,	483	Clapp v. Bromaghen, 9 Cow. 530,	572
Chouteau v. Allen, 74 Mo. 56,	499	v. Freeman, 16 R. I. 344,	319
v. Jupiter Iron Works, 94 Mo. 388,	619	v. Hawley, 97 N. Y. 610,	91, 96
Chrisman v. Melne, 6 Ind. 487,	767	v. Martin, 33 Ill. App. 438,	581, 718
Christian v. Atlantic, etc., Co., 133 U. S. 233,	596	v. Minneapolis, etc., Co., 36 Minn. 6,	692
v. O'Neal, 46 Miss. 669,	147	v. Reid, 40 Ill. 121,	349
v. Lebeschultz, 18 S. C. 602,	681	Claridge v. Mackenzie, 4 Man. & G. 143,	56
v. State (Ga.), 12 S. E. Rep. 645,	738		
Christie v. State, 44 Ind. 408,	530		

[References are to Pages.]

Clark v. Benefiel, 18 Ind. 405,	392	Clawson v. Lowry, 70 Blackf. 140,	535,
v. Brown, 70 Ind. 405,	292		700
v. Bullock, 65 Mo. 535,	486	Clay, Ex parte, 98 Mo. 578,	669
v. City of Austin, 38 Minn. 487,	640,	v. Clark, 76 Ind. 161,	769
	654	Claypool v. Gish, 108 Ind. 424,	221
v. Clark, 7 Paige, 607,	335,	v. Norcross, 36 N. J. Eq. 524,	225
v. Continental, etc., Co., 57 Ind.	462	Clayton v. Blough, 93 Ind. 85,	237,
	149		279, 345, 538, 748
v. Donaldson, 49 How. Pr. 63,	683	v. State, 100 Ind. 201,	253, 620
v. Deutsch, 101 Ind. 491,	688, 749	Cleave v. Milliken, 13 Ind. 105,	108
v. Dutcher, 9 Cow. 674,	556	Cleveland, In re, 17 Alt. Rep. (N. Y.) 772,	4, 5
v. Fitch (Neb.), 49 N. W. Rep.	66	Cleveland, etc., Co. v. Asbury, 120 Ind. 289,	624, 626
374,	634	v. Bowen, 70 Ind. 478,	693
v. Flint, 22 Pick. 231,	509	v. Chamberlain, 1 Black, 419,	125,
v. Fredericks, 105 U. S. 4, 391,	78		129, 186
v. Gresham, 67 Miss. 203,		v. Closser, 126 Ind. 348,	65, 84,
v. Gresham (Miss.), 7 So. Rep.	46		168, 356, 697, 700
224,	492	v. Newell, 104 Ind. 264,	571
v. Hershey, 52 Ark. 473,		v. Obenchain, 107 Ind. 591,	630
v. Jeffersonville, etc., Co., 44 Ind. 248,	566, 590	v. Vajen, 76 Ind. 146	268, 413
v. Kane, 37 Mo. App. 258, 161,	164	v. Wynant, 100 Ind. 160,	723
v. Lamb, 8 Pick. 415,	582	v. Wynant, 119 Ind. 539,	604
v. Levering, 37 Minn. 120,	732	Clegg v. Fithian, 32 Ind. 90,	281
v. Lilliebridge (Kan.), 26 Pac. Rep. 43,	630	v. Patterson, 32 Ind. 135,	281
v. McCrary, 80 Ala. 110,	755	v. Waterbury, 88 Ind. 21,	394, 624
v. McElvy, 11 Cal. 154,	577	Claggett v. Sims, 31 N. H. 22,	261
v. Missouri, etc., Co., 35 Kan.	624	Clelland v. Tanner, 8 Col. 252,	449
350,	7	v. Walbridge, 78 Cal. 358,	769
v. People, Breese (Ill.), 340,	303	Clem v. Clem (Ky.), 13 S. W. Rep. 102,	574
v. Raymond, 27 Mich. 456,	536	v. Commonwealth (Ky.), 13 S. W. Rep. 102,	611
v. Rhoads, 79 Ind. 342,	87, 511	v. Martin, 34 Ind. 341,	737
v. Shaw, 101 Ind. 563,	11	v. State, 31 Ind. 480,	661
v. Smith, 13 Pet. 195,	530, 679	v. State, 33 Ind. 418,	4, 528
v. State, 87 Ala. 71,	251, 632	Clemson v. State Bank, 1 Scam. 45,	273
v. State, 4 Ind. 268,	771	Clester v. Gibson, 15 Ind. 10,	75
v. State, 125 Ind. 1,	713, 719, 771	Clews v. Bank, 105 N. Y. 398,	617
v. Stephenson, 73 Ind. 489,	599	Clicquot's Champagne, 3 Wall. 114,	700
v. Trovinger, 8 Ind. 334,	37, 43	Climie v. Odell, 20 Mich. 12,	93
v. Vaughan, 3 Conn. 191,	604	Cline v. Gibson, 23 Ind. 11,	162
v. Wilson, 77 Ind. 176,	294	v. Inlow, 14 Ind. 419,	596
v. Wise, 46 N. Y. 612,	190	v. Lindsey, 110 Ind. 337,	167,
v. Wright, 24 So. Car. 526,	126,		508, 571, 678
	158, 183, 184, 350	v. Love, 47 Ind. 258,	268
Clarke v. Bell, 2 Litt. 162,	267, 344	Clinton v. Phillips, 7 T. B. Mon. 118,	323
v. Matthewson, 12 Peters, 164,	170,	v. Rowland, 24 Barb. 634,	657, 661
	134, 143	Clodfelter v. Hulett, 92 Ind. 426,	163,
v. Sawyer, 2 N. Y. 498,	414		615, 746
v. State, 87 Ala. 71,	252	Clore v. McIntire, 120 Ind. 262,	678
Clark Civil Tp. v. Brookshire, 114 Ind. 437,	790	Close v. Samm, 27 Ia. 503,	539
Clark's Cove Guano Co. v. Appling, 33 W. Va. 470,	399	Clough v. Curtis, 10 Sup. Ct. Rep. 573,	5
Clarkson v. Guernsey, etc., Co., 22 Mo. App. 109,	29	v. Thomas, 53 Ind. 24,	601, 736
v. Manson, 60 How. Pr. 45,	398	Clouser v. Clapper, 59 Ind. 548,	791
v. Meyer, 14 N. Y. Supp. 144,	614	v. Ruckman, 104 Ind. 588,	767
Clawson v. Chicago, etc., Co., 95 Ind. 152,	271	Clowes v. Dickenson, 8 Cow. 328,	17

TABLE OF CASES.

xlv

[References are to Pages.]

Clack v. State, 40 Ind. 263,	434, 530	Coleman v. Bell, 4 N. M. 46,	544
Care v. Lav, 30 Ala. 208,	483	v. Dobbins, 8 Ind. 156, 271, 391,	683
Carter v. Riddle, 124 Ind. 500,	91	v. Gilmore, 49 Cal. 340,	789
Chan v. Grimes, 63 Ind. 21,	743	v. Kells, 31 So. Car. 601,	470
Coates v. Cunningham, 100 Ill. 463,	471	v. McAnulty, 16 Mo. 173,	140
v. First Nat. Bank, 91 N.Y. 20,	405,	v. Morrison, 1 A. K. Marsh. 406,	127
	414	v. State, 111 Ind. 563,	251, 253,
v. Hopkins, 34 Mo. 135,	537		255, 527, 685
v. Wilkes, 94 N. C. 174,	457	Colerick v. Hooper, 3 Ind. 316,	176, 182
Coats v. Gregory, 10 Ind. 345,	704	Colglazier v. Colglazier, 124 Ind.	
Cobb v. Griffith, 12 Mo. App. 130,	657	196,	510, 710
v. Malone, 91 Ala. 388,	678	Colle v. State, 75 Ind. 511,	768
Cobble v. Tomlinson, 50 Ind. 550,	288,	College Corner, etc., Co. v. Moss,	
	784	77 Ind. 139,	630
Coble v. Elzroth, 125 Ind. 429,	251, 577,	Collett v. Allison (Ok.), 25 Pac.	
	740, 786	Rep. 516,	591
Coburn v. Ames, 80 Cal. 243,	168	Colley v. Commonwealth (Ky.), 12	
v. Murray, 2 Me. 336,	755	S. W. Rep. 132,	254
v. Smart, 53 Cal. 742,	68, 114	Collins v. Collins, 100 Ind. 266,	774
Cochnower v. Cochnower, 27 Ind.		v. Davis, 32 Ohio St. 76,	356
253,	282, 284	v. Frost, 54 Ind. 242,	619
Cochran v. Dodd, 10 Ind. 476,	162	v. Gibbs, 2 Burr. 899,	396
Cochrane v. State, 30 Ohio St. 61,	232	v. Huff, 63 Ga. 207,	592
Cockrill v. Hall, 76 Cal. 192,	151	v. Lightle, 50 Ark. 97,	413
Cockrum v. West, 122 Ind. 372,	294	v. Loyal, 56 Ala. 403,	672
Cody v. Filley, 4 Cal. 342,	313	v. McDuffie, 89 Ind. 562,	374, 375
Coe v. Beckwith, 31 Barb. 339,	601	v. Maghee, 32 Ind. 268,	789
v. Givan, 1 Blackf. 367,	404, 791	v. Mitchell, 5 Fla. 364,	140
Coffey v. Wilson, 2 Ala. 701,	90	v. Nichols, 7 Ind. 447,	633
Coffin v. Argo, 134 Ill. 276,	216	v. Seattle, 2 Wash. Ty. 354,	261
v. Edington (Idaho), 23 Pac.		v. U. S. Express Co., 27 Ind. 11,	159
Rep. 80,	115	Collis v. Bowen, 8 Blackf. 262,	679
v. Evansville, etc., Co., 7 Ind.		Coloma v. Eaves, 92 U. S. 484,	285
413,	288, 632	Colorado, etc., Co. v. Cowell, 6 Col.	
Coffman v. Acton, 74 Ia. 147,	402	73,	134
Cogan v. Ebdon, 1 Burr. 383,	581	v. Caldwell, 11 Col. 545,	630
Coggeshall v. State, 112 Ind. 561,	305	Colt v. McConnell, 116 Ind. 249,	771
Coggswell v. Hogan, 1 Wash. 4, 92,	109	Colton v. Rupert, 60 Mich. 318,	155
v. State, 65 Ind. 1,	637	v. Vandergolgen, 87 Ind. 361,	536
Cohen v. Trowbridge, 6 Kan. 385,	633	Colvig v. Klawath Co., 16 Ore. 294,	62
Cohens v. Virginia, 6 Wheat. 264,	58,	Colvin v. Warford, 18 Md. 273,	469
	134	Columbian Ins. Co. v. Catlett, 12	
Cohn v. Wright, 89 Cal. 86,	713	Wheat. 383,	640
Cut v. Haven, 30 Conn. 190,	672	Columbus, etc., Co. v. Board, 65	
Cibert v. Rankin, 72 Cal. 197,	463	Ind. 427,	9
Cochen v. Ninde, 120 Ind. 88,	98, 394,	v. Braden, 110 Ind. 558,	567
	783	v. Gibbs, 24 So. Car. 60,	158
Cole v. Allen, 51 Ind. 122,	284, 469,	v. Griffin, 45 Ind. 369,	256
v. Butler, 43 Me. 401,	147	v. Hydraulic, etc., Co., 33 Ind.	
v. Connolly, 16 Ala. 271,	462	435,	86
v. Crawford, 69 Tex. 124,	575, 624	v. Powell, 40 Ind. 37,	618, 689,
v. Driskell, 1 Blackf. 16,	640, 754		757, 760
v. Fall Brook Coal Co., 57 Hun.		Combs v. State, 26 Ind. 98,	5
585,	788	v. State, 75 Ind. 215,	159, 622, 786
v. Gourlay, 79 N. Y. 527,	514	v. Hibberd, 45 Cal. 174,	109
v. Howard, 56 Ind. 330,	62	Commercial Fire Ins. Co. v. Allen,	
v. Kidd, 80 Ind. 563,	296	80 Ala. 571,	622
v. Terrell, 71 Tex. 549,	291	Commissioners, Ex parte, 112 U	
Coke v. State, 75 Ind. 511,	256, 691,	S. 177,	440
	770, 771	v. Clark, 94 U. S. 278,	643

[References are to Pages.]

Commissioners v. Hall, 7 Watts (Pa.), 390,	9, 37	Connelley v. Leslie, 28 Mo. App. 551,	756
v. Kelsey, 120 Ill. 483,	33	v. Peck, 3 Cal. 75,	523
Commonwealth v. Andrews, 97 Mass. 543,	248	Connolly v. Shamrock, etc., Society, 43 Mo. App. 283,	628
v. Barry, 9 Allen, 276,	572	Conner v. Citizens Ry. Co., 105 Ind. 62,	700
v. Brown, 123 Mass. 410,	681	v. Himes, 49 Ind. 482,	673
v. Brown, 147 Mass. 585,	529, 578	v. Marion, 112 Ind. 517,	202, 203
v. Certain Intoxicating Liquors, 148 Mass. 124,	581	v. Paxson, 1 Blackf. 207,	308
v. Flanagan, 7 W. & S. 415,	528	v. Pope, 23 Mo. App. 344,	486
v. Dandridge, 2 Va. Cas. 408,	7	v. Town of Marion, 112 Ind. 517,	687
v. Dedham, 16 Mass. 141,	251	v. Winton, 8 Ind. 315,	581, 768
v. Durham, 22 Pick. 11,	323	Connecticut, etc., Co. v. Clapp, 1 Cush. 559,	616
v. Flanagan, 7 W. & S. 415,	528	v. Franklin County Commissioners, 127 Mass. 50,	441
v. Hipple, 69 Pa. St. 9,	5	v. Union Trust Co., 112 U. S. 250,	746
v. Jackson, 1 Leigh. 485,	306	Connoble v. Clark, 38 Mo. App. 486,	547
v. James, 99 Mass. 438,	534	Connor v. Connor, 4 Col. 74,	134
v. Lehigh Valley Co., 12 Pa. St. 429,	102	v. People, 23 Mo. App. 344,	499
v. Livermore, 4 Gray, 18,	528	Conoway v. Weaver, 1 Ind. 263,	675, 766
v. Matthews (Ky.), 12 S. W. Rep. 323,	239	Conrad v. Baldwin, 3 Ia. 207,	668
v. McCready, 2 Metcf. (Ky.), 376,	249	v. Kinzie, 105 Ind. 281,	692
v. McDowell, 86 Pa. St. 377,	198, 199	Conradt v. Clauve, 93 Ind. 476,	570
v. Meserve (Mass.), 27 N. E. Rep. 997,	255	Conrow v. Schloss, 55 Pa. St. 28,	438
v. Mead, 153 Mass. 284,	733	Consaul v. Lidell, 7 Mo. 250,	757
v. Mosier, 135 Pa. St. 221,	677	Conselyea v. Swift, 103 N. Y. 604,	615
v. Picketson, 5 Met. 412,	535	Consolidated Coal Co. v. Schaefer (Ill.), 25 N. E. Rep. 788,	559
v. Powers, 109 Mass. 353,	534	Contee v. Dawson, 2 Bland. 264,	82
v. Smith, 4 Binney, 117,	431	v. Pratt, 9 Md. 67,	94
v. Webster, 5 Cush. 295,	538	Continental Life Ins. Co. v. Houser, 111 Ind. 266,	491
v. Wetzell, 84 Ky. 537,	307	v. Kessler, 84 Ind. 310,	295
v. Wickersham, 90 Pa. St. 311,	434	Continental, etc., Co. v. Yung, 113 Ind. 159,	624, 686
Commonwealth Ins. Co. v. Pierro, 6 Minn. 569,	124	Conwell v. Clifford, 45 Ind. 392,	688
Company of Carpenters v. Hayward, 1 Doug. 374,	702	Conway v. Clinton, 1 Utah, 215,	578
Comparet v. Hedges, 6 Blackf. 416,	648	v. Day, 79 Ind. 318,	181
v. Southwood, 1 Kan. 143,	743	v. State, 118 Ind. 482,	739
Compton v. Ivey, 59 Ind. 352,	398	v. Vizzard, 122 Ind. 266,	577
v. State, 89 Ind. 338,	256, 767, 768	Conyers v. Mericles, 75 Ind. 443,	179
Comstock v. Cole, 28 Neb. 470,	151	562, 565, 605	
Conant v. Riseborough, 30 Ill. App. 498,	66	Cook v. Citizens' National Bank, 73 Ind. 256,	82
Conaway v. Ascherman, 94 Ind. 187,	116, 171, 206	v. Conway, 3 Dana, 454,	273
Concannon v. Noble, 96 Ind. 326,	116	v. Darling, 18 Pick. 393,	285
Conden v. Morningstar, 94 Ind. 150,	536, 677, 698, 773	v. Dickerson, 1 Duer, 679,	335, 462
Cones v. Ward, 47 Mo. 289,	735	v. Doud, 14 Col. 483,	622
Congdon v. Congdon, 59 Vt. 597,	93	v. Farrah, 105 Mo. 492,	546
Conger v. Miller, 104 Ind. 592,	399	v. Hamilton, 67 Ia. 394,	54
Conklin v. Waltz, 3 Ind. 396,	404	v. Hannibal, etc., Co., 63 Mo. 397,	485
Conley v. Dibber, 91 Ind. 413,	511	v. Hopkins, 66 Ind. 208,	605
Connard v. Christie, 16 Ind. 427,	599	v. King, 7 Ill. App. 549,	326
Connell v. Putnam, 58 N. H. 335,	523	v. Knickerbocker, 11 Ind. 230,	75
		v. McNaughton, 128 Ind. 410,	711
		v. Skelton, 20 Ill. 107,	669

TABLE OF CASES.

xlvi

[References are to Pages.]

Cook v. State, 13 Ind. 154.	308	Coster, Ex parte, 7 Cow. 523,	435
v. Wood, 24 Ill. 295,	180	v. Peters, 7 Rob. (N. Y.) 386,	497
Cooke v. Crawford, 1 Tex. 9,	313	Cotes v. Carroll, 28 How. Pr. 436, 138,	152
v. Williamson, 11 Ind. 242,	681	Cothren v. Connaughton, 24 Wis.	
Cook County v. McCrea, 93 Ill. 236,	30	134,	323, 780
Cookerly v. Duncan, 87 Ind. 332,	736	Cottle v. Cottle, 6 Greenl. 140,	620, 621
Cool v. Peters Box, etc., Co., 87		Cottrell v. Ætna Life Ins. Co., 97	
Ind. 531,	81, 271	Ind. 311,	527, 587
Coombs v. Hilbred, 43 Cal. 453,	750	v. Cottrell, 81 Ind. 87,	538
Coon v. Cook, 6 Ind. 268,	420	v. Cottrell, 126 Ind. 181,	634
v. Grand Lodge, 76 Cal. 354,	97	v. Nixon, 109 Ind. 378, 19, 113,	718
v. McCormick, 69 Ia. 539,	312	v. Shadley, 77 Ind. 348,	580
v. Welborn, 83 Ind. 230,	282, 375	Cotzhausen v. Simons, 47 Wis. 103,	580
Cooper, In re, 22 N. Y. 67,	9	Coulter v. Coulter, 81 Ind. 542,	181
Cooper, Matter of, 93 N. Y. 507,	634	County Ct. of Warren v. Daniel, 2	
v. City of Big Rapids, 67 Mich.		Bibb. 573,	440
607,	414	Courtney v. Courtney (Ind.),	30
v. Coates, 21 Wall. 105, 509, 573,	656	Courts of Lancaster, In re, 4 Pa.	
v. Cooper, 86 Ind. 75,	172, 174,	L. Jr. Rep. 315,	40
	360, 361	Couse v. Havens, 44 Ind. 282,	446
v. Blood, 2 Wis. 62,	567	Couts v. Neer, 70 Tex. 468,	610
v. Board, 64 Ind. 520,	162	Coverdale v. Alexander, 82 Ind. 503,	414
v. Breckenridge, 11 Minn. 341,	656	Covert v. Shirk, 58 Ind. 264,	313
v. Hamilton, 8 Blackf. 377,	590	Covington, etc., Co. v. Moore, 3	
v. Hayes, 96 Ind. 386,	275	Ind. 510,	592
v. Helsabeck, 5 Blackf. 14,	589	Cowan v. Kinney, 33 Ohio St. 422,	732
v. Jackson, 99 Ind. 566,	563, 564	Cowdin v. Teal, 67 N. Y. 581,	210
v. Johnson, 26 Ind. 247,	514	Cowell v. Buckelen, 14 Cal. 640,	434
v. Mills County, 69 Ia. 350,	560	Cowgill v. Long, 15 Ill. 202,	61
v. Robertson, 87 Ind. 222,	375	Cowles v. Robinson, 11 Cal. 587,	610
v. Shepardson, 51 Cal. 298,	475	Cox v. Albert, 78 Ind. 241,	394, 419
v. State, 120 Ind. 377,	253, 529,	v. Baker, 113 Ind. 62,	779
570, 578, 579, 620, 678, 791		v. Dill, 85 Ind. 334,	698
v. Sunderland, 3 Clarke (Ia.),		v. Gress, 51 Ark. 224,	178
114,	286	v. Harvey, 53 Ind. 174,	788
Cooter v. Baston, 89 Ind. 185,	52	v. Hunter, 79 Ind. 590,	394
Copeland v. Koontz, 125 Ind. 136,	570	v. James, 45 N. Y. 557,	593
v. State, 126 Ind. 51,	634	v. Louisville, etc., Co. (Ky.), 11	
Copley v. Rose, 2 N. Y. 115,	401	S. W. Rep. 808,	489
Corbett v. City of Troy, 53 Hun.		v. Macy, 76 Iowa, 316,	161
228,	639	v. Pruitt, 25 Ind. 90,	378, 494
Corey v. Lugar, 62 Ind. 60,	308, 315	v. State, 49 Ind. 568,	255
v. Rhineheart, 7 Ind. 291,	744	v. United States, 6 Pet. 172,	119
Corinne, etc., Co. v. Johnston, 5		v. Vickers, 35 Ind. 27,	403
Utah, 147,	446, 453	Coxe v. Deringer, 82 Pa. St. 236,	677
Corn v. City of Cameron, 19 Mo.		v. Field, 1 Gr. (N. J.), 215,	267
App. 573,	414	Coykendall v. Way, 29 Minn. 162,	82
Cornett v. Williams, 20 Wall. 226,	12	Coyle v. Crevy, 34 La. Ann. 339,	313
Corning v. Troy, etc., Co., 44 N. Y.		Coyner v. Boyd, 55 Ind. 166,	538
577,	643	Crabs v. Mickle, 5 Ind. 145,	412, 550,
v. Woodin, 46 Mich. 44,	684		731
Cornwall v. Davis, 38 Fed. Rep.		Crabtree v. Hagerbaugh, 23 Ill. 349,	619
878,	127	Craddick v. Pritchett, Peck (Tenn.),	
Corry v. Caulfield, 2 Ball & Beatty,		17,	93
255,	134	Craft v. Dalles City (Ore.), 27 Pac.	
Cort v. Birbeck, 1 Doug. 218,	644	Rep. 163,	762
Cory v. Silcox, 6 Ind. 39,	534, 678	v. State Bank, 7 Ind. 219,	102
Coryell v. Stone, 62 Ind. 307,	531, 782	Craig v. Encey, 78 Ind. 141,	339
Corwin v. Thomas, 83 Ind. 110,	181	v. Fanning, 6 How. Pr. 336,	788
Cosgrove v. Cosby, 86 Ind. 511,	769	v. Frazier, 127 Ind. 286, 684, 689,	747

[References are to Pages.]

Craighead v. Wilson, 18 How. 199,	73	Crocker v. Dunkin, 6 Blackf. 535,	286
Cralle v. Cralle, 81 Va. 773,	459	Cromelien v. Brink, 29 Pa. St. 522,	681
v. Cralle, 84 Va. 198,	489	Cromwell v. Lowe, 14 Ind. 234,	43
Crandall v. First National Bank,		Cronk v. Cole, 10 Ind. 485,	635
61 Ind. 349,	761	Crookshank v. Kellogg, 8 Blackf.	
Crane, Ex parte, 5 Pet. 190,	438	256,	480, 616
v. Andrews, 10 Col. 265,	310, 339	Crosby v. McDermitt, 7 Cal. 146,	483
v. Crane, 12 Conn. 463,	9	Cross v. Moulton, 15 Johns. 469,	528
v. Farmer, 14 Col. 294,	111, 160	v. Pearson, 17 Ind. 612,	616, 747
v. Farmer (Col.), 23 Pac. Rep.		v. People, 47 Ill. 152,	251, 398
455,	14, 78	v. State, 55 Wis. 261,	780
v. Kimmer, 77 Ind. 215,	284, 672	v. Tuesdale, 28 Ind. 44,	597
v. Giles, 3 Kan. 54,	18	v. Wilson, 52 Ark. 312,	156
v. Reeder, 28 Mich. 527,	72	Crotty v. Wyatt, 3 Bradw. 388,	533
Crank v. Flowers, 4 Heisk. 629,	672	Crouse v. Holman, 19 Ind. 30,	596
Cranor v. School District, 18 Mo.		v. Rowley, 3 N. Y. Supp. 863,	678
App. 397,	757	Crow v. Board, 118 Ind. 51,	62
Cravens v. Chambers, 55 Ind. 5,	69, 84	v. Edwards, Hob. 5 b.,	424
v. Duncan, 55 Ind. 347,	483	Crowder v. Reed, 80 Ind. 1,	397, 399
Crawford, In re, 113 N. Y. 560,	568	Crowell v. City of Peru, 47 Ind. 308,	675
v. Anderson (Ind.), 28 N. E.		v. Harvey, 30 Neb. 570,	788
Rep. 314,	159, 168	v. Western, etc., Bank, 3 Ohio	
v. Crockett, 55 Ind. 220,	596	St. 406,	733
v. Georgia, etc., Co., 88 Ga. 5,	788	Crowley v. Pendleton, 46 Conn.	
v. Kansas City, etc., Co., 45		62,	785
Kan. 474,	263	Croy v. State, 32 Ind. 384,	527
v. Powell, 101 Ind. 421,	712	Crum v. Elliston, 32 Mo. App. 591,	650
v. Prairie, etc., Co., 44 Ind. 361,	99	Cruine v. Wilson, 104 Ind. 583,	217
v. Wingfield, 25 Tex. 414,	482	Crumley v. Hickman, 92 Ind. 388,	319,
v. Witherbee, 77 Wis. 419,	733	766, 771	
Crawfordsville, City of, v. Brund-		Crumley v. McKinney (Tex.), 9	
age, 57 Ind. 262,	566	S. W. Rep. 157,	314
v. Hays, 42 Ind. 200,	630	Crump v. Morgan, 3 Ired. Eq. 91,	519
v. Johnson, 51 Ind. 397,	472	Cruzan v. Smith, 41 Ind. 288,	715, 724,
Cray v. State, 32 Ind. 384,	250	748	
Creamer v. Sirp, 91 Ind. 366,	348, 758	Cubberly v. Wine, 13 Ind. 353,	295
Credit Foncier v. Rogers, 10 Neb.		Cuddy, In re, 131 U. S. 280,	88
184,	672	Culbertson v. Hill, 87 Mo. 553,	792
Credit Co. v. Arkansas, etc., Co.,		Culph v. Philips, 17 Ind. 209,	420
128 U. S. 258,	97, 104	Cumberland Coal, etc., Co. v. Sher-	
Crech v. Richards, 76 Ga. 36,	785	man, 20 Md. 117,	492
Creely v. Bay State, etc., Co., 103		Cummings v. Mayor, 11 Paige, 596,	30
Mass. 514,	593, 594	Cummings v. Armstrong, 34 W.	
Creighton v. Kerr, 20 Wall. 204,	633	Va. 1,	438, 441
Crib v. Morse, 79 Wis. 193,	490	v. Mayor, 11 Paige, 596,	593, 594
v. Waycross, etc., Co., 82 Ga.		v. McKinney, 5 Ill. 57,	69
597,	636	Cuneo v. Bessoni, 63 Ind. 524,	111
Crich v. Williamsburgh, etc., Co.,		Cunard Steamship Co. v. Voorhis,	
45 Minn. 441,	582, 655	104 Ind. 525,	19
Crippen v. Morss, 49 N. Y. 63,	411	Cunningham v. Ashley, 13 Ark. 653,	484
Crisfield v. Murdock, 127 N. Y. 315,	734	v. Gallagher, 61 Wis. 170,	611
Crispen v. Hannover, 86 Mo. 160,	494	v. Jacobs, 120 Ind. 306,	301
Crisman v. Masters, 23 Ind. 319,	375	v. McKinley, 22 Ind. 149,	584
Critchell v. Brown, 72 Ind. 539,	124,	v. Smithson, 12 Leigh. (Va.) 32,	551
154, 323		v. State, 65 Ind. 377,	571
Crutchfield v. Richmond, etc., Co.,		v. Thomas, 25 Ind. 171,	88, 291
76 N. C. 320,	572	Cupp v. Campbell, 103 Ind. 213,	401, 402
Crittenden v. Methodist, etc.,		Curan's Case, 7 Gratt. 619,	521
Church, 8 How. Pr. 327,	74	Curm v. Rauh, 100 Ind. 247,	53
Crocker v. Carrier, 65 Wis. 662,	745	Curran v. Curran, 40 Ind. 473,	40

TABLE OF CASES.

xlix

[References are to Pages.]

Curry v. Bratney, 29 Ind. 195,	698, 731	Danville, etc., Co. v. State, 16 Ind.	456,	521, 592
v. Miller, 42 Ind. 320,	418	Darby v. Ouseley, 36 Eng. L. &	Eq. 518,	617
Corten v. Atkinson, 29 Neb. 612,	116,	Darland v. Rosencrans, 56 Ia. 122,	535	
	122, 138	Darlington v. Warner, 14 Ind. 449,	728	
Curtis v. Gooding, 99 Ind. 45,	599	Darnall v. Hurt, 55 Ind. 275,	276	
v. Root, 28 Ill. 367,	334	Darr v. State, 82 Ind. 11,	241, 245	
Curtiss v. Hazen, 56 Conn. 146,	402	Darrell v. Hilligoss, etc., Co., 90	Ind. 264,	521
Cushman v. Flanagan, 50 Tex. 389,	525	Darst v. Bates, 51 Hill, 439,	72	
Cutrell v. Cuthrell, 101 Ind. 375,	702	Dart v. Dart, 32 L. J. P. M. & A.	125,	10
Cutter v. Evans, 115 Mass. 27,	318			
v. State, 62 Ind. 398,	374, 446	Darwins v. Durker, 14 Ore. 37,	208	
Cutsinger v. Nebeker, 58 Ind. 401,	489	Dashing v. State, 78 Ind. 357,	735	
Cutter v. Gumberts, 3 Eng. (Ark.)	449,	Davenport City v. Dows, 15 Wall.	390,	388
	71	Davenport v. Alpin, 70 Mich. 192,	546	
D		v. Barnett, 51 Ind. 329,	596	
D. R. Morton, 91 U. S. 365,	78	v. Fletcher, 16 How. U. S. 142,	137	
D Overnois v. Leavitt, 8 Abb. Pr.	639	v. Harris, 27 Ga. 68,	657, 661	
Dabbs v. Dabbs, 27 Ala. 646,	560	v. Russell, 5 Day, 145,	588	
DaCosta v. Guien, 7 S. & R. 462,	192	David v. Calloway, 30 Ind. 112,	597	
Dagling v. Illinois, etc., Co., 33 Ill.	App. 341,	v. Leslie, 14 Ia. 84,	666	
Daggett v. Flanagan, 78 Ind. 253,	517,	Davidson v. Bates, 111 Ind. 391,	108	
	520	v. City of New Orleans, 32 La.	Ann. 1245,	490
Dahl v. Milwaukee, etc., Co., 65	Wis. 371,	v. Farrell, 8 Minn. 258,	675	
Daney v. Indianapolis, 53 Ind. 483,	45	v. Henop, 1 Cranch. C. C. 280,	615	
v. Knisler (Neb.), 47 N. W.	Rep. 1045,	v. King, 49 Ind. 338,	285, 728	
Dany v. National, etc., Co., 64 Ind. 1,	404	v. King, 51 Ind. 224,	727	
v. State, 10 Ind. 536,	408	v. Morrison, 86 Ky. 397,	412	
Davata County v. Glidden, 113 U.	S. 122,	v. Murphy, 13 Conn. 213,	161	
Dave v. Copple, 53 Mo. 321,	63	v. Peck, 4 Mo. 438,	769	
v. Kent, 58 Ind. 584,	80	v. State, 20 Fla. 784,	592	
v. Pruins (Cal.), 20 Pac. Rep.	296,	v. State, 62 Ind. 276,	758	
	266	Davie v. Davie, 52 Ark. 221, 64, 66,	75	
v. See, 51 N. J. L. 378,	610	Davless v. Arbuckle, 1 Dana, 525,	616	
Davy v. American, etc., Co., 150	Miss. 77,	Davis' Est., In re (Mont.), 27 Pac.	Rep. 342,	64
Dawmple v. Williams, 63 N. Y.	791,	Davis v. Bargus, 41 La. Ann. 313,	78	
Dawmple v. Williams, 63 N. Y.	791,	v. Beason, 133 U. S. 333,	88	
Dawmple v. Williams, 63 N. Y.	791,	v. Binford, 58 Ind. 457,	162, 769	
Dawmple v. Williams, 63 N. Y.	791,	v. Binford, 70 Ind. 44, 126, 287,	451	
Dawmple v. Williams, 63 N. Y.	791,	v. Byrd, 94 Ind. 525,	538	
Dawmple v. Williams, 63 N. Y.	791,	v. Calvert, 5 Gill. & J. 269,	699	
Dawmple v. Williams, 63 N. Y.	791,	v. Charles River, etc., Co., 11	Cush. 506,	702
Dawmple v. Williams, 63 N. Y.	791,	v. Crouch, 94 U. S. 514,	499	
Dawmple v. Williams, 63 N. Y.	791,	v. Curtis, 70 Ia. 398,	489	
Dawmple v. Williams, 63 N. Y.	791,	v. Daverill, 11 Md. 141,	622	
Dawmple v. Williams, 63 N. Y.	791,	v. Davis, 76 Ind. 160,	75	
Dawmple v. Williams, 63 N. Y.	791,	v. Donner, 82 Cal. 35,	65	
Dawmple v. Williams, 63 N. Y.	791,	v. Durham, 13 How. Pr. 425,	697	
Dawmple v. Williams, 63 N. Y.	791,	v. Elliott, 15 Gray, 90,	663	
Dawmple v. Williams, 63 N. Y.	791,	v. Franklin, 25 Ind. 407,	713	
Dawmple v. Williams, 63 N. Y.	791,	v. Green, 57 Ind. 493,	563	
Dawmple v. Williams, 63 N. Y.	791,	v. Hardy, 76 Ind. 272,	596, 786	
Dawmple v. Williams, 63 N. Y.	791,	v. Henson, 29 Ga. 345,	589	
Dawmple v. Williams, 63 N. Y.	791,	v. Hudson, 29 Minn. 27,	421	
Dawmple v. Williams, 63 N. Y.	791,			
D				

[References are to Pages.]

Davis v. Jenkins, 14 Ind. 572,	183	De Armond v. Stoneman, 63 Ind.	608
v. Liberty, etc., Co., 84 Ind. 36,	567,	386,	
v. Mayor, 1 Duer, 151,	63	Deas v. Thorne, 3 John. 543,	45
v. Montgomery, 123 Ind. 587,	296,	Deatly v. Potter, 29 Mo. App. 222,	12
	790	Deatty v. Shirley, 83 Ind. 218,	292
v. Perry, 41 Ind. 305,	393,		293, 719, 729
v. Pool, 67 Ind. 425,	297, 637,	De Barry-Baya, etc., Co. v. Aus-	29
v. Reamer, 105 Ind. 318,	554	tin, 76 Ga. 306,	60
v. Robinson, 70 Tex. 394,	156	Debolt v. Carter, 31 Ind. 355,	60
v. Scott, 13 Ind. 506,	266,	Decatur v. Paulding, 14 Pet. 497,	43
v. Speiden, 104 U. S. 83,	451	Decatur Bank v. St. Louis Bank, 21	
v. State, 35 Ind. 496,	621	Wall. 294,	57
v. State, 119 Ind. 555,	9	Decker v. Bryant, 7 Barb. 182,	657, 66
v. State, 15 Ohio, 72,	517	Deen v. Hemphill, 11empst. 154,	32
v. State, 75 Tex. 420,	754	Deere, etc., Co. v. Hucht, 32 Mo.	
v. State, 14 Tex. App. 645,	761	App. 153,	10
v. Sturgis, 1 Ind. 213,	312	Deer Lodge v. Kohrs, 2 Mont. 66,	21
v. Town of Farmington, 42 Wis.		Deery v. Cray, 5 Wall. 795,	573, 61
425,	580,	v. Cray, 10 Wall. 263,	57
v. Town of Fulton, 52 Wis. 657,	567	Deeter v. Sellers, 102 Ind. 458,	71
v. Vaughan, 7 Rich. (S. C.) 342,	91	Deford v. Urbain, 42 Ind. 476,	368, 44
Davis County v. Horn, 4 Gr. (Ia.) 94,	111	De Forest v. Thompson, 40 Fed.	
Davis Henderson Lumber Co. v.		Rep. 375,	59
Gottschalk, 81 Cal. 641,	132	De France v. De France, 34 Pa. St.	
Daubenspeck v. Daubenspeck, 44		385,	70
Ind. 320,	785	De Graffenreid v. Thomas, 14 Ala.	
Daugherty v. Deardorf, 107 Ind. 527,	598	681,	70
Daunhauer v. Hilton, 82 Ind. 531,	266,	De Groot, Ex parte, 6 Wall. 497,	43
	279, 296	De Hart v. Apher, 107 Ind. 460,	792, 79
Dawson v. Baum, 3 Wash. Ty. 464,	782,	Dehart v. Dehart, 15 Ind. 167,	42
	789	De Hart v. Etnire, 121 Ind. 242,	62
v. Coffman, 28 Ind. 220, 218, 782,	786	De Haven v. De Haven, 77 Ind. 236,	30
v. Dawson, 29 Mo. App. 521,	669	Dehority v. Nelson, 56 Ind. 414,	680, 71
v. Hemphill, 50 Ind. 422,	784	Deig v. Moorhead, 110 Ind. 451,	21
v. Shirk, 102 Ind. 543,	526, 532, 624,		529, 56
	718	Deitch v. Demott, 89 Ind. 601,	266, 20
v. Wilson, 79 Ind. 485,	271	De Johnson v. Sepulbeda, 5 Cal. 149,	55
v. Wisner, 11 Ia. 6,	560	De La Hunt v. Holderbaugh, 58	
Day v. Callow, 39 Cal. 593,	146	Ind. 285,	63
v. Day, 100 Ind. 460,	188, 191	De Lashnutt v. Sellwood, 10 Ore.	
v. Henry, 104 Ind. 324,	703, 735	51,	20
v. Huntington, 78 Ind. 280,	91, 92,	Delaney v. Gault, 30 Pa. St. 63,	147, 28
	349, 351, 362	Delaplaine v. Lawrence, 10 Paige,	
v. Patterson, 18 Ind. 114,	599	602,	11
v. School City of Huntington,		Delaney v. Fox, 2 C. B. N. S. 768,	3
78 Ind. 280,	450	Delcep v. Hunter, 1 Sneed, 100,	7
v. Wright, 104 Ind. 324,	739	Deleaney v. Brett, 51 N. Y. 78,	41
Deacon v. Schwartz, 18 Ind. 285,	628	Delhaney v. State, 115 Ind. 499,	67
Deal v. Holter, 6 Ohio St. 228,	650	Delonde v. Carter, 28 Ala. 541,	11
Dean v. Georgia, etc., Co., 79 Ga.		Delphi, City of, v. Lowery, 74 Ind.	
211,	518	520,	486, 729, 73
v. Jones, 27 Mo. App. 350,	447	Demerritt v. Randall, 116 Mass. 331,	53
v. Miller, 66 Ind. 440,	670	Demetz v. Benton, 35 Mo. App. 559,	54
v. Thatcher, 3 Va. 470,	672	Dempsey v. Mayor, 10 Daly. 417,	62
Dearborn v. Patton, 4 Ore. 58,	161	Demske v. Hunter, 23 Mo. App. 466,	70
Deardorf v. Ulmer, 34 Ind. 353,	306	Den v. Graham, 1 Dev. & Batt. 76,	60
Dearmond v. Dearmond, 12 Ind. 455,	514	Denby v. Hart, 4 Blackf. 13,	30
De Armond v. Adams, 25 Ind. 455,	281	Deneale v. Archer, 8 Pet. 526,	12
v. Glasscock, 40 Ind. 418,	784	Denman v. McMahan, 37 Ind. 241,	20

TABLE OF CASES.

li

[References are to Pages.]

Dennis v. Louisville, etc., Co., 116	Dickson v. Rose, 87 Ind. 103,	200, 744,
Ind. 42,		748, 749
v. Maxfield, 10 Allen, 138,	Diehl v. Ohrie, 3 Whart. (Pa.)	143, 192
Dennison v. Talmage, 29 Ohio St.	Dietrich v. Kock, 35 Wis. 618,	398
433,	Diffendal v. Virginia, etc., Co., 86	
Denny v. Denny, 113 Ind. 22,	Va. 459,	591
v. Moore, 13 Ind. 418,	Dikeman v. Struck, 76 Wis. 332,	630
Denton v. Woods, 86 Tenn. 37,	Dill v. O'Farrell, 45 Ind. 268,	566
Denver, etc., Co. v. Cowgill (Kan.),	v. Lawrence, 109 Ind. 564,	531
24 Pac. Rep. 475,	Dillard v. Central, etc., Co., 82 Va.	
Denver v. Pearce, 13 Col. 383,	734,	668
De Pew v. Robinson, 95 Ind. 109,	Dille v. Lovell, 37 Ohio St. 415,	615,
De Priest v. State, 68 Ind. 569,		681
Deputy v. Hill, 85 Ind. 75,	v. State, 34 Ohio St. 617,	534
v. Mooney, 97 Ind. 463,	Dillingham v. Russell, 73 Tex. 47,	657,
Dequindre v. Williams, 31 Ind. 444,		658
670, 672	v. Skein, Hempst. 181,	323
Derrick v. Emmens, 38 N. Y. Rep.	Dillman v. Dillman, 90 Ind. 585,	221
481,	Dillon v. Bell, 9 Ind. 320,	197
Detrick v. McGlone, 46 Ind. 291,	v. Cockcroft, 90 N. Y. 649,	550
Detro v. State, 4 Ind. 200,	v. Connecticut, etc., Ins. Co.,	
Des Moines, etc., Co. v. Polk	44 Md. 386,	82
County, etc., Co. (Ia.), 45 N. W.	Dimick v. Campbell, 31 Cal. 238,	168
Rep. 773,	Dingle v. Swain, 15 Col. 120,	638
De Sylva v. Henry, 3 Porter, Ala.	Dingler v. Strawn, 36 Ill. App. 563,	314
132,	Dirnwiddie v. State, 103 Ind. 101,	128,
Devecmon v. Shaw, 70 Md. 219,		548, 549
Devereux v. Champion Cotton	v. Jacobs, 82 Mo. 195,	760
Mills, 17 So. Car. 66,	Dismore v. Atlantic, etc., Co., 46	
Devlo v. State, 4 Ind. 200,	How. Pr. 193,	601
Devol v. McIntosh, 23 Ind. 529,	District of Columbia v. McBlair,	
Devoss v. Jay, 14 Ind. 400,	124 U. S. 320,	491
Devot v. Marx, 19 La. Ann. 491,	v. Woodbury, 136 U. S. 450,	738
Dewey v. Greene, 4 Denio, 93,	Diveny v. City of Elmira, 51 N.	
v. State, 91 Ind. 173,	Y. 506,	529, 530
Dewitt v. Prescott, 51 Mich. 298,	Dix v. Akers, 30 Ind. 431,	597, 790, 791
De Wolf v. Hayden, 24 Ill. 525,	Dixon v. Caldwell, 15 Ohio St. 412,	215
Dexter v. Codman, 148 Mass. 421,	v. Dixon, 19 Ia. 512,	523
Dial v. Dial, 33 S. C. 306,	v. Dukes, 85 Ind. 434,	708, 709, 710
Dibblee v. Sheldon, 10 Blatch. 178,	v. Hill, 8 Ind. 147,	43
Dibrell v. Eastland, 3 Yerg. 507,	v. Judge, 4 Mo. 286,	436
Dick v. Kendall, 6 Ore. 166,	Doane v. Glenno, 21 Wall. 33,	733
v. Mullins, 128 Ind. 365,	Dobbins v. Baker, 80 Ind. 52,	123, 154,
		361
v. Williams, 130 Pa. St. 41,	v. Oswalt, 20 Ark. 619,	534
Dickinsheets v. Kaufman, 29 Ind.	v. State, 14 Ohio St. 493,	514, 517
154,	Dobson v. Dobson, 7 Neb. 206,	93
Dickey v. Davis, 39 Cal. 565,	v. Simonton, 100 N. C. 56,	493
v. Shirk, 128 Ind. 278,	Dockerty v. Huston, 125 Ind. 102,	293,
Dickerson v. Chrisman, 28 Mo. 134,		626, 648
v. Hays, 4 Blackf. 44,	Doctor v. Hartman, 74 Ind. 221,	13, 392,
v. Turner, 15 Ind. 4,		444, 754
Dickinson v. Coulter, 45 Ind. 445,	Dodd v. Bowles, 3 Wash. Ty. 11,	441,
	v. Moore, 91 Ind. 522,	689
v. Dickey, 76 N. Y. 602,	Dodds v. Vannoy, 61 Ind. 89,	637, 792
Dickson, Ex parte, 64 Ala. 188,	Dodge v. Coffin, 15 Kan. 277,	677
Dickson v. Chicago, etc., Co., 81	v. Cole, 97 Ill. 338,	57
Ill. 215,	v. District Tp., 17 Ia. 85,	546
v. Lambert, 98 Ind. 487,	v. Gaylord, 53 Ind. 365,	480, 491,
		643

[References are to Pages.]

Dodge v. Knowles, 114 U. S. 430,	212	Doubling v. Polack, 18 Cal. 625,	70
v. People, 4 Neb. 220,	529	Dougan v. State (Ind.), 25 N. E. Rep. 171,	21
v. Pope, 93 Ind. 480, 629, 712,	748	Dougherty v. State, 5 Ind. 453, 232,	251
v. Strong, 2 Johns. Ch. 228,	788	Douglass v. Blankenship, 50 Ind. 160,	291
Dodson v. Scroggs, 47 Mo. 285,	735	v. Dakin, 46 Cal. 49,	161
Doe v. Clark, 6 Ind. 466,	301	v. Fulda, 54 Cal. 588,	101
v. Conidine, 6 Wall. 458,	26	v. Keehn, 78 Ind. 199,	171
v. Crocker, 2 Ind. 575,	496	v. McAllister, 3 Cranch, 298,	57
v. Gildart, 6 Miss. 606,	763	v. Negelona, 88 Tenn. 769,	92
v. Harvey, 3 Ind. 104,	672		109, 44
v. Herr, 8 Ind. 24,	195	v. State, 72 Ind. 385,	251, 291
v. Makepeace, 8 Blackf. 575,	755,		752, 77
	761	Douglass County v. Bolles, 94 U. S. 104,	28
v. McDonald, 4 Ind. 615,	683	Douglass v. Davis, 45 Ind. 493,	111
v. Natchez Ins. Co., 8 S. & M. 197,	763	Dougle v. Gates, 21 Ind. 65,	63
v. Parker, 3 Sm. & M. 114,	96	Douns v. Opp, 82 Ind. 166,	77
v. Peebles, 1 Ga. 1,	763	Douthitt v. Smith, 69 Ind. 463,	39
v. Owen, 2 Blackf. 452,	176, 183	Dove v. Commonwealth, 82 Va. 301,	67
v. Rue, 4 Blackf. 263,	640	Dow v. Merrill (N. H.), 18 Atl. Rep. 317,	69
v. Smith, 1 Ind. 451,	672, 764	v. Merrill, 65 N. H. 248,	69
Dolan v. Church, 1 Wyo. 187,	647	Dowdell v. Wilcox, 64 Ia. 721,	74
v. State, 122 Ind. 141,	239, 257,	Dowell v. Caruthers, 26 Kan. 720, 62, 9	15
	291, 293, 527, 647	v. Lahr, 97 Ind. 146,	15
Doles v. State, 97 Ind. 555, 531, 541,	620	Dower v. Church, 21 W. Va. 23,	61
Doll v. Feller, 16 Cal. 432,	483, 735	Downer v. Howard, 44 Wis. 82,	14
Dollman v. Munson, 90 Mo. 85,	792	Downard v. Hadley, 126 Ind. 131,	41
Dominquez v. Mascotti, 74 Cal. 269,	682	Downey v. State, 77 Ind. 87,	68
Donahue v. Dryer, 23 Ind. 521,	580	v. Washburn, 79 Ind. 242,	18
v. Enterprise, etc., Co., 33 S. C. 608,	446	Downing v. McCartney, 19 U. S. Sup. Ct. Rep. Co-ed. 757,	12
Donald v. St. Louis, etc., Co., 52 Ia. 411,	187	Dowling v. Crapo, 65 Ind. 209,	63
Donaldson, Ex parte, 44 Mo. 149,	673	Downs v. Opp, 82 Ind. 166,	20
Donaldson v. Dunn, 87 Ind. 343,	403	Doyal v. Landes, 119 Ind. 479,	77
Donelson v. Taylor, 8 Pick. 390,	701	Doyle, In re, 73 Cal. 564,	63
Donley v. Camp, 22 Ala. 659, 569,	572	Doyle v. Kiser, 8 Ind. 396,	49
Donnell v. Jones, 13 Ala. 490,	537	v. Mulren, 7 Abb. Pr. (N. S.) 258,	55
Donellan v. Hardy, 57 Ind. 393, 395,	567	Dozenback v. Raymer, 13 Col. 451,	62
Donnelly v. Woolsey, 59 Hun. 618,	630	Drake v. State (N. J.), 20 Atl. Rep. 747,	57
Donovan v. Huntington, 24 Ind. 321,	45	v. State, 53 N. J. L. 23,	71
Dooley v. Martin, 28 Ind. 189,	176	v. Wakefield, 11 How. Pr. 106,	34
Dooling v. Moore, 19 Cal. 81,	109	Draper v. Davis, 102 U. S. 370, 341,	34
v. Moore, 20 Cal. 141,	94	Drayton v. Thompson, 1 Bay. (S. C.) 263,	75
Doolittle v. State, 93 Ind. 272,	291	Dresse v. Brooks, 5 How. Pr. 75,	21
Dooly v. Baker, 2 Mo. App. 325,	512,	Dressler v. Davis, 7 Wis. 527,	56
	532	Drey v. Doyle, 99 Mo. 459,	61
Dorbert v. State, 68 Md. 209,	676	Drew v. Claypool, 61 Mich. 233,	28
Doremus v. Selden, 19 Johns. 213,	602	v. State, 124 Ind. 9, 253, 255,	57
Dorman v. State, 34 Ala. 216,	512		612, 61
v. State, 56 Ind. 454,	405	Drinkout v. Eagle Machine Works, 90 Ind. 423,	197, 61
Dorsey v. McGee, 30 Neb. 637,	781	Dritt v. Dodds, 35 Ind. 63,	675, 71
v. State, 25 N. E. Rep. 350,	27	Dronilliard v. Whistler, 29 Ind. 552,	1
v. Thompson, 37 Md. 25,	495	Dryden v. Britton, 19 Wis. 22,	41
Dorr v. Hill, 62 N. H. 506,	436		
v. McDonald, 43 Minn. 458,	675		
v. Rohr, 82 Va. 359,	413		
Doss v. Tyack, 14 How. 297,	98		
Doty v. Gillett, 43 Mich. 203,	414		
v. State, 6 Blackf. 529,	680		

liii

Dabois v. Campau, 28 Mich.	304,	579
v. Johnson, 81 Ind.	520,	268
Duck v. Abbott, 24 Ind.	349,	601
v. Peeler, 74 Tex.	268,	475
Dudley v. Fisher, 7 Blackf.	553,	630
v. Parker, 55 Hun.	29,	691
Duesterberg v. State, 116 Ind.	141,	624,
		686
v. Swartzel, 115 Ind.	180,	556
Duff v. Duff, 71 Cal.	513,	779
Dugle v. State, 100 Ind.	259,	530
Dugenan v. Claus, 46 Kan.	275,	628
Duke v. Brown, 18 Ind.	111,	696
Dukes v. State, 11 Ind.	557,	409
Dugnan v. Wyatt, 3 Blackf.	385,	793
Dukes v. Working, 93 Ind.	501, 181,	300
Dumont v. Dufore, 27 Ind.	263,	52
v. Lockwood, 7 Blackf.	576,	420
Dunbar v. Locke, 62 N. H.	442,	412
Duncan v. Cravens, 55 Ind.	525,	520
v. Forgey, 25 Mo. App.	310,	65
v. Gainey, 108 Ind.	579,	227
v. Holliday, 59 Miss.	550,	671
v. Geraldineysburgh, etc., Co.,	136	
Pa. St.	478,	591
v. Kohler, 37 Minn.	379,	610
v. Lyon, 3 Johns.	Chen.	455
v. State, 88 Ala.	31,	251
v. State, 84 Ind.	204, 239, 251,	680
Duncombe v. Daniel, 8 C. & P.	222,	617
v. Powers, 75 Ia.	185,	266
Dunderdale v. Grymer, 16 How.	Pr.	104,
		604
Dunham v. Courtney, 24 Neb.	627,	403
Dunkel v. Wehle, 13 Abb. N. C.	476,	320
Dunkin v. McKee, 23 Ind.	447,	598
Dunkle v. Elston, 71 Ind.	585,	126, 287
Dunlop v. Hayden, 29 Ind.	303,	581
Dunn v. Crocker, 22 Ind.	324,	308
v. Gibson, 9 Neb.	513,	732
v. Hubble, 81 Ind.	489,	760
v. State, 29 Ind.	259,	759
v. Tousey, 80 Ind.	288,	736
Du Pont v. Davis, 35 Wis.	631,	492
Dupree v. Perry, 18 Ala.	34,	111, 272
Durand v. Gage, 76 Mich.	624,	439
Durant v. Lexington, etc., Co.,	97	
Mo. 62,		657
Durbin v. Haines, 99 Ind.	463,	184
Darfee v. Abbott, 50 Mich.	479,	625
Dargin v. Neal, 82 Cal.	595,	467
Durham v. Bischof, 47 Ind.	211,	598
v. Craig, 79 Ind.	117,	266, 274
v. Fechheimer, 67 Ind.	35,	520, 521
v. Hall, 67 Ind.	123,	597
v. State, 117 Ind.	477,	35, 217
v. State, 128 Ind.	16,	9
Du Souchet v. Dutcher, 113 Ind.		
249, 159, 182, 248, 395, 636,	602,	791
Duchane v. Benedict, 120 U. S.	630,	51
Dutton v. Dutton, 30 Ind.	452,	353
v. Hobson, 7 Kan.	196,	147
Duvall v. Martin, 28 Mo. App.	526,	758
Dwight v. St. John, 25 N. Y.	203,	73
Dwiggins v. Cook, 71 Ind.	579,	672
Dzialynski v. Bank, 23 Fla.	44,	445
Dye v. Mann, 10 Mich.	291,	168
v. State (Ind.),		267
Dyer v. Board, 84 Ind.	542,	90
v. Bradley, 88 Cal.	590,	308
v. Bradley, 89 Cal.	557,	326
v. Brady (Cal.), 26 Pac. Rep.		511,
		452
Dyer v. Brady, 88 Cal.	590,	340
v. Dyer, 87 Ind.	13,	692
Dykeman v. Budd, 3 Wis.	640,	13

E

Eagle Machine Works v. Ahrens,		
123 Ind.	233,	562
Eakle v. Smith, 24 Md.	339,	330
Ealer v. Freret, 11 La. Ann.	455,	554
Earl v. Dresser, 30 Ind.	11,	758
Earle v. Earle, 91 Ind.	27,	504
v. Simons, 94 Ind.	573,	294
Earp v. Board, 36 Ind.	470,	511
v. Commissioners, 36 Ind.	470,	638
East v. Peden, 108 Ind.	92,	215
East, etc., Co. v. Williams, 71 Tex.		86
444,		
East Tennessee, etc., Co. v. Martin,		85 Tenn. 134,
		291
Eastham v. Sallis, 60 Tex.	576,	68, 73
Eastman v. Godfrey, 15 Kan.	341,	765
v. State, 109 Ind.	278,	9
Easter v. Acklemire, 81 Ind.	163,	122,
		154, 208, 307
v. Severen, 78 Ind.	540, 120,	122, 361
Eaton v. Barnhill, 68 Miss.	305,	544
v. Caldwell, 3 Minn.	134,	294
v. Rocca, 75 Cal.	93,	413
v. Ryan, 5 Neb.	47,	73
Eberhart v. Reister, 96 Ind.	478,	394,
		396, 567
Eberly v. Moore, 24 How.	147,	249
Ebblesole v. Redding, 22 Ind.	232,	294
Eddleman v. McGlathery (Tex.),	11	
S. W. Rep.	1100,	76
Eddy v. Beal, 34 Ind.	159,	306
Eden v. Lingenfelser, 39 Ind.	19,	619
Edgell v. Francis, 86 Mich.	232,	746
Edgerly v. Emerson, 23 N. H.	555,	568
Edmonds v. State, 34 Ark.	720,	789
Edmonson v. Bloomshire, 7 Wall.		306,
		104, 228
Edwards v. Beall, 75 Ind.	401,	736
v. Cary, 60 Mo.	572,	577
v. Edwards, 22 Ill.	121,	494
v. Husking, 31 Ill. App.	223,	614

[References are to Pages.]

Edwards v. Perkins, 7 Ore. 149,	126, 129,	Edwood, Town of, v. Citizens, etc.,	
v. Tracy, 62 Pa. St. 374,	350	Co., 114 Ind. 332,	3
v. Vandemack, 13 Ill. 633,	732	Ely v. Board, 112 Ind. 361,	67
Egan v. Menard, 32 Minn. 273,	21	v. Tallman, 14 Wis. 28,	67
Egbert v. Rush, 7 Ind. 706,	411	Elyton Land Co. v. Morgan, 88	
Eggleston v. Castle, 42 Ind. 531,	480	Ala. 434,	63
Eicholtz v. Wilbur, 4 Col. 434,	577	Emerick v. Armstrong, 1 Ohio, 513,	110
Eigenman v. Rockport, etc., Asso.,	134	Emison v. Shepard, 121 Ind. 184,	78
79 Ind. 41,	774	Emmerson v. Clark, 2 Scam. 489,	754
Eigenmann v. Kerstein, 72 Ind. 81,	494		75
Eighmy v. People, 78 N. Y. 330,	248	Emmert v. Darnall, 58 Ind. 141,	110
Eigemann v. Swan, 6 Bosw. 668	709	Emmett v. Yandes, 60 Ind. 548, 285,	72
Eitel v. State, 33 Ind. 201,	4	Emmons v. Kiger, 23 Ind. 483,	21
Elbert v. Hoby, 73 Ind. 111,	768	Emory v. Pease, 20 N. Y. 62,	40
Elder v. Sidwell, 66 Ind. 316,	261	Empire, etc., Co. v. Engley, 14 Col.	
Elderkin v. Shultz, 2 Blackf. 245,	599	289,	66
Eldridge, Matter of, 82 N. Y. 162,	516	Endsley v. State, 76 Ind. 467, 256,	76
Eldridge v. State, 12 Tex. App. 208,	761	Engard v. Frazier, 7 Ind. 154,	20
Election of Executive Officers, In		England v. McLaughlin, 35 Ala. 590,	130
re, 10 Law Rep. Ann. 803,	11	Engleman v. Arnold, 118 Ind. 81,	402
Elfresh v. Guard, 32 Ind. 408,	786		76
Elgin v. Marshall, 106 U. S. 578,	50,	v. State, 2 Ind. 91,	102, 321
	51, 80	Englis v. Furniss, 3 Abb. Pr. 82,	521
Elgin Lumber Co. v. Langman, 23		English v. Devarro, 5 Blackf. 588,	76
Ill. App. 250,	456	v. Smock, 34 Ind. 115,	59
Elkhart, etc., Asso. v. Houghton,		v. State, 81 Ind. 455,	401
103 Ind. 286,	678	Eno v. Crooke, 6 How. Pr. 462,	49
Elkhart, City of, v. Wickwire, 87		Enright v. Grant, 5 Utah, 400,	46
Ind. 77,	562	Ensley v. McCorkle, 74 Ind. 240,	320
Elkin v. Gregory, 30 S. C. 422, 269,	557	Enterprise, Town of, v. State, 24	
Ellerman v. New Orleans, etc., Co.,		Fla. 152,	45
2 Woods, 120,	72	Entrop v. Williams, 11 Minn. 381,	6
Elliott v. Pell, 1 Paige, 263,	134	Entsminger v. Jackson, 73 Ind. 144,	5
v. Dycke, 78 Ala. 150,	126	Ensign v. Harvey, 15 Neb. 330,	52
v. Russell, 92 Ind. 526, 702, 747,	784	Ensminger v. McIntire, 23 Cal. 593,	64
v. Smith, 23 Pa. St. 131,	34	v. Powers, 108 U. S. 292,	45
v. Stevenson, 21 Ind. 359,	601	Enwright v. State, 58 Ind. 567,	67
v. State, 73 Ind. 10,	530, 531	Epperson v. Hostetter, 95 Ind. 583,	60
v. Woodward, 18 Ind. 183,	746,	Epps v. State, 19 Ga. 102,	528, 62
	782, 789	v. State, 102 Ind. 539, 253, 530,	62
Ellis v. Bullard, 11 Cush. 496,	133	Epstein v. Greer, 85 Ind. 372, 308,	33
v. Ewbanks, 3 Scam. 190,	178	Erben v. Lorillard, 19 N. Y. 299,	652
v. Ford, 5 Blackf. 554,	525		65
v. Jeans, 26 Cal. 272,	479	Erickson v. Elder, 34 Minn. 370,	31
v. Keller, 82 Ind. 524,	181	Erie R. R. Co. v. Stringer, 32 Ohio	
v. McLemore, 1 Baily L. (So.		St. 468,	7
Car.) 13,	602	Errissman v. Errissman, 25 Ill. 119,	53
v. State, 25 Fla. 702,	528	Erskine v. Duffy, 76 Ga. 602,	79
Ellison v. Rerick, 125 Ind. 396, 545,	654	Erwin v. Bulla, 29 Ind. 95,	53
Elmore v. McCrary, 80 Ind. 544,	395,	v. Collier, 3 Mont. 189,	49
	396	v. Scotten, 38 Ind. 289,	121, 44
Elson v. O'Dowd, 40 Ind. 300,	590	v. Scotten, 40 Ind. 389,	60
Elston v. Castor, 101 Ind. 426,	713	Eschback v. Hurtt, 47 Md. 61,	70
Elting v. Gould, 96 Mo. 535,	155	Eshelman v. Snyder, 82 Ind. 498,	39
Elwell v. Dodge, 33 Barb. 336,	546		51
v. Fabre, 13 N. Y. Supp. 829,	653	Eshon v. Chowan Co., 95 N. C. 75,	44
v. Fosdick, 134 U. S. 500, 124,	125	Eslinger v. East, 100 Ind. 434,	74
v. Martin, 32 Vt. 217,	589	Espy v. Balkum, 45 Ala. 256,	33
		Eshbach v. Hurtt, 47 Md. 61,	69

lv

Eggs v. Lower, 120 Ind.	239,	147,	148,	Everit v. Walworth County Bank,			
		154,	504	13 Wis.	419,		481
Estep v. Burke, 19 Ind.	87,	274,	732	Everroad v. Gabbert, 83 Ind.	489,		718
v. Estep, 23 Ind.	114,		561	Eversdon v. Mayhew, 85 Cal.	1,		491
v. Larsh, 21 Ind.	183,	665,	782	Ewald v. Coleman, 19 Ind.	66,		86
v. Waterhouse, 45 Ind.	140,		527	v. Corbett, 32 Cal.	493,		140
Estey, etc., Co. v. Rannels, 67				Ewing v. Patterson, 35 Ind.	326, 399,	404	
Mich.	310,		339	Exchange Bank v. Ault, 102 Ind.			
Evans v. Irvine, 10 Mont.	509,		713		322,		672
Evans v. Trabue, 128 U. S.	225		116	Exley v. Berryhill, 63 Minn.	117,	96,	462
Evans v. Baldwin, 9 How. Pr.	80,		497	Eyre v. Cook, 9 Ia.	185,		557
Evans v. Batchelder, 90 Ind.	520,		606	Eysamen's Will, In re, 113 N.Y.	62,	612	
Evans v. Anderson, 84 Ind.	333, 122,	154					
v. Armstrong, 42 Ind.	475,	174					
Eureka Steam Heating Co. v. Slot-				F			
erman, 67 Wis.	118,	208,	316	Faber v. Bruner, 13 Mo.	541,		513
Evans v. Adams, 3 Gr. L. (N. J.)				v. Hovey, 117 Mass.	107,		463
			90	Fabyan v. Russell, 39 N. H.	399,		261
373-			791	Factors, etc., Co. v. New Harbor,			
v. Christopherson, 24 Minn.			143	etc., Co., 37 La. Ann.	233,		129
339-				Faden v. Fritz, 110 Ind.	1,		53
v. Cleveland, 72 N. Y.	486,			Fagan v. McTier, 81 Ga.	73,		453
v. Commonwealth (Ky.), 12 S.				Fahlor v. State, 108 Ind.	387,		771
W. Rep.	768,	239		Fahnstock v. State, 23 Ind.	231,		530
v. Evans, 105 Ind.	204,	217		Fairbanks v. Corliss, 1 Abb. (N. Y.)			
v. Feeny, 81 Ind.	532,	294, 728		150,			124
v. Galloway, 20 Ind.	479,	104		v. Loring, 29 N. E. Rep.	452,		768
v. Kilby, 81 Ga.	278,	455		v. Meyers, 98 Ind.	92,	373,	748
v. Nealis, 87 Ind.	262,	532		Fairchild v. Odell, 38 Cal.	286,		93
v. Pike, 118 U. S.	-41,	571, 574		Fall v. Hazelrigg, 45 Ind.	576,		277
v. Schafer, 88 Ind.	92,	159		Falley v. Gribbling, 128 Ind.	110,		391
v. Shafer, 88 Ind.	92,	766					604
v. State, 67 Ind.	68,	782, 792		Fancher v. Grass, 60 Ia.	505,		448
v. State, 7 Ind.	271,	679		Fankboner v. Fankboner, 20 Ind.			
v. State, 58 Ind.	587,	298		62,		404,	554
v. White, 53 Ind.	1,	635		Faris v. Lampson, 73 Cal.	100,		373
v. Young, 10 Col.	316,	672		Farley v. Board, 126 Ind.	468,		62
Evansville, City of, v. Martin, 103				v. State, 127 Ind.	419,	255,	618
Ind.	206,	397, 398,	783	Farman v. Borders, 119 Ill.	228,		271
v. Thayer, 59 Ind.	324,		566	v. Lauman, 73 Ind.	568,	622,	608
v. Wilter, 86 Ind.	414,		623	v. Ratcliff, 42 Ind.	537,		268
Evansville, etc., Co. v. Barbee, 59				Farmers' Bank v. Butterfield, 100			
Ind.	592,		444	Ind. 229,		412, 532,	626
v. Crist, 116 Ind.	446,		690	Farmers', etc., Bank v. Lonergan,			
v. Evansville, 15 Ind.	395, 154,	285		21 Mo.	46,		697
v. Frank, 29 N. E. Rep.	419,	768		v. Sprigg, 11 Md.	389,		192
v. Gilmore, 1 Ind. App.	468,	708		Farmers, etc., Co. v. Groff, 87 Pa.			
v. Lawrence, 29 Ind.	622,	281		St. 124,			537
v. Montgomery, 85 Ind.	494,	658		Farmers Loan Trust Co., Matter			
v. Mosier, 114 Ind.	447,	354		of, 129 U. S.	206,	79,	513
v. Swift, 128 Ind.	34,	30, 33		Farmers Loan, etc., Co. v. Canada,			
v. Taft (Ind.), 28 N. E. Rep.				etc., Co., 127 Ind.	250,	67, 301,	397,
			716				637, 713
v. Wildman, 63 Ind.	370,	605,	674	Farnsworth v. Coots, 46 Mich.	117,		624
Evarts v. State, 48 Ind.	422,		529	Farnum v. Pitcher, 151 Mass.	470,		619,
Evie v. Louis, 91 Ind.	457,	507,	609				643
Everett v. Lowdham, 5 C. & P.	91,	538		Farrar v. Churchill, 135 U. S.	609,		104,
v. Union Pacific Ry. Co., 59							345
Ia.	243,		5				

[References are to Pages.]

Farrell v. Patterson, 43 Ill. 52,	119	Field v. Burton, 71 Ind. 380,	121, 154
v. Pingree, 5 Utah, 530,	470	348, 361, 443, 448	
v. State, 3 Ind. 573,	525	v. Chicago, etc., Co., 21 Mo.	
v. State, 7 Ind. 345,	69, 231, 232	App. 600,	191
v. State, 33 Ind. 183,	250	v. Holzman, 93 Ind. 205, 17, 32,	604
v. State, 85 Ind. 221,	241, 243	v. Malone, 102 Ind. 251, 147,	154
Farrington v. Turner, 53 Mich. 72,	592	v. People, 2 Scam. (Ill.) 79,	57
Farris v. Houston, 74 Ala. 162,	56	v. Schricker, 14 Ia. 119,	308
v. People, 129 Ill. 521,	612	Fielden v. People, 128 Ill. 595, 177,	756
Farwell v. Becker, 129 Ill. 261,	79	Fields v. Hunter, 8 Mo. 128,	763
v. Myers, 59 Mich. 179,	589	v. Moul, 15 Abb. Pr. 6,	487
Fasnacht v. Frank, 23 Wall. 416,	72	Fifteenth Ave. In re, 54 Cal. 179,	96
Fasnacht v. German, etc., Asso., 99		Fifth Avenue Bank v. Webber, 27	
Ind. 133,	774	Abb. N. C. 1,	648, 743
Fassinow v. State, 89 Ind. 235, 291,	669	Figart v. Halderman, 59 Ind. 424,	184
Fathman v. Tumulty, 34 Mo. App.		v. Halderman, 75 Ind. 564,	673
236,	582	Fight v. State, 7 Ohio, 180,	250
Fatman v. Leet, 41 Ind. 133,	604	Figures v. Dunklin, 68 Tex. 645,	300
Faught v. Faught, 98 Ind. 470,	17, 31	Filley v. Walker, 27 Neb. 506,	597
Faulker v. Guild, 10 Wis. 563,	147	v. Walker, 44 N. W. Rep. 737,	343
Faure v. United States Express		Finch v. Hartpence, 29 Neb. 368,	78
Co., 23 Ind. 48,	101, 467	Fineux v. Hovenden, Croke's Eliz.	
Faurote v. State, 123 Ind. 6,	713	664,	424
Faust v. City of Huntington, 91		Finlay v. Bryson, 84 Mo. 664,	126
Ind. 493,	561	Findley v. State, 5 Blackf. 576,	568
Fawkner v. Baden, 89 Ind. 587,	306	Fink v. Algermissen, 25 Mo. App.	
Fay v. Richards, 30 Ill. App. 477,	792	186,	661
Fearing v. Irwin, 55 N. Y. 486,	190	Finn v. Corbitt, 36 Mich. 318,	682
Feaster v. Woodfill, 23 Ind. 493,	378,	Finneran v. Leonard, 7 Allen, 54,	283
647, 669		Firemen Ins. Co. v. Schwing (Ky.),	
Feder v. Field, 117 Ind. 386,	17, 355,	11 S. W. Rep. 14,	613
356, 358, 411, 453		Firestone v. Daniels, 71 Ind. 570,	297
Feeney v. Mazelin, 87 Ind. 226, 732, 781		v. Firestone, 78 Ind. 534, 178,	287
Fehring v. Swineford, 33 Wis. 550,	96	v. Hershberger, 121 Ind. 201,	660
Feibleman v. Packard, 108 U. S. 14,	116	v. Werner, 1 Ind. App. 293,	736
Felch v. Gilman, 22 Vt. 38,	127	First Baptist Church v. Branham,	
Felger v. Etzell, 75 Ind. 417,	394, 397,	90 Cal. 22,	597
636, 637		First Congregational Society v.	
Felkner v. Scarlet, 29 Ind. 154,	570	Trustees, 23 Pick. 148,	634
Fell v. Muller, 78 Ind. 507,	506	First Nat. Bank v. Ashmead, 23	
v. Rich Hill Coal Mining Co.,		Fla. 379,	460
23 Mo. App. 216,	414	v. Briggs, 34 Minn. 266,	98
Fellenzer v. Van Valzah, 95 Ind.		v. Carter, 89 Ind. 317,	711
128,	159, 167, 773	v. Carpenter, 41 Ia. 518,	673
Fenner v. Bettner, 22 Wend. 621,	117	v. Colter, 61 Ind. 153, 698, 732, 781	
Ferger v. Wesler, 35 Ind. 53,	669	v. Essex, 84 Ind. 144, 122, 124, 152	
Ferguson v. Board, 44 Ia. 701,	112	v. First Nat. Bank, 76 Ind. 561,	473
v. Dent, 29 Fed. Rep. 1,	325	v. Gary, 14 S. C. 571,	9
v. Harrison, 7 Ind. 610,	37	v. Holt, 87 Cal. 158,	54
v. Landram, 1 Bush. 548,	127, 415	v. Hummel, 14 Col. 259,	594
v. Rutherford, 7 Nev. 385,	537	v. Hurford, 29 Ia. 579,	191
v. State, 49 Ind. 33,	622	v. Murdough, 40 Ia. 26,	79
Fernbach v. City of Waterloo, 76		v. Omaha, 96 U. S. 737,	318
Ia. 598,	678	v. Redick, 110 U. S. 224,	5
Ferrier v. Deuthman, 51 Ind. 21, 162,	766	v. Rogers, 13 Minn. 407,	335, 461
Ferris v. Johnson, 27 Ind. 247,	648	v. Root, 107 Ind. 224,	587, 588
Fertich v. Michener, 111 Ind. 472,	469	v. Williams, 126 Ind. 423, 653,	782
Fetters v. Muncie Nat. Bank, 34		783	
Ind. 251,	614	v. Wright (Ia.), 48 N. W. Rep.	
Fewlass v. Abbott, 28 Mich. 270,	682	91,	261

TABLE OF CASES.

lvii

[References are to Pages.]

First Unitarian Society v. Faulkner , 91 U. S. 415,	699	Fleming v. McDonald , 50 Ind. 278,	588
Fischer v. Coons , 26 Neb. 400,	288, 736	v. State , 11 Ind. 234,	530, 792
v. Holmes , 123 Ind. 525,	120, 556	Fletcher v. Mansur , 5 Ind. 267,	604
v. Longbein , 103 N. Y. 84,	449	v. Martin , 126 Ind. 55,	712
v. Neill , 6 Fed. Rep. 89,	731	v. State , 49 Ind. 124,	622, 759
Fischli v. Fischli , 1 Blackf. 360,	73	Flint v. Burnell , 116 Ind. 481,	771
Fiscus v. Turner , 125 Ind. 46,	771	Flint River, etc., Co. v. Foster , 5 Ga. 194,	148
Fish v. Ferris , 5 Duer. 49,	588	Floeger v. Wiedner , 77 Tex. 311,	680
v. Smith , 12 Ind. 563,	619	Flood v. Joyner , 96 Ind. 459,	782
v. Weatherwax , 2 Johns. Cas. 215,	435	Fleming v. Mershon , 36 Ia. 413,	111
Fisher's Estate, In re , 75 Cal. 523,	100, 224	Floore v. Steigelmayer , 76 Ind. 479,	391
Fisher v. Cid Copper Mining Co. , 97 N. C. 95,	469	Floral Spring Water Co. v. Rives , 14 Nev. 431,	437, 519
v. Perdue , 48 Ind. 323,	187, 188, 403	Flory v. Wilson , 83 Ind. 391,	61, 81, 92, 759
Fisk v. Chicago, etc., Co. , 74 Ia. 424,	628	Flournoy v. Jeffersonville , 17 Ind. 169,	9
v. Chicago, etc., Co. (Ia.) , 48 N. W. Rep. 1081,	624	Floyd v. Floyd , 4 Rich. (So. Car.) 23,	547
v. Henarie , 14 Ore. 29,	410	Flueter v. McClelland , 3 C. B. (N. S.) 357,	145
v. Patriot, etc., Co. , 54 Ind. 479,	86	Fogarty v. State , 80 Ga. 450,	530, 536
v. Reigleman , 75 Wis. 499,	156	Fogg v. Gibbs , 8 Baxt. 464,	672
v. Union, etc., Co. , 6 Blatchf. 362,	72	Folden v. State , 13 Neb. 328,	251, 252
Fitch v. Armour , 14 N. Y. Supp. 319,	624	Fontaine v. Houston , 58 Ind. 316,	154
v. Bunch , 30 Col. 208,	789	Fonville v. State , 91 Ala. 39,	739
v. Citizens National Bank , 97 Ind. 211,	289	Foot v. Glover , 4 Blackf. 313,	704
v. Creighton , 24 How. (U. S.) 159,	11	Foote v. Beecher , 78 N. Y. 155,	657
v. Develen , 15 Barb. 47,	392	v. Lawrence , 1 Stew. (Ala.) 483,	666
v. Lothrop , 2 Root. 524,	267, 344	v. Massachusetts, etc., Asso. , 39 Fed. Rep. 23,	630
v. Polke , 5 Blackf. 86,	403	Forbes v. Porter , 23 Fla. 47,	65, 315
v. Rathbun , 61 N. Y. 579,	414	Forcy v. Leonard , 63 Wis. 553,	524
Fitzenrider v. State , 30 Ind. 238,	759	Ford v. Booker , 53 Ind. 395,	393
Fitzgibbon v. Lake , 29 Ill. 165,	495	v. Cameron , 19 Mo. App. 467,	190, 191
Fitzgerald v. Evans , 53 Tex. 461,	444	v. Ford , 110 Ind. 89,	630, 678
v. Genter , 26 Ind. 238,	603	v. Ford , 72 Wis. 621,	491
v. Goff , 99 Ind. 28,	620, 691	Fordyce v. McCants , 51 Ark. 509,	568, 614
v. Hayward , 50 Mo. 516,	532	v. Merrill , 49 Ark. 277,	288
v. Jeroleman , 10 Ind. 338,	571, 578	Forelander v. Hicks , 6 Ind. 448,	665
v. Urton , 4 Cal. 235,	4	Forgay v. Conrad , 6 How. 201,	82, 119
v. Wellington , 37 Kan. 460,	339	Forgerson v. Smith , 104 Ind. 246,	491
Fitzgerald, etc., Co. v. Fitzgerald , 137 U. S. 98,	630	Forgey v. First Nat. Bank , 66 Ind. 123,	728
Fitzpatrick v. Papa , 89 Ind. 17,	518, 535, 596, 730	Forster, etc., Co. v. Guggemos , 24 Mo. App. 444,	51
Flagg v. Sloan , 16 Ind. 432,	85	Forsythe v. Kreuter , 100 Ind. 27,	296, 725, 768
Flaherty v. Miner , 33 N. Y. St. Rep. 681,	545	Foster's Will, In re , 34 Mich. 21,	619
v. Miner , 123 N. Y. 382,	547	Foster v. Berkley , 8 Minn. 351,	560
Flatter v. McDermitt , 25 Ind. 326,	579	v. Bringham , 99 Ind. 505,	266, 279
Fleenor v. Driskill , 97 Ind. 27,	74	v. Hinson , 76 Ia. 714,	291, 533
Fleetwood v. Brown , 109 Ind. 567,	562, 565, 608	v. Pointer , 9 C. & P. 718,	697
v. Dorsey Machine Co. , 95 Ind. 491,	692	v. State , 59 Ind. 481,	789
Fleischman v. Walker , 91 Ill. 318,	58	v. State , 41 Mo. 61,	431
		Foulks v. Falls , 91 Ind. 315,	305
		Foster v. Ward , 75 Ind. 594,	625, 682, 686

[References are to Pages.]

Fourth National Bank v. Stout, 113 U. S. 684,	79, 80	Freeman v. Bowman, 25 Ind. 236,	793
Fouty v. Morrison, 73 Ind. 333,	198,	v. Hawkins, 77 Tex. 498,	155
	199, 238	v. Paul, 105 Ind. 451,	146
Fovora v. Johnson, 79 Ga. 553,	618	v. People, 4 Denio, 9,	257, 529, 578, 737
Fowle v. Alexander, 11 Wheat. 320,	714	v. Rhodes, 36 Minn. 297,	266
Fowler v. Bowery, etc., Bank, 113 N. Y. 450,	391, 398, 403	v. St. Louis Quarry Co., 30 Mo. App. 362,	40
v. Burget, 16 Ind. 341,	628	v. Tanah, 12 C. B. 406,	96
v. Eddy, 110 Pa. St. 117,	392	v. Weeks, 45 Mich. 335,	127
v. Farmers, etc., Co., 21 Wis. 77,	658	French, Ex parte, 100 U. S. 1,	316
v. Hawkins, 17 Ind. 211,	535	v. Cowan, 79 Me. 426,	592
v. Lindsey, 3 Dall. 411,	182	v. Detroit Free Press Co. (Mich.), 48 N. W. Rep. 615,	657
v. Strawberry Hill, 74 Ia. 644,	535	v. Edwards, 4 Sawy. 125,	496
Fox v. Allensville, etc., Co., 46 Ind. 31,	101	v. Hay, 22 Wall. 250,	72
v. Fields, 12 Heisk. 31,	93	v. Howard, 14 Ind. 455,	680
v. Hunt, 8 How. Pr. 12,	406	v. Shoemaker, 14 Wall. 314,	601
v. Town of Monticello, 83 Ind. 483,	744	v. Snell, 37 Me. 100,	323
Foxwell v. State, 63 Ind. 539,	690	v. State, 12 Ind. 670,	252
Foy v. Domec, 33 Cal. 317,	448	v. State, 81 Ind. 151,	774
Fraedrich v. Flieth, 64 Wis. 184,	539	Frenzel v. Miller, 37 Ind. 1,	597
Frakes v. Brown, 2 Blackf. 295,	495	Frevert v. Swift, 19 Nev. 400,	309
Frame v. Badger, 79 Ill. 441,	572	Frey v. Michie, 68 Mich. 323,	592
v. Trebble, 1 J. J. Mar. (Ky.) 205,	23	Friddle v. Crane, 68 Ind. 583,	605
Frank v. Grimes, 105 Ind. 346,	625,	v. Crane, 97 Ind. 497,	567
	686, 693	Frisk v. Reigelman, 95 Wis. 499,	155
v. Kessler, 30 Ind. 230,	790, 791	Fritch v. Klausling (Ky.), 13 S. W. Rep. 241,	601
v. King, 121 Ill. 250,	33	Fritz v. Barnes, 6 Neb. 475,	635
v. Thomas, 35 Ill. App. 547,	315	v. Clark, 80 Ind. 591,	640
Frankfort Bridge Co. v. Williams, 9 Dana, 403,	560	Fry v. Bennett, 16 How. Pr. 385,	96
Franklin v. Reiner, 8 Cal. 310, 153,	448	v. Bennett, 28 N. Y. 324,	614
Franco-Texan Land Co. v. Chaptive (Tex.), 3 S. W. Rep. 31,	758	v. Currie, 103 N. C. 203,	469
Frentz v. Harrow, 13 Ind. 507,	108	v. State, 81 Ga. 645,	413
Frenz, etc., Co. v. Mielenz, 5 Dak. 136,	266, 345	Ft. Madison, etc., Co. v. Batavia Bank, 77 Ia. 393,	490
Frosh v. Holmes, 8 Tex. 29,	680	Ft. Wayne, etc., Co. v. Beyerle, 110 Ind. 100,	747, 790
Fraser v. Jennison, 42 Mich. 206,	617	Ft. Worth, etc., Co. v. Thompson, 75 Tex. 501,	612
v. Little, 13 Mich. 195,	310	Fulkerson v. Armstrong, 39 Ind. 472,	757, 760
Frasier v. Hubble, 13 Ind. 432, 281,	284	Fuller v. Aderns, 12 Ind. 559,	81
Frazer v. Boss, 66 Ind. 1,	483	v. Coats, 18 Ohio St. 343,	691
v. Smith, 6 Blackf. 210,	322	v. Curtis, 100 Ind. 237,	596
Frazier v. State, 106 Ind. 562,	230	v. Indianapolis, etc., Co., 18 Ind. 91,	296
v. Vernon, 3 Wash. Ty. 392,	266	v. Sweet, 30 Mich. 237,	31
Frear v. Bryan, 12 Ind. 343,	601	v. Wright, 59 Ind. 333,	308
Fredericks v. Judah, 73 Cal. 604,	623	Fulmer v. Fulmer, 22 Ia. 230,	554
Free v. Haworth, 19 Ind. 404,	378	Fultz v. Wycoff, 25 Ind. 321,	604
Freeborn v. Denman, 2 Hals. (N. J.) 190,	267, 344	Fulwider v. Ingels, 87 Ind. 414,	571
Freedom, Town of, v. Norris, 128 Ind. 377,	712	Furber v. Conway, 23 Mo. App. 412,	761
Frees v. Baker (Tex.), 6 S. W. Rep. 563,	309	Ferguson v. United States, etc., Co., 11 N. Y. Supp. 73S,	721
Freeze v. De Puy, 57 Ind. 188,	678	Furnival v. Boyle, 4 Russ. 142,	631
Freitag v. Burke, 45 Ind. 38,	405	v. Stronger, 1 Bing. N. C. 68,	44
Freligh v. Ames, 31 Mo. 253,	534		

TABLE OF CASES.

lix

[References are to Pages.]

First v. Second Avenue Ry. Co., 72 N. Y. 542,	652, 657	Gardner v. Haney, 86 Ind. 17,	440
		v. Haynie, 42 Ill. 291,	769
		v. State, 94 Ind. 489,	788, 792
		v. Stover, 43 Ind. 356,	368, 446
		Garland v. Wholebau, 20 Ia. 271,	411
		Garlington v. Copeland, 25 S. C. 41,	345
		Garner v. Beauchamp, 20 Mo. 318,	557
		v. Gordon, 41 Ind. 92,	88
		Garnhorts v. United States, 16	
		Wall. 162,	677
		Garnet v. Rogers, 52 Mo. 145,	306
		Garrett v. Shove, 15 R. I. 538,	309
		v. State, 109 Ind. 527,	252, 678
		Garrick v. Chamberlain, 100 Ill. 476,	471
		Garrigan v. Dickey, 27 N. E. Rep.	
		713,	345, 628
		Garrigus v. Bennett, 9 Ind. 528,	746
		Garrison v. People, 6 Neb. 274,	178
		v. State, 110 Ind. 145,	774
		Garritte v. Popplein, 73 Md. 322,	447
		Garst v. State, 68 Ind. 101,	789
		Garver v. Daubenspeck, 22 Ind.	
		238,	203, 296, 777
		Garvin v. Daussman, 114 Ind. 429,	148
		Gaskell v. Viquesney, 122 Ind. 244,	596
		Gasper v. Adams, 24 Barb. 287,	521
		Gass v. State, 34 Ind. 425,	592
		Gates v. Andrews, 37 N. Y. 657,	666
		v. Salmon, 28 Cal. 320,	75
		v. Scott, 123 Ind. 459,	287, 579, 728
		v. Walker, 35 Cal. 289,	168
		Gatling v. Newell, 12 Ind. 116,	177, 182,
			472
		Gaul v. Fleming, 10 Ind. 253,	614
		Guarantee, etc., Co. v. Buddington,	
		23 Fla. 514,	146
		Gaven v. Dopman, 5 Cal. 342,	556
		Gavisk v. McKeever, 37 Ind. 454,	308,
			312, 325
		Gawtry v. Doane, 51 N. Y. 90,	731
		Gay v. Davey, 47 Ohio St. 396,	479
		v. Parport, 101 U. S. 391,	308
		Gaylord v. La Fayette, 115 Ind. 423,	488
		Gaylords v. Kilshaw, 1 Wall. 81,	601
		Gazette, etc., Co. v. Morss, 60 Ind.	
		153,	774
		Geary v. Bangs (Ill.), 27 N. E. Rep.	
		462,	642
		Gebb v. Rose, 40 Md. 87,	274
		Gebhart v. Burkett, 57 Ind. 378,	568,
			658, 659, 691
		Geiss v. Franklin Ins. Co., 123 Ind.	
		172,	783
		Gemmell v. Butler, 4 Pa. St. 252,	141
		Genella v. Relyea, 32 Cal. 159,	97, 109
		Gent v. Lynch, 23 Md. 58,	604
		George v. Brooks, 94 Ind. 274,	562, 566
		v. Lutz, 35 Tex. 694,	325
		v. State, 25 Tex. App. 229,	757
		v. Swafford, 75 Ia. 491,	623
G			
Gaar v. Millikan, 68 Ind. 208,	487		
Gane v. McGinnis, 55 Ind. 372,	399		
Gabriel v. Mullen, 30 Mo. App. 464,	121		
Gaff v. Greer, 88 Ind. 122,	399, 549		
v. Hutchinson, 38 Ind. 341,	520,		
	581, 718		
Gage v. Bailey, 119 Ill. 539,	489		
v. Downey, 79 Cal. 140,	682		
v. Du Puy, 127 Ill. 216,	120		
v. Du Puy, 132 Ill. 134,	560		
v. Gates, 62 Mo. 412,	191		
v. Reid, 118 Ill. 35,	271		
v. Scales, 100 Ill. 218,	33		
Gage Co. v. Fulton, 16 Neb. 5,	313		
Gagg v. Vetter, 41 Ind. 228,	539		
Gaines v. White (S. Dak.), 47 N.			
W. Rep. 524,	788		
Gaither v. Wilmer, 71 Md. 361,	582		
Galbreath v. Gray, 20 Ind. 290,	599		
v. Trump, 83 Ind. 381,	45, 78		
Gallup v. Henderson, 6 N. Y. Supp.			
914,	791		
Galpin v. Page, 18 Wall. 350,	369,		
	134, 421, 667		
Galvin v. State, 56 Ind. 51,	296		
v. Woollen, 66 Ind. 464,	393, 394		
Galveston, etc., Co. v. Cooper, 70			
Tex. 67,	623		
v. Nolan, 53 Tex. 139,	141		
Galway v. State, 93 Ind. 161,	525		
Gallagher v. Himelberger, 57 Ind.			
63,	565		
v. Kilkeary, 29 Ill. App. 600,	466		
v. Southwood, 1 Kan. 143,	757		
Gallittly v. Barrackman, 12 Ind. 279,	277		
Gallimore v. Blankenship, 99 Ind.			
29,	163, 768		
Galloway v. State, 29 Ind. 442,	533		
v. Week, 54 Wis. 604,	559		
Gall v. Finch, 24 How. Pr. 193,	101		
Gamble v. Gibson, 83 Mo. 290,	176		
Gander v. State, 50 Ind. 539,	394		
Gandolfo v. State, 11 Ohio St. 114,	514,		
	517		
Gandolpho v. State, 33 Ind. 439,	768		
Gano v. Chicago, etc., Co., 66 Wis.			
1,	655		
Ganson v. Madigan, 15 Wis. 144,	611		
Grant v. Timmons, 78 Tex. 11,	446		
Garber v. Doersom, 117 Pa. St. 162,	128		
v. Morriken, 5 Ia. 476,	771		
v. State, 94 Ind. 219,	255		
Gardner v. Case, 111 Ind. 494,	748		
v. Fisher, 87 Ind. 369,	399, 736		
v. Gardner, 87 N. Y. 14,	86		

[References are to Pages.]

Georgia, etc., Co. v. Nelms, 71 Ga.	305	Girault v. Adams, 61 Md. 1,	531
301,		Given v. Collins, 43 Ind. 271,	704
Georgia R. R. Co. v. Olds, 77 Ga.	266	Givins v. Bradley, 3 Bibb. 192,	771
673,		Glade v. Schmidt, 15 Ill. App. 51,	635
Gerald v. Gerald, 31 S. C. 171,	314	Glandy v. Lanning, 68 Ind. 142,	781
v. Jones, 78 Ind. 378,	567	Glantz v. City of South Bend, 106	
Germain v. Mason, 12 Wall. 259,	119,	Ind. 305,	293, 711
	132	Glasgow v. Hobbs, 52 Ind. 239,	691
Gernon v. Hoyt, 90 N. Y. 631,	402	Glaspell v. Northern, etc., Co.	
Gessell's Appeal, 84 Pa. St. 238,	75	(Col.), 27 Pac. Rep. 248,	787
Getman v. Ingersoll, 117 N. Y. 75,	44	Glass v. Wiles (Tex.), 14 S.W. Rep.	
Geveke v. Grand Rapids, etc., Co.,		225,	544
57 Mich. 589,	636	Gleaves v. Davidson, 85 Tenn. 380,	291
Gharkey v. Halstead, 1 Ind. 389,	731	Glenn v. Fant, 134 U. S. 398,	166
Gheens v. Golden, 90 Ind. 427,	567	v. Glore, 42 Ind. 60,	659, 733
Gibbs v. Coonrod, 54 Ia. 736,	646	v. Shelburne, 29 Tex. 125,	671
Gibbons v. Ogden, 6 Wheat. 448,	499	v. State, 46 Ind. 368,	378, 665
v. Van Alstyne, 56 Hun. 639,	158	Glidewell v. Daggy, 21 Ind. 95,	70
Gibson v. Choleau, 50 Mo. 85,	483	Glos v. Randolph, 130 Ill. 245,	447
v. Garreker, 82 Ga. 46,	297	Glore v. Hare, 4 Neb. 131,	100
v. Hall, 57 Tex. 405,	127	Glover v. Benjamin, 73 Ill. 42,	126
v. Keyes, 112 Ind. 568,	102	v. Collins, 18 N. J. L. 232,	477
v. Lacy, 87 Ind. 202,	704	v. Holman, 3 Heisk. 519,	671
v. Schufeldt, 122 U. S. 27,	79	v. Lyon, 57 Ala. 365,	130
v. State, 9 Ind. 264,	792, 793	v. Stephenson, 126 Ind. 532	549
Giermann v. St. Paul, etc., Co., 42		Goar v. Cravens, 57 Ind. 365,	727
Minn. 5,	643	v. Maranda, 57 Ind. 339,	670
Gilbank v. Stephenson, 30 Wis.		Goddard v. Ordway, 94 U. S. 672,	461
155,	325	v. Ordway, 4 Otto. 672,	337
Gilbert, Estate of, 104 N. Y. 200,	73	Godfrey's Case, 11 Co. R. 45,	272
v. Allen, 57 Ind. 524, 588, 603,	604	Godfrey v. Craycraft, 81 Ind. 476,	562
v. Hall, 115 Ind. 549,	630, 683	v. Godfrey, 17 Ind. 6,	420, 670
v. Southern, Etc., Co., 62 Ind.		v. Wilson, 70 Ind. 50,	157
522,	472	Goff v. Scott, 126 Ind. 200,	622
v. Weisch, 75 Ind. 557,	213	Goldberg v. Utley, 60 N. Y. 427,	635
Gilchrist v. Rea, 9 Paige, 66,	142	Golden Gate, etc., Co. v. Hendy	
Giles v. Caines, 3 Caines, 107,	628	Co., 82 Cal. 184,	120
v. Canary, 99 Ind. 116,	413	Golden, etc., Co. v. Smith, 2 Dak.	
v. Law, 14 Ind. 16,	483	Ty. 374,	119
v. Little, 134 U. S. 645,	17	Goldmark v. Rosenfeld, 69 Wis. 469,	66
Gilman v. Gilman, 35 Barb. 591,	143	Goldsberry v. Carter, 28 Ind. 59,	281
Gilmer v. Bird, 15 Fla. 401,	145	Goldsby v. Robertson, 1 Blackf. 247,	709
v. Higley, 110 U. S. 47,	573, 614	Gong v. Stearns, 16 Ore. 219,	438
Gilmore v. Board, 35 Ind. 344,	217	Goodall v. Mopley, 45 Ind. 355,	596
v. Bright, 101 N. C. 382,	580	Goodell v. Starr, 127 Ind. 198, 154,	285,
v. Ham, 15 N. Y. Sup. 391,	66		504
v. Pittsburgh, etc., Co., 104 Pa.		Good Intent, etc., Co. v. Hartzell,	
St. 275,	731	22 Pa. St. 277,	260
Gillespie v. State, 9 Ind. 380,	301	Goodman v. Kennedy, 10 Neb. 270,	535
Gillian v. Ball, 49 Mo. 249,	572	v. Niblack, 102 U. S. 556,	354
Gillman v. Eddy, 8 How. Pr. 133,	398	v. Pocock, 15 Q. B. 576,	126
Gillis v. Martin, 2 Dev. Eq. 470,	160	Goodnight v. Goar, 30 Ind. 418,	604
Gillooly v. State, 58 Ind. 182,	254, 527,	Goodnow v. Plumb, 67 Ia. 661,	391
	586	Goodrich v. Friendersdorff, 27 Ind.	
Gilpatrick v. Glidden, 82 Me. 201,	66	308,	616
Gilpin v. Consequa, 3 Wash. C. C.		v. Hunton, 29 La Ann. 372,	72
184,	535	v. Trustees, etc., 23 Ind. 272,	616
Giltrak v. Watters, 77 Ia. 149,	266	Goodsell v. Taylor, 41 Minn. 207,	661
Ginsburg v. Kuntz, 15 N. Y. Sup.		v. Western Union Tel. Co., 9	
237,	319	N. Y. Supp. 425,	597

TABLE OF CASES.

lxi

[References are to Pages.]

Goodwin v. Bunzle, 50 N. Y. Sup. Ct. 441.	307	Graham v. State, 66 Ind. 386,	714, 715, 716, 725
v. Fox, 120 U. S. 775,	207, 211, 319, 325	v. State, 28 Tex. App. 582,	254
v. Fox, 129 U. S. 601,	269	v. Swigert, 12 B. Mon. 522, 328,	338
v. Goodwin, 48 Ind. 584,	63, 69, 229, 468	Grand Chute, etc., Co. v. Winegar,	15 Wall. 355,
v. Hilliard, 76 Iowa, 555,	151	Grand Rapids, etc., Co. v. Diller,	110 Ind. 223,
v. Smith, 72 Ind. 113,	743, 757	v. Ellison, 117 Ind. 234,	520, 708
v. State, 96 Ind. 550,	577, 691	v. Gray, 38 Mich. 461,	419
v. Walls, 52 Ind. 268,	605	v. Jarvis, 30 Mich. 308,	531
Goodwine v. Crane, 41 Ind. 335,	160, 769, 774	Grand Trunk Ry. Co. v. Cummings,	106 U. S. 700,
v. Hendrick, 29 Ind. 383,	179	Grandolpho v. State, 33 Ind. 439,	256
v. Miller, 32 Ind. 419,	566	Granier v. Louisiana, etc., Co., 42 La. Ann. 880,	314
Gossill v. Decker, 4 Hun. 625,	639	Granger v. Parker, 142 Mass. 186,	320
Gordon v. Bruner, 49 Mo. 570,	587	v. Buzick, 3 G. Gr. (Ia.) 570,	560
v. Carter, 79 Ind. 386,	599	Grant v. Connecticut, etc., Co., 28 Wis. 387,	324
v. Donahue (Cal.), 21 Pac. Rep. 970,	675	v. Holmes, 75 Mo. 109,	291
v. Donahue, 79 Cal. 501	682	v. Hubbell, 2 J. & S. (N. Y.) 224,	269
v. Ogden, 3 Pet. 33,	49	v. Phoenix Ins. Co., 106 U. S. 429,	68, 72, 82
v. Spencer, 2 Blackf. 286,	517, 519	v. Reese, 82 N. C. 72,	646
v. Stockdale, 89 Ind. 240,	708	v. Westfall, 57 Ind. 121,	296, 729, 782
Gorsuch v. Rutledge, 70 Md. 272,	402	Granville County, etc., Board v. State Board,	106 N. C. 81,
Gorley v. Sewell, 77 Ind. 316,	61	Graves, Ex parte, 61 Ala. 381,	437
Goshen, City of, v. England, 119 Ind. 368,	528, 679	v. Campbell, 74 Tex. 576,	568
v. Croxton, 34 Ind. 239,	36	v. Duckwall, 103 Ind. 560,	167, 666
Goss v. Mather, 2 Lans. 283,	589	Graves v. Maguire, 6 Paige, 379,	335
v. Turner, 21 Vt. 437,	535	v. State, 121 Ind. 357, 251, 254, 398,	405, 550
Gossard v. Woods, 98 Ind. 195,	399, 610	Gray v. Baldwin, 8 Blackf. 164,	87
Gosset v. Howard, 10 Q. B. 359,	670, 677	v. Brignardello, 1 Wall. 627,	178, 495
Gott v. Brigham, 45 Mich. 424,	419	v. Bridge, 11 Pick. 189,	441
v. Powell, 41 Mo. 416,	495, 496, 497	v. Cooper, 5 Ind. 506,	300
Goudy v. Werbe, 117 Ind. 154,	537	v. Dickey, 20 Ind. 96,	284
Gough v. Dorsey, 27 Wis. 119,	5	Graydon v. Gaddis, 20 Ind. 515,	733
v. Root, 73 Wis. 32,	467	v. Gray, 3 Litt. 465,	657
Gould v. Day, 94 U. S. 405,	739	v. Montgomery, 17 Ia. 66,	676
v. Howe, 127 Ill. 251,	164	v. Palmer, 28 Cal. 416,	97, 109
v. Raymond, 59 N. H. 260,	26	v. Robinson, 90 Ind. 527,	179, 558
v. Weed, 12 Wend. 12,	703	v. Schenck, 3 How. Pr. 231,	373
Grazier v. Georgetown, 6 Wheat. 593,	513	v. State, 78 Ind. 68,	306
Grace v. Dempsey, 75 Wis. 313,	530	v. Stiver, 24 Ind. 174, 108, 288,	297, 688
v. McArthur, 76 Wis. 641,	791	v. Taylor (Ind.), 28 N. E. Rep. 220,	714
Gradin v. Le Roy, 2 Paige, 509,	593	v. Thomas, 18 La. Ann. 412,	765
Gracter v. De Wolf, 112 Ind. 1,	309, 311	v. Winder, 77 Cal. 525,	100
v. State, 105 Ind. 271,	253, 408	Gready v. Ready, 40 Wis. 478,	559
v. Williams, 55 Ind. 461,	470	Great West Ins. Co. v. Pierce, 1 Wyo. 49,	398
Graff v. Pittsburgh, etc., Co., 31 Pa. St. 489,	701	Great Western, etc., Co. v. Woodmas, etc., Co., 12 Col. 46,	413
Graham v. Bayne, 18 How. 60,	476		
v. Board, 25 Ind. 333,	445		
v. Davis, 4 Ohio St. 362,	535		
v. Henderson, 35 Ind. 195,	603, 732, 782		
v. Nowlin, 54 Ind. 389,	411, 551		
v. Payne, 122 Ind. 403,	708		
v. Spencer, 14 Fed. Rep. 603,	633		

[References are to Pages.]

Greaves v. George, 49 How. Pr. 79,	52 How. Pr. 58,	601	Griffin v. Hodshire, 119 Ind. 235,	596.
Greer v. Greer, 58 Hun. 251,	v. State, 50 Ind. 267,	265	v. Kemp, 46 Ind. 172,	599
Gregg v. Moss, 14 Wall. 564,	408	509	v. Nelson, 106 N. C. 235,	604
Gregory v. Dodge, 14 Wend. 593,	744	509	v. Pate, 63 Ind. 273,	446, 454
v. Gregory, 89 Ind. 345,	404	744	v. Ransdell, 71 Ind. 440,	256
v. Perdue, 29 Ind. 66,	188	404	v. Reis, 68 Ind. 9,	295
v. Slaughter, 19 Ind. 342,	183, 493	7, 9	v. Veil, 56 Mo. 310,	514
v. State, 94 Ind. 384,	7, 9	748	Griffiths, Ex parte, 118 Ind. 83,	5, 14,
v. Van Voorst, 85 Ind. 108,	748	217		26, 36
Greely v. Hanman, 12 Col. 94,	217	550	Griffith v. Baltimore, etc., Co., 44	643
Greeley v. Provident Savings Bank,	103 Mo. 212,	550	Fed. Rep. 574,	576
Green v. Blackwell, 5 Stew. (N. J.),	768,	124	v. Clift, 4 Utah, 462,	252
v. Castello, 35 Mo. App. 127,	208	13	v. State, 12 Ind. 548,	228
v. Creighton, 10 Sm. & M. 159,	72	630	Grigsby v. Purcell, 99 U. S. 505,	518
v. Elliott, 86 Ind. 53,	75	117,	v. Schwarz (Cal.), 22 Pac. Rep.	12
v. Fisk, 103 U. S. 518,	593	788	Grignon v. Astor, 2 How. 319,	398
v. Milbank, 3 Abb. (N. C.) 138,	80,	788	v. Black, 45 N. W. Rep. 122,	112
v. Robinson, 5 How. (Miss.) 80,	445	383	Griggs v. Detroit, etc., Co., 10 Mich.	643
v. Ronen, 62 Ia. 89,	383	492	v. Houston, 104 U. S. 553,	640
v. Smith, 21 Ill. App. 198,	515, 490,	232	v. Seeley, 8 Ind. 264,	657
v. Springfield, 130 Ill. 515,	490,	232	v. Smith, 13 N. Y. Supp. 273,	66
v. State, 10 Neb. 102,	578,	679	Grimes v. Camberlain, 27 Neb. 605,	745
v. State, 88 Tenn. 614,	141,	272,	v. Duzan, 32 Ind. 361, 237, 398,	697
v. Watkins, 6 Wheat. 260,	276	556	v. Fall, 15 Cal. 63,	538,
			v. Martin, 10 Ia. 347,	598
v. White, 37 N. Y. 405,	556		Grinnel v. Schmidt, 2 Sandf. 706,	215
Green Bay, etc., Co. v. Hewlitt, 62	Wis. 316,	128	Grissom v. Moore, 106 Ind. 296,	761
Greenfield v. State, 113 Ind. 597,	294	288	Griswold v. Sharp, 2 Cal. 17,	395
Greenman v. Cohee, 61 Ind. 201,	288	409	Grogan v. San Francisco, 18 Cal.	580,
Greenley v. State, 66 Ind. 141,	409			624, 625, 686
Greenough v. Greenough, 11 Pa. St.	489,	5, 7, 9	Grose v. Dickerson, 53 Ind. 460,	638
v. Shelden, 9 Ia. 503,	554		Grose v. Fowler, 21 Cal. 392,	102
Green River, etc., Co. v. Marshall,	42 Ind. 470,	276	v. Haisley (Ind.), 28 N. E. Rep.	534
Greensburgh v. Corwin, 58 Ind. 518,	36		Groton, Town of, v. Hurlburt, 22	648
Greensburgh, etc., Co. v. Sidener,	40 Ind. 424,	162, 766	Grover, etc., Co. v. Barnes, 49 Ind.	182, 687
Greenup v. Crooks, 50 Ind. 410,	488,	596,	Groves v. Coon, 1 N. Y. 536,	21
	528		v. Maguire, 6 Paige Ch. 379,	462
v. Stoker, 8 Ill. 202,	291,	647, 668	v. Marks, 32 Ind. 319,	215, 525
Greenwood v. State, 116 Ind. 485,	291,	647, 668	v. Ruby, 24 Ind. 418,	413
Graham v. Chantry, 69 Ia. 728,	448		Grows v. Maine, etc., Co., 69 Me.	639
Griesley v. State, 123 Ind. 72,	217, 692			412,
Grice v. Ferguson, 1 Stew. (Ala.)	36,	714	Grubb v. State, 117 Ind. 277,	251, 252,
Griebel v. State, 111 Ind. 369,	592			255, 678, 685
Griesel v. Schmal, 55 Ind. 475,	278,	394	Grubbs v. Morris, 103 Ind. 166,	761
Griffce v. Mann, 62 Md. 248,	64		Gruber v. Baker, 20 Nev. 453,	596
Griffin v. Barr, 60 Vt. 599,	610		Gruhl v. Gruhl, 123 Ind. 86,	67
v. Cranston, 5 Bosw. 658,	639		Grundy v. Pine Hill Coal Co.	481
v. Harriman, 74 Ia. 436,	620		(Ky.), 9 S. W. Rep. 414,	758
v. Griffin, 10 Ind. 170,	75		Guard v. Risk, 11 Ind. 156,	
			Guardian Savings Bank v. Reilly,	64
			8 Mo. App. 544,	

[References are to Pages.]

Guarantee, etc., Co. v. Buddington, 23 Fla. 514.	122, 124	Haines v. State, 7 Tex. App. 30,	102
Gudner v. Kilpatrick, 14 Neb. 347,	306	Hake v. Strubel, 121 Ill. 321,	758
Guenther v. Peeple, 24 N. Y. 100,	674	Hale's Appeal, 44 Pa. St. 438,	102
Guernsey v. Edwards, 26 N. H. 224,	127	Hale v. Akers, 132 U. S. 554,	17
Guez v. Dupuis, 152 Mass. 454,	314	v. Matthew, 118 Ind. 527,	758
Guice v. State, 60 Miss. 714,	250	Hall v. Brooks, 89 N. Y. 33,	111
Guilford v. Love, 49 Tex. 715,	670	v. Carter, 74 Ia. 364,	695
Guidry v. Garland, 41 La. Ann. 756,	78	v. Chicago, etc., Co., 65 Ia. 258,	525
Guirdy v. Garland (La.), 6 So. Rep. 563.	50	v. Craig, 125 Ind. 523	630
Guiri v. Gillett, 124 Ind. 501,	759	v. Durham, 109 Ind. 434,	162, 164, 480, 643, 754
Gulf, etc., Co. v. Edwards, 72 Tex. 303.	497, 454	v. Durham, 113 Ind. 327,	53, 182
v. Keith, 74 Tex. 287,	529	v. Gittings, 2 Harr. & J. 112,	738
v. Pool, 70 Tex. 713,	535	v. Hedrick, 125 Ind. 326,	400
Gulick v. Connely, 42 Ind. 134,	626	v. Henline, 9 Ind. 256,	700
Gullett v. Miller, 106 Ind. 75,	52, 781	v. King, 29 Ind. 205,	358, 581
Gumbel v. Pitkin, 113 U. S. 545,	137	v. Lyons, 29 W. Va. 410,	791
Gunter v. Laffan, 7 Cal. 588,	489	v. Marks, 34 Ill. 358,	3, 532
Gunther v. Liverpool, etc., Co., 134 U. S. 110,	643	v. Pay Rock, etc., Co., 6 Col. 81,	124
Gurney v. Brown, 27 Ill. App. 640,	612	v. Reed, 17 Ohio, 498,	773
Gutbrecht v. Prospect Park, etc., Co., 28 Hun. 497,	146	v. State, 8 Ind. 439,	619
Gutperle v. Koehler, 84 Ind. 237, 268,	269	v. Spurgeon, 23 Ind. 73,	46
		v. Stevens, 116 N. Y. 201,	643
		v. Suitt, 39 Ind. 316,	603
		v. Wadsworth, 30 W. Va. 55,	392
		v. Weare, 92 U. S. 728,	616, 662
		v. Wells, 54 Miss. 289,	496
		Hall's Safe, etc., Co. v. Rigby, 79 Ind. 150,	467
		Halleck v. Janden, 34 Cal. 167,	671
		v. Weller, 72 Ind. 342,	45
		Hallet v. Jenks, 1 Caine's Cas. 43,	709
		Hallock v. Portland, 8 Ore. 29,	750
		Halloran v. Halloran (Ill.), 27 N. E. Rep. 82,	786
		v. State, 80 Ind. 586,	217
		v. Texas, etc., Co., 40 Tex. 465,	208
		Halsey v. Darling, 13 Col. 1,	678
		v. Flint, 15 Abb. Pr. 367,	493
		Halstead v. Brown, 17 Ind. 202,	756
		Halstead Lumber Co. v. Sutton (Kan.), 26 Pac. Rep. 444,	544
		Halton v. Jones, 78 Ind. 466,	792
		Ham v. Carroll, 17 Ind. 442,	638
		v. Greve, 41 Ind. 531,	207, 306, 307, 314, 325, 331
		v. Rogers, 6 Black. 559,	420
		Hamilton v. Ames, 74 Mich. 298,	413
		v. Barricklow, 96 Ind. 398,	271
		v. Burch, 28 Ind. 233,	176, 178, 775
		v. Byram, 122 Ind. 283,	712
		v. Elkins, 46 Ind. 213,	297, 785
		v. Hart, 125 Pa. St. 142,	127
		v. Moore, 3 Dall. 371,	228
		v. Noble, 1 Blackf. 188,	404
		v. Pease, 38 Conn. 115,	620
		v. Prescott, 73 Tex. 565,	486, 487
		v. Ross, 25 Neb. 630,	610
		v. Shoaff, 99 Ind. 63,	693
		v. Summers, 13 B. Mon. 11,	699
H. G. Olds Wagon Works v. Combs, 121 Ind. 62,	557		
Habel v. State, 28 Tex. App. 588,	254		
Habich v. Folger, 20 Wall. 1,	633		
Hablichtel v. Gambert, 75 Ia. 539,	288,		
	580		
Hacker v. Blake, 17 Ind. 97,	561		
Hackett v. State, 113 Ind. 532, 147,	284		
Haddon v. Haddon, 42 Ind. 378,	771		
Hadley v. Gutridge, 58 Ind. 302,	734		
v. Hadley, 82 Ind. 95, 163, 692, 768			
v. Hill, 73 Ind. 442, 117, 212, 361, 448			
v. Milligan, 100 Ind. 49,	269		
v. Prather, 64 Ind. 137,	399		
v. State, 66 Ind. 275,	563		
Haebler v. Bernharth, 115 N. Y. 459,	65		
Hagaman v. Moore, 84 Ind. 496,	713		
Hagan v. Walker, 14 How. 29,	596		
Hagar v. Reclamation District, 111 U. S. 701,	148		
Hagard v. Wason, 152 Mass. 268,	630		
Hagenbuck v. McClaskey, 81 Ind. 577,	640		
Hager v. Hager, 38 Barb. 92,	620		
Hagerty v. Lee (N. J.), 21 Atl. Rep. 933,	591		
Hahn v. Behrman, 73 Ind. 120, 115, 141			
v. Kelly, 34 Cal. 391,	421, 668, 670		
Haight v. Gay, 8 Cal. 297,	4		
Haines v. Kent, 11 Ind. 126,	614		
v. McLaughlin, 135 U. S. 584,	562		

[References are to Pages.]

Hamilton v. Winterrowd, 43 Ind. 393,	524, 567	Hardaway v. Biles, 1 Sm. & Mar. 657,	323
Hamlin v. Reynolds, 22 Ill. 207,	754	Harderle v. City of La Fayette, 20 Ind. 234,	628
Hamlyn v. Nesbit, 37 Ind. 284,	64, 219,	Harden v. Fisher, 1 Wheat. 300,	714
Hamm v. Romine, 98 Ind. 77,	531, 758,	Hardenbrook v. Ligonier, 95 Ind. 70,	36
Hamman v. Mink, 99 Ind. 277,	52	Hardie v. Kretsinger, 17 Johns. 293,	697
Hammon v. Sexton, 69 Ind. 37,	118,	Hardin v. Clark, 32 S. C. 480,	391
	120, 448	v. Helton, 50 Ind. 319,	689
Hammond v. Hopping, 13 Wend. 505,	697	v. Owings, 1 Bibb. 214,	209, 318
v. Hudson River, etc., Co., 20 Barb. 378,	601	v. State, 22 Ind. 347,	573
v. Pinklow, 149 Mass. 356,	556	v. Trimmer, 30 S. C. 391,	392
v. Schiff, 100 N. C. 161,	739	v. Watson, 85 Tenn. 593,	99
Hammond, City of, v. New York, etc., Co., 126 Ind. 597,	35, 45, 59,	Harding v. Brophy (Ill.), 24 N. E. Rep. 558,	160
Hammons v. Bigelow, 115 Ind. 363,	596	v. Cowgar, 127 Ind. 245,	562
Hampshire, etc., Bank v. Billings, 17 Pick. 87,	327	v. Griffin, 7 Blackf. 462,	605
Hampson v. Fall, 64 Ind. 382,	595	v. Whitney, 40 Ind. 379,	528
Hampton v. Rouse, 13 Wall. 187,	116	Hardt v. State, 13 Tex. App. 426,	246
Hamrick v. Danville, etc., Co., 30 Ind. 147,	63	Hardy, In re, 35 Minn. 193,	111, 114
v. Danville, etc., Co., 41 Ind. 170,	277	v. Blazer, 29 Ind. 226,	601
Hanaw v. Bailey, 83 Mich. 24,	319,	v. Chipman, 54 Ind. 591,	287, 728
Hancock v. Heaton, 53 Ind. 111,	288	v. Miller, 89 Ind. 440,	287
v. State, 14 Tex. App. 392,	250	Hargens v. Goodman, 12 Ind. 629,	675
v. Town of Worcester (Vt.), 18 Atl. Rep. 1041,	756	Hargrove v. John, 120 Ind. 285,	638
Hand v. Atlantic, etc., Bank, 55 How. Pr. 231,	601	v. Washington, 32 S. C. 584,	452
v. Taylor, 4 Ind. 409,	37	Harker v. State, 8 Blackf. 540,	700
Handlan v. McManus, 100 Mo. 124,	159	Harkey v. Cain, 69 Tex. 146,	581
Handly v. Anthony, 5 Wheat. 374,	27	Harkness v. Hyde, 98 U. S. 476,	630, 631,
Hanes v. Worthington, 14 Ind. 320,	669		633
Hanf v. Northwestern Asso., 76 Wis. 450,	655	Harlan v. Edwards, 13 Ind. 430,	281
Hanlan v. Edwards, 13 Ind. 430,	282, 284	Harlan v. Stout, 22 Ind. 488,	496, 599
Hanna v. Aebker, 84 Ind. 411,	269	Harmann v. Hartmetz, 128 Ind. 353,	628
v. Board, 29 Ind. 170,	62	Herman v. Jeffries, 4 Mont. 513,	755
v. Ewing, 3 Blackf. 34,	404	Harman v. State, 11 Ind. 311,	250
Hannah v. Dorrell, 73 Ind. 465,	178, 775	v. State, 22 Ind. 331,	256, 769
Hannibal, etc., Co. v. Moore, 37 Mo. 338,	733	Harmon v. Chandler, 3 Ia. 150,	770
Hannum v. State, 38 Ind. 32,	188, 393,	v. Herndon, 99 N. C. 477,	309
Hanrick v. Patrick, 119 U. S. 156,	119	v. Lexington, 32 S. C. 583,	455
Hans v. Louisiana, 134 U. S. 1,	305	Harmony Club v. New Orleans Gas Light Co. (La.), 7 So. Rep. 538,	46
Hansher v. Morris, 1 Blackf. 307,	602	Harness v. State, 57 Ind. 1,	703
Hansher v. Hansher, 94 Ind. 208,	300	Harpending v. Shoemaker, 37 Barb. 270,	587
Hanson v. Elton, 38 Minn. 493,	568	Harper v. Archer, 4 Sm. & Marsh. 99,	315
v. Frickes, 79 Cal. 283,	402	v. Bibb, 45 Ala. 670,	130
v. Voll (Cal.), 21 Pac. Rep. 971,	383	v. Jacobs, 51 Mo. 296,	6, 291, 668
Harbaugh v. Albertson, 102 Ind. 69,	128,	v. Pound, 10 Ind. 32,	395
	306	v. State, 101 Ind. 109,	691, 792, 793
Harbor v. Morgan, 4 Ind. 158,	700	v. Tahourdin, 6 M. & S. 383,	313
		Harrell v. Harrell, 117 Ind. 94,	274
		v. Seal, 121 Ind. 193,	771
		Harriman v. Queen Ins. Co., 49 Wis. 71,	580
		v. Wilkins, 20 Me. 93,	619
		Harrington v. Roberts, 7 Ga. 510,	272
		v. Sedalia, 98 Mo. 583,	560
		v. State, 76 Ind. 112,	781
		v. State, 83 Ala. 9,	655

TABLE OF CASES.

lxv

[References are to Pages.]

Harrington v. Witherow, 2 Blackf.		Hartford Tp. v. Bennett, 10 Ohio	
37.	791	St. 441,	635
Harris v. Boone, 69 Ind. 300,	782	Hartlep v. Cole, 101 Ind. 458,	301,
v. Carmack, 6 Dana, 242,	266	307, 397, 685,	687
v. Central R. Co., 78 Ga. 525,	536	Hartlepp v. Whitely (Ind.), 28 N.	
v. Claflin, 36 Kan. 543,	155	E. Rep. 535,	719
v. Clark, 4 How. Pr. 78,	73	Hartman v. Eveline, 63 Ind. 344,	748
v. Doe, 4 Blackf. 369,	541	v. Greenhow, 102 U. S. 672,	305
v. Hannibal, etc., Co., 37 Mo.	587	v. Heady, 57 Ind. 545,	590
397.		Hartook v. Crawford, 85 Va. 413,	78
v. Howe (Ind.), 27 N. E. Rep.	30	Harvey v. Brickbin, 50 Hun. 376,	601
561.		v. Cook, 24 Ill. App. 134,	576
v. Ingledew, 3 P. W. 98,	134	v. Donnellan, 36 Ind. 501,	630
v. Musgrove, 72 Tex. 18,	669	v. Fink, 111 Ind. 249, 70, 98, 126,	456
v. Muskingum, etc., Co., 4		v. Laffin, 2 Ind. 477,	674
Blackf. 267,	287	v. Parry, 82 Ind. 263,	693
v. People, 130 Ill. 457,	681	v. Sinker, 35 Ind. 341,	769
v. Regester, 70 Md. 109,	321	v. State, 40 Ind. 516,	731
v. Rivers, 53 Ind. 216,	404	v. Tyler, 2 Wall. 328, 691, 746,	762
v. Rupel, 14 Ind. 209,	781, 792	Hasbronck v. City of Milwaukee,	
v. Shaffer, 92 N. C. 30,	646	21 Wis. 219,	689
v. Tomlinson (Ind.), 30 N. E.		Haskins v. St. Louis, etc., Co., 109	
Rep. 214,	775	U. S. 106,	208, 318
v. Vandever, 21 N. J. Eq. 424,	4	Hasselback v. Linton, 17 Ind. 545,	164
v. Wilson, 7 Wend. 57,	700	Hasselman v. Allen, 42 Ind. 257,	687
v. Wright, 123 Ind. 272,	395	v. Carroll, 102 Ind. 153,	723
v. Brooklyn, etc., Co., 100 N.		Hastings v. Halleck, 10 Cal. 31,	448
Y. 621,	412	Hatch v. Judd, 29 Ia. 95,	646
v. Farnsworth, 1 Heisk. 751,	74	Hathaway v. Hathaway, 2 Ind. 513,	101
v. Hedges, 60 Ind. 266, 368, 375,	446	v. Hemingway, 20 Conn. 190,	535
v. McCormick, 69 Cal. 616,	399	Hatten v. Robinson, 4 Blackf. 479,	525
v. Mosely, 31 Tex. 608,	141	Hatton v. Jones, 78 Ind. 466,	691
v. Moss, 41 La. Ann. 239,	78	Hawes v. Clark, 84 Cal. 272,	646
v. Phoenix, etc., Co., 83 Ind.		v. People, 124 Ill. 560,	16, 441
575.	488	v. People, 129 Ill. 123,	758
Harrison v. Price, 22 Ind. 165,	597,	v. Pritchard, 71 Ind. 166,	320
	750, 758, 759	v. State, 88 Ala. 37,	528
v. Thurston, 11 Fla. 307,	71	Hawkins v. Edwards, 1 Ia. 296,	523
v. Trader, 29 Ark. 85,	459	v. Governor, 1 Ark. 570,	9
v. Young, 9 Ga. 359,	731	v. Hawkins, 28 Ind. 66,	106, 349
Harrison School Tp. v. McGregor,		v. Heinzman, 126 Ind. 600,	274,
6 Ind. 185,	162, 438, 511, 591, 792		345, 781
Harrod v. Dismore, 127 Ind. 338,	504	v. Massie, 62 Mo. 582,	64, 68
Harshman v. Armstrong, 43 Ind.		v. McDougal, 126 Ind. 544,	103,
129,	99, 105, 214, 263, 333	146, 150, 266,	281
Hasted v. Dodge, 75 Ia. 402,	472	v. State, 24 Ind. 288,	47
Hart v. Barnes, 24 Neb. 782,	215	v. State, 125 Ind. 570,	3, 7
v. Burch, 130 Ill. 426,	601	v. State, 126 Ind. 294,	335, 462
v. Burch, 31 Ill. App. 22,	444	v. State, 25 N. E. Rep. 818,	4
v. Burnett, 15 Cal. 530,	474	Hawley v. Harrell, 19 Conn. 142,	127
v. Foley, 67 Ia. 407,	767	v. Simmons, 101 Ill. 654,	467
v. Heilner, 3 Rawle. 407,	701	v. Smith, 45 Ind. 183, 491, 563,	606
v. State, 26 Ind. 100,	182	Hawthorne v. East Portland, 12	
v. State, 14 Neb. 572,	534	Ore. 210,	325
v. Walker, 77 Ind. 331,	288	v. State, 28 Tex. App. 212,	120
Harter v. Eltzroth, 111 Ind. 159, 167, 698		Haughey v. Wilson, 1 Hilt. (N.Y.)	
Hartford, City of, v. Chipman, 21		259,	286
Conn. 458,	590	Haun v. Wilson, 28 Ind. 296,	300
Hartford City, etc., Co. Lowe,		Hauser v. Roth, 37 Ind. 89,	163, 401,
125 Ind. 275,	520, 641		403, 525, 647

[References are to Pages.]

Hausmelt v. Patterson, 124 N. Y.	596	Heath v. Erie, etc., Co., 8 Blatchf.	601
349,	691	347,	567
Haus v. Niblack, 80 Ind. 407	391	v. Keyes, 35 Wis. 668,	567
Hauxhurst v. Ritch, 119 N. Y. 621,	670	v. State, 101 Ind. 512, 248, 251,	247
Haverly, etc., Co. v. Howlutt, 6	582	Heaton v. Knowlton, 65 Ind. 255,	330
Col. 574,	398	453, 455	
Hay v. Osterout, 3 Ohio, 384,	736	Heavenridge v. Moudy, 34 Ind. 28,	470
v. Short, 49 Mo. 139,	5		597
v. State, 58 Ind. 337, 521, 635,	523	Heavener v. Saeger, 79 Ga. 471,	546
Hayburn's Case, 2 Dall. 409 n,	571	Heberd v. Myers, 5 Ind. 94,	514
Hayden v. Hayden, 46 Cal. 332,	782	v. Wines, 105 Ind. 237,	732
v. Songer, 56 Ind. 46,	435	Heckle v. Grewe, 125 Ill. 58,	560
v. Woods, 16 Neb. 306,	768	Heckert's Appeal, 13 S. & R. 48,	225
Hayes, Ex parte (Ala.), 9 So. Rep.	336	Heckett v. Lathrop, 36 Kan. 661,	156
156,	327	Hiddings v. Dempsea, 12 App.	
88 Ind. 1,	781	Cas. 107,	356
v. Hayes, 75 Ind. 395,	479	Heddrick v. Heddrick, 74 Ind. 78,	202
v. Joseph, 26 Cal. 535,	303	Hedderich v. State, 101 Ind. 564,	102
v. Kenyon, 7 R. I. 531,	350	Hedges v. Armistead, 60 Tex. 276,	313
v. Martin, 45 Cal. 559,	353	Hedrick v. D. M. Osborne & Co.,	
v. Missouri, 120 U. S. 68,	648	99 Ind. 143,	394, 567, 773
v. Nourse, 107 N. Y. 577, 129,	647	v. Hedrick, 28 Ind. 291,	756
v. O'Brien, 26 N. E. Rep. 601,	395	Heed v. Knox, 8 La. Ann. 73,	560
v. Solomon, 90 Ala. 520,	108	Heeser v. Miller, 77 Cal. 192,	736
v. Sykes, 120 Ind. 180, 250, 291,	788	Heffner v. Day, 54 Ark. 79,	69
Haymond v. Saucer, 84 Ind. 3,	480	Hefner v. Northwestern, etc., Co.,	
Haynes v. Nowlin (Ind.),	421	123 U. S. 747,	489
v. State, 45 Ind. 424,	719	Heffren v. Jayne, 39 Ind. 463,	304
v. Thomas, 7 Ind. 38,	571	Hege v. Newsome, 96 Ind. 426, 279, 296,	397, 690
Hays v. Ford, 55 Ind. 52,	261		418
v. Hostetter, 125 Ind. 60, 713,	261	Hegler v. Faulkner, 127 U. S. 482,	418
v. Hynds, 28 Ind. 531,	408	Heilbron v. Fowler Switch Co., 75	
v. Johns, 42 Ind. 505,	296	Cal. 426,	100
v. State, 77 Ind. 450,	213,	Heilman v. Shanklin, 60 Ind. 424,	614
v. Walker, 90 Ind. 105,	328, 339	Heiney v. Garretson, 1 Ind. App.	
v. Wilstach, 101 Ind. 100,	394	548,	265, 579, 708
Haywood v. Hedrick, 94 Ind. 340,	68	Heinlen v. Cross, 63 Cal. 44,	335, 462
Hazelhurst v. Morris, 28 Md. 67,	658	v. Southern, etc., Co., 65 Cal.	
Hazleton v. Union Bank, 32 Wis.	562	304,	447
34,	683	Heitman v. Schuk, 40 Ind. 93,	393
Hazelett v. Butler University, 84	646	Heizer v. Kelley, 73 Ind. 582, 159, 169	
Ind. 230,	525	Helden v. Helden, 9 Wis. 557, 325, 341	
Hazewell v. Couser, 81 N. Y. 630,	689	Helena v. Albertose, 8 Mont. 499,	735
Heacock v. Hosmer, 109 Ill. 245,	673	Helm v. Boone, 6 J. J. Marsh. 351,	450
v. Lubuke, 107 Ill. 396,	539	v. First Nat. Bank, 91 Ind. 44,	301
Head v. Longworthy, 15 Ia. 235,	375		788
Headly v. Board, 4 Blackf. 116,	87	Helphenstine v. Vincennes National	
Heady v. Vevay, etc., Co., 52 Ind.	703	Bank, 65 Ind. 582,	102, 281
117,	545	Helms v. Wagner, 102 Ind. 385, 748, 749	
v. Wood, 6 Ind. 82,	672	Hellebush v. Blake, 119 Ind. 349,	81
Heagy v. Black, 90 Ind. 534,	530	Heller v. Clark, 103 Ind. 591, 221, 361	
v. State, 85 Ind. 260,	528, 530	Hemmenway v. Corey, 16 Vt. 225,	112
Hearman v. Owen, 42 Mo. App. 387,	648	Hemphill v. Black, 90 N. C. 14,	440
Hearn v. State, 62 Ala. 218,		v. Collins, 117 Ill. 396,	438
Hearne v. City of Greensburgh, 51		Hemsley v. Myers, 45 Fed. Rep.	
Ind. 119,		283,	591
Heaton v. Cincinnati, etc., Co., 16		Hemstead v. Cargill (Minn.), 48 N.	
Ind. 275,		W. Rep. 686,	319
v. Colgrove, 3 Ind. 265,			

TABLE OF CASES.

lxvii

[References are to Pages.]

Henderson, Ex parte, 84 Ala. 36,	438,	Herd v. Cist (Ky.), 12 S. W. Rep.	
6 Fla. 279,	16, 519	466,	681
Henderson v. Barbee, 6 Blackf. 26,	273,	Hereth v. Hereth, 100 Ind. 35,	268, 667
	546	Herff v. Giggs, 121 Ind. 471,	108
v. Benson, 141 Mass. 218,	208	Hering v. Chambers, 103 Pa. St. 172,	668
v. Benson, 41 Miss. 218,	320	Herkimer v. McGregor, 126 Ind.	
v. Burch, 10 Ind. 54,	446	247,	783
v. Dickey, 76 Ind. 264,	709, 714	562,	448
v. Dickey, 50 Mo. 161,	32	Herndon v. Howard, 9 Wall. 664,	36,
v. Halliday, 10 Ind. 24, 214, 261,	263,		115
	333	Herrick v. Butler, 30 Minn. 156,	672
v. Henderson, 110 Ind. 316,	562	v. Racine, etc., Co., 43 Wis. 93,	92
v. Henderson, 3 Hare's Ch.		Herring v. State, 1 Ia. 205,	767
100,	596	Herron v. Cole, 25 Neb. 493,	636
v. Reed, 1 Blackf. 347,	767	v. Cole, 25 Neb. 692,	597
v. State, 60 Ind. 296,	249, 407	Hershey v. Knees, 75 Cal. 115,	782
v. Winchester, 31 Miss. 290,	489	Hershman v. Hershman, 63 Ind.	
Hendrick v. Whittemore, 105 Mass.		451,	292, 695, 718
23,	147, 285	Herstein v. Walker, 90 Ala. 477, 490,	493
Hendricks v. Frank, 86 Ind. 278,	122,	Hertzfield v. State, 6 Ind. 23,	249
	154, 361, 532	Hervey v. Parry, 82 Ind. 283,	567
v. Gilchrist, 76 Ind. 369,	590	v. Savery, 48 Ia. 313,	675
v. State, 73 Ind. 482,	118	Herzeberg v. Sachse, 60 Md. 426,	54
Hendrickson v. Sullivan, 28 Neb.		Herzog v. Chambers, 61 Ind. 333,	103,
790,	448		118
v. Walker, 32 Mich. 68,	625	Heshion v. Scott, 94 Ind. 570,	268, 337
Hendry v. Hendry, 32 Ind. 349,	635	Hess v. Cole, 23 N. J. L. 116,	650
Henley v. Mayor, 6 Bing. 100,	582	v. Dean, 66 Tex. 663,	668
v. McNoun, 76 Ind. 380,	749	v. Lowery, 122 Ind. 225, 23 N.	
Henline v. People, 81 Ill. 269,	286	E. Rep. 156,	143
Hennessey v. State, 23 Tex. App.		v. Hess, 119 Ind. 66,	749
340,	763	v. Lowrey, 122 Ind. 225,	539, 540
Hennies v. Vogel, 87 Ill. 242,	617	Hessey v. Heitkamp, 9 Mo. App. 36,	306
Henning v. State, 106 Ind. 386,	250,	Hessian v. State, 116 Ind. 58,	760
	253, 527, 579, 668,	Hessin v. Heck, 88 Ind. 449,	610
v. State, 24 Tex. App. 315,	761	Hestres v. Brennon, 50 Cal. 210,	15
Henny Buggy Co. v. Patt, 73 Ia.		Hewitt v. Brown, 21 Minn. 163,	635
767,	291	v. Buck, 17 Me. 147,	704
Hepburn v. Dunlop, 1 Wheat. 179,	32	v. Filbert, 116 U. S. 142,	212
Henri v. Grand, etc., Co., 59 Mo.		v. Powers, 84 Ind. 295,	566
581,	191	v. Young (Ia.), 47 N. W. Rep.	
Henry v. Carson, 96 Ind. 412,	569	1084,	597
v. Dean, 6 Dak. 78,	738	Hexter v. Schneider, 14 Ore. 184,	522
v. Hunt, 52 Ind. 114,	118	Hey v. Schooley, 7 Ohio, pt. II, 48,	462
v. Ricketts, 1 Cranch. C. C. 545,	579	Heyl v. State, 109 Ind. 589,	253, 529
v. Sioux City, etc., Co., 70 Ia.		Heyman v. McBurney, 66 Ala. 51,	566
233,	622	Heymes v. Champlin, 52 Mich. 25,	168
v. State Bank, 3 Ind. 216,	37	Heyneman v. Blake, 19 Cal. 579,	26
v. Thomas, 118 Ind. 23,	770	Hiatt v. Ballinger, 59 Ind. 303,	70
Henshaw v. McDowell, 99 N. C.		v. Renk, 64 Ind. 590,	638
181,	208	Hibbitts v. Jack, 97 Ind. 570,	479, 491
v. Robertson, 1 Bailey (S. C.)		Hickam v. People (Ill.), 27 N. E.	
Ch. 311,	489	Rep. 88,	746
Henslie v. State, 3 Heisk. 202,	251	Hickenbottom v. Delaware, etc.,	
Henson v. Ott, 7 Ind. 512,	601	Co., 122 N. Y. 91,	411
v. Walts, 40 Ind. 170,	69, 88	Hickey v. State, 23 Ind. 21,	251, 524
Herbert v. City of North Hampton,		Hickox v. Elliott, 28 Fed. Rep. 117,	330
152 Mass. 266,	554	Hicks v. Bell, 3 Cal. 219,	4
Herbison v. Taylor, 29 Neb. 217,	754	v. Ellis, 65 Mo. 176,	680

[References are to Pages.]

Hicks v. Michel, 15 Cal. 107,	429, 462	Hinkle v. Shelley, 100 Ind. 88,	274
v. State, 83 Ind. 483,	766	Hinson v. Adrain, 91 N. C. 372,	461
Hidden v. Jordan, 28 Cal. 301,	494	Hinton v. Pritchard, 107 N. C. 128,	446
Hiel v. Hiel, 40 Kan. 69,	269	v. Whittaker, 101 Ind. 344, 128,	548
Higbee v. Moore, 66 Ind. 263,	678	Hintrager v. Mahoney, 78 Ia. 537,	124, 125
v. Rodeman, 28 N. E. Rep. 442,	360	Hintz v. Graupner (Ill.), 27 N. E.	
Higgins v. Carlton, 28 Md. 115,	584	Rep. 935,	628
v. Kendall, 73 Ind. 522, 267,	289, 396	Hipes v. State, 73 Ind. 39,	662
Higgs v. Hunt, 75 Mo. 106,	486	Hipp v. Babin, 19 How. 271,	594
Higham v. Vanosdol, 101 Ind. 160,	703	Hitchins v. Eardley, L. R., 2 Prob.	
v. Warner, 69 Ind. 549,	401	& Div. 248,	701
Highfill v. Monk, 81 Ind. 203,	683	Hitchings v. Van Brunt, 38 N. Y.	
Hill v. Chicago, etc., Co., 129 U. S.		335,	483
170,	445	Hite v. Lenhart, 7 Mo. 22,	788
v. Chipman, 59 Wis. 211,	521	Hoag v. Alleghany City, 21 Pitts.	
v. Corcoran, 15 Col. 270,	620	L. Jr. 46,	91
v. Covell, 1 N. Y. 522,	709	Hoar v. Leaman (Pa.), 15 Atl. Rep.	
v. Finigan, 77 Cal. 267,	556	716,	610
v. First Nat. Bank, 42 Kan. 364,	160	Hobart v. Hobart, 86 N. Y. 636, 116,	270
v. Hagaman, 84 Ind. 287,	755	Hobart College v. Fitzhugh, 27 N.	
v. Haverstick, 17 Ind. 517,	54	Y. 130,	191
v. Hazen, 93 Ind. 109,	506	Hoberg v. State, 3 Minn. 262,	619
v. Heirsmons, 17 Hun. 470,	402	Hobbs v. Beckwith, 6 Ohio St. 252,	73
v. Hill, 6 Ala. 166,	111	v. Board, 116 Ind. 376,	548
v. Holloway, 52 Ia. 678,	770	v. Cowden, 20 Ind. 310,	628
v. Hoover, 5 Wis. 386,	180	Hobler v. Cole, 49 Cal. 250,	793
v. Jamieson, 16 Ind. 125, 296,	767, 768	Hockett v. Johnson, 87 Ind. 251,	775
v. Lewis, 45 Kan. 162,	601	Hockstedler v. Hockstedler, 108	
v. Louth, 109 Ind. 315,	748	Ind. 506,	274
v. Marsh, 46 Ind. 218,	597	Hodge v. Drake, 60 Hun. 577,	736
v. Newman, 47 Ind. 187,	162	Hodges v. Bales, 102 Ind. 494, 531,	571, 787
v. Nisbet, 100 Ind. 341,	289	v. Cooper, 43 N. Y. 216,	691
v. Pressley, 96 Ind. 447, 101,	149	v. Kowing, 58 Conn. 12, 413,	551
v. Roach, 72 Ind. 57, 70, 451,	792	v. Templer, 6 Mod. 191,	650
v. Starkweather, 30 Ind. 434,	129, 248	Hodgden v. Commissioners, 10 Kan.	
v. State, 64 Ga. 453,	620	637, 200,	755
v. Weisler, 49 Cal. 146,	789	Hodkins v. Mead, 119 N. Y. 166,	582
Hildreth v. Gwindon, 10 Cal. 490,	153	Hodgson v. Jeffries, 52 Ind. 334,	692
Hillenberg v. Bennett, 88 Ind. 540,	221	Hoes v. Boyer, 108 Ind. 494,	595
Hilliard v. Beattie, 59 N. H. 462,	536	Hoey v. Pierson, 67 Wis. 262,	66
v. McDaniels, 48 Vt. 122,	112	Hogan v. Robinson, 94 Ind. 138,	120
v. Oram, 106 N. C. 467,	66	v. Ross, 11 How. 294,	337
Hillstad v. Hostetter, 46 Minn. 393,	657	Hoge v. Richmond, etc., Co., 93 U.	
Hilltown Road, 18 Pa. St. 233,	648	S. 1,	388
Hilton v. Southwick, 17 Me. 303,	621	Hogshead v. State, 120 Ind. 327,	570, 574, 791
Hinckley v. Gilman, etc., Co., 94 U.		Hogue v. McClintock, 76 Ind. 205,	379, 467
S. 467, 115,	136	Hogg v. State, 7 Ind. 551,	541, 618
Hinds v. Harbou, 58 Ind. 121,	678	Hohenthal v. Watson, 28 Mo. 360,	54
v. Tweedle, 7 How. Pr. 278,	587	Hohorst v. Hamburg-American	
Hines v. Driver, 89 Ind. 339, 70, 98,	474	Packet Co., 38 Fed. Rep. 273,	633
v. Driver, 100 Ind. 315, 70, 791,	792	Hoke v. Applegate, 92 Ind. 470, 533,	566
v. Durer, 89 Ind. 339,	783	Holborn Union v. St. Leonard's	
Hinkle v. Ball, 34 Ark. 177,	434	Parish, 2 Q. B. Div. 145,	439
v. Davenport, 38 Ia. 355,	523	Holbrook v. Connelly, 6 Ohio St.	
v. Holmes, 85 Ind. 405, 312, 313,	339	199,	638
v. Margerum, 50 Ind. 240, 361,	399, 779	Holcroft v. King, 25 Ind. 352,	179, 557

TABLE OF CASES.

lxix

[References are to Pages.]

Holding v. Smith , 42 Ind. 536,	675	Hood v. Pearson , 67 Ind. 368,	470
Holdridge v. Sweet , 23 Ind. 118,	599	Hook v. Linton , 10 Pet. 107,	115
Holladay v. Elliott , 3 Ore. 340,	523	Hooker's Estate , In re, 75 Ia. 377,	291
Holland v. Challen , 110 U. S. 25,	11	Hooker v. Brandon , 66 Wis. 498,	610,
v. Jones, 9 Ind. 495,	598		638
v. Union County, 68 Ia. 56,	675	v. Eagle Bank, 30 N. Y. 83,	697
Hollett v. Evans , 28 Ind. 61,	69	v. Village of Brandon, 75 Wis. 8,	655
v. Thomas, 90 Ind. 398,	567	Hooksett v. Amoskeag, etc., Co. ,	
Holliday v. Henderson , 67 Ind. 103,	435,	44 N. H. 105,	577
	591	Hooper v. Beecher , 109 N. Y. 609,	124,
Hollingsworth v. Koon , 117 Ill. 511,	353		445
v. State, 79 Ga. 605,	535	v. State (Tex.), 16 S. W. Rep.	
v. State, 8 Ind. 257,	261, 263	655,	761
v. State, 111 Ind. 289,	239, 251	Hoot v. Spade , 20 Ind. 326,	524
Holloran v. Midland Ry. Co. ,	28	Hoover v. State , 110 Ind. 349,	408
N. E. Rep. 549,	92, 103, 138, 150,	v. Wood, 9 Ind. 286,	28
	207, 213, 364, 447, 448	Hopcraft v. Keys , 9 Bing. 613,	56
Holly v. Perry , 94 N. C. 30,	320	Hope v. Blair , 105 Mo. 85,	663
Holloway v. Gallias , 49 Cal. 149,	141	Hopkins v. Hopkins , 39 Wis. 165,	450
v. Holloway, 103 Mo. 274,	75	v. Stanley, 43 Ind. 553, 692, 693,	695
v. State, 53 Ind. 554,	528, 531,	Hopkinson v. Steel , 12 Vt. 582,	537
v. Stephens, 1 Hun. 308,	497	Hopson v. Murphy , 4 Tex. 248,	487
Holman v. Herscher (Tex.) , 16 S.		Hopt v. United States , 104 U. S. 631,	689
W. Rep. 984,	266	Hopt v. Utah , 120 U. S. 430,	531
v. Langtree, 40 Ind. 349,	603	Hord v. Noblesville , 6 Ind. 55,	301
v. State, 105 Ind. 513,	7	Horn v. Indianapolis Nat. Bank , 125	
Holmes v. Boyd , 90 Ind. 332,	597	Ind. 381,	149, 156, 416, 488, 595,
v. Braidewood, 82 Mo. 610,	545	Hornaday v. Shields , 119 Ind. 201,	394
v. Campbell, 12 Minn. 221,	670	Hornberger v. State , 5 Ind. 300, 232, 249,	401, 744
v. Fairbanks, 17 Wis. 434,	546,		
v. Gayle, 1 Ala. 517,	765	Hornbuckle v. Stafford , 111 U. S.	
v. Hinkle, 63 Ind. 518,	700	389,	509, 573
v. Jones, 121 N. Y. 461,	617	Horicon Shooting Club v. Gorsline ,	
v. Phenix, etc., Co., 49 Ind. 356,	277	73 Wis. 196,	77
v. State, 88 Ind. 145,	252	Hormann v. Hartmetz , 128 Ind.	
v. Staler, 57 Ill. 209,	526	353,	295, 609, 752, 758
v. Turner Falls Co., 150 Mass.		Horner v. Doe , 1 Ind. 130,	672
535,	739	v. Hoadley, 97 Ind. 600,	743, 760
v. Wallace, 46 Pa. St. 266,	192	Hornsby v. South Carolina R. Co. ,	
Holstein v. Adams , 72 Tex. 485,	610	26 S. C. 187,	536
Holt v. Edmondson , 31 Ga. 357,	93	Horton v. Green , 104 N. C. 400,	454
v. Simons, 14 Mo. App. 450,	767	v. Sawyer, 59 Ind. 587,	350
v. State, 11 Ohio St. 691,	514, 517	v. Wilson, 25 Ind. 316, 162, 299,	767,
v. Board, 55 Ind. 194,	397		782, 786
Holten v. Holten , 5 Wkly. Dig. 14,	549	Hose v. Allwine , 91 Ind. 497,	301
Holton v. Kemp , 81 Mo. 661,	677	Hostetler v. State , 62 Ind. 183,	394
Holtzclaw v. Ware , 34 Ala. 307,	224	Hoston v. Ducker , 86 Ky. 123,	91
Holzman v. Hibben , 100 Ind. 338,	732	Hotchkiss v. Jones , 4 Ind. 260,	186
Homan v. Brinckerhof , 1 Denio, 184,	414	v. Platt, 66 N. Y. 620,	116
Home, etc., Co. v. Caldwell , 85 Ala.		v. Platt, 7 Hun. 56,	270
607,	402	Houck v. Graham , 106 Ind. 195,	566, 588
v. Camden, 2 H. Bl. 533,	441	Houk v. Allen , 126 Ind. 568,	620, 787
Home Ins. Co. v. Duke , 75 Ind. 535,	394	v. Barthold, 73 Ind. 21, 284, 670,	671
Home Life Ins. Co. v. Dunn , 20		Hough v. Western, etc., Co. , 1 Biss.	
Ohio St. 175,	72	425,	72
Home for Inebriates v. Kaplan		Houghton, Appeal of , 42 Cal. 35,	61
(Cal.), 24 Pac. Rep. 119,	64	v. Jones, 1 Wall. 702,	398
Hon v. State , 89 Ind. 249,	400	House v. Duncan , 50 Mo. 453,	522
Honeycutt v. St. Louis, etc. , 40		v. McKinney, 54 Ind. 240,	623
Mo. App. 674,	265	v. Wright, 22 Ind. 383,	70

[References are to Pages.]

Houseman v. Roberts, 5 C. & P.	696	Hudson Canal Co. v. Pennsylvania	
394,	696	Co., 8 Wall. 276,	305
Houston v. Briner, 59 Ind. 25,	296	Huff v. Cole, 45 Ind. 300,	480, 645
v. Bruner, 39 Ind. 376,	70, 784	v. Gilbert, 4 Blackf. 19,	755
v. Moore, 3 Wheat. 433,	499	v. Lafayette, 108 Ind. 14,	326
v. Starr, 12 Tex. 424,	70	v. Shepard, 58 Mo. 242,	633
v. Ward, 8 Tex. 124,	487	Huffman v. Hughlett, 11 Lea. 549,	589
v. Williams, 13 Cal. 24,	7, 9	v. Indiana Nat. Bank, 51 Ind.	268
Howard v. Carpenter, 22 Md. 249,	192	394,	239
v. Kopperl, 74 Tex. 494,	676	v. State, 28 Tex. App. 174,	647
v. Russell, 75 Tex. 171,	315	Huffmond v. Bence, 128 Ind. 131,	532, 647
v. Ross (Wash.), 28 Pac. Rep.	526,	Hufford v. State, 6 Ind. 365,	254
v. Sexton, 1 Denio, 440,	755	Hughes, Ex parte, 114 U. S. 147,	438
v. Winters, 3 Nev. 539,	648	Hughes' Appeal, 90 Pa. St. 60,	490
Howe v. Briggs, 17 Cal. 385,	793	Hughes v. Ainslee, 28 Ind. 346,	786
v. Fleming, 123 Ind. 262,	788	v. Commonwealth (Ky.), 14 S.	
Howe, etc., Co. v. Rosine, 87 Ill. 165,	701	W. Rep. 682,	648
Howell v. Crutchfield, Hemp. 99,	657	v. Detroit, etc., Co., 78 Mich.	
v. Foster, 25 Ill. App. 42,	434	399,	492
v. Mills, 53 N. Y. 322,	601	v. Feeter, 18 Ia. 142,	635
v. Morlan, 78 Ill. 162,	515, 516	v. Galveston, etc., Co., 67 Tex.	
Howes v. Halliday, 10 Ind. 339,	673	595,	260
Howie v. State, 1 Ala. 113,	782	v. Hinds, 69 Ind. 93,	179, 180
Howk v. Allen, 126 Ind. 568,	119	v. Hughes, 54 Pa. St. 240,	310
Howland v. Reeves, 25 Mo. App.	510	v. McKee, 1 A. K. Marsh. 28,	781
458,	791	v. Moore, 17 Mo. App. 148,	191
Howley v. Smith, 45 Ind. 183,	562	v. People, 116 Ill. 330,	528
Howorth v. Scarce, 29 Ind. 278,	394	v. Swope (Ky.), 1 S. W. Rep.	
Hovey v. Chase, 52 Me. 304,	570	394,	44
v. McDonald, 109 U. S. 150,	116,	v. Wheeler, 76 Cal. 230,	640, 653
v. State, 119 Ind. 386,	136, 341	Hull v. Green, 26 Ind. 388,	524
Hoxie v. County Commissioners,	58, 479	v. Louth, 109 Ind. 315, 725, 743,	760,
25 Me. 333,	441	v. Westcutt, 17 Fla. 280,	772
Hoyt, Ex parte, 13 Pet. 279,	438	Hulton v. Uphill, 2 H. L. Cas. 674,	474
Hoyt v. Williams, 41 Mo. 270,	765	Humbert v. Brisbane, 25 S. C. 506,	399
Hubbard v. Camperdown Mills, 26		Humble v. Bland, 6 Term. R. 255,	632
S. C. 581,	650	Hume v. Conduit, 76 Ind. 598, 147,	284
Hubbell v. Broadwell, 8 Ohio, 120,	495	Hummel v. Tyner, 70 Ind. 84,	570
v. McCourt, 44 Wis. 584,	16	Humphrey v. Baker, 103 U. S. 736,	450,
v. Skiles, 16 Ind. 138,	599, 782	v. Ball, 4 Gr. (Ia.) 204,	451
v. Woolf, 15 Ind. 204,	603	Humphreys v. Klick, 49 Ind. 189,	793
Huber v. State, 57 Ind. 341,	786	v. State, 75 Ind. 469,	792
Hubertz v. State, 50 Ind. 374,	362	v. Stevens, 49 Ind. 491,	566
Hubble v. Osborn, 31 Ind. 249,	536	Humphries v. Davis, 100 Ind. 274,	218,
v. Wright, 23 Ind. 322,	554		265, 364
Hubler v. Pullen, 9 Ind. 273,	520	Hunderlock v. Dundee, etc., Co., 88	
Huckabee v. Nelson, 54 Ala. 12,	133	Ind. 139,	116, 121
Huckell v. McCoy, 38 Kan. 53,	622	Hunes v. Reeves, 2 Gr. (Ia.) 190,	272
Huckshold v. St. Louis, etc., Co.,		Hungerford v. Cushing, 8 Wis. 324,	16,
99 Mo. 548,	623		498
Hudelson v. Armstrong, 70 Ind. 99,	308	Hunnicut v. Peyton, 102 U. S. 333,	743
Hudgins v. Kemp, 18 How. 530,	208	Hunsinger v. Hofer, 110 Ind. 390,	537,
Hudnit v. Nash, 1 C. E. Green (N.			676
J.), 550,	134	Hunt v. Blackburn, 127 U. S. 774,	455
Hudson v. Densmore, 68 Ind. 391,	159	v. Blanton, 89 Ind. 38,	712
v. Houser, 123 Ind. 309,	570	v. Brennan, 1 Hun. 213,	634
v. State, 34 Ala. 253,	674	v. Campbell, 83 Ind. 48,	215, 525
v. State, 1 Blackf. 317,	529, 530	v. Danforth, 2 Curt. C. C. 592,	590

1xx1

Hunt v. Hawley, 70 Ia. 183,	118	Hyde v. Redding, 74 Cal. 493,	291
v. Kemper, 9 S. W. Rep. 803,	252	Hydraulic, etc., Co. v. Neumeister,	
v. Lane, 9 Ind. 248,	588	15 Mo. App. 592,	317
v. State, 49 Ga. 255,	534	Hyer v. Norton, 26 Ind. 269,	129, 248,
v. State, 28 Tex. App. 149,	623		350
Hunter v. Chrisman, 70 Ind. 439,	52,	Hyland v. Milner, 99 Ind. 308,	537, 703
	361, 448		
v. Fitzmaurice, 102 Ind. 449,	290,		
	297, 785		
v. French, 86 Ind. 320,	222		
v. Harris, 24 Ill. App. 637,	559		
v. Hatfield, 68 Ind. 416,	162, 762		
v. Hunter, 100 Ill. 519,	68		
v. Leavitt, 36 Ind. 141,	273		
v. McLaughlin, 43 Ind. 38,	398		
v. Miller, 17 Ind. 88,	75		
v. Pfeiffer, 108 Ind. 197,	638		
v. State, 101 Ind. 406,	256, 257		
v. Trench, 86 Ind. 320,	225		
Huntington v. Colman, 1 Blackf.			
345,	571, 578		
v. Conkey, 23 Barb. 218,	615, 616		
v. Drake, 24 Ind. 347,	70		
Huntington, City of, v. Breen, 77			
Ind. 29,	391		
Huntington Co. v. Kaufman (Pa.),			
17 Atl. Rep. 595,	61		
Hupp v. McInturf, 4 Ill. App. 449,	793		
Hurd v. Earl, 4 Blackf. 184,	404		
v. Newton, 36 Mich. 35,	682		
Hurlbut v. Hurlbut, 12 Ind. 346,	150		
v. Thomas, 55 Conn. 181, 10			
Atl. Rep. 556,	148		
Hurn, Ex parte (Ala.), 9 So. Rep.			
115,	435		
Hurven v. Lehman, 35 Ill. App. 489,	770		
Hursh v. Hursh, 99 Ind. 500, 81, 99,	101		
Hurst v. Ash Grove, 96 Mo. 168,	288		
Husman v. Sims, 104 Ind. 317,	326		
Husted v. Mead, 58 Conn. 55,	792		
Huston v. McCloskey, 76 Ind. 38,	580,		
	774		
v. Neil, 41 Ind. 504,	599		
v. Vail, 51 Ind. 299,	621		
v. Vail, 84 Ind. 262,	357		
Hutchison v. Trauerman, 112 Ind. 21,	480		
Hutkoff v. Demorest, 103 N. Y. 377,	4		
Hutts v. Bowers, 77 Ind. 211,	465		
v. Hutts, 51 Ind. 581,	261, 669, 703		
v. Shoaf, 58 Ind. 395,	296		
Hyatt v. Clements, 65 Ind. 12,	614, 615,		
	729, 777		
v. Cochran, 69 Ind. 436,	420, 670		
v. Dusenbury, 106 N. Y. 663,	114		
v. Dusenbury, 1 Silvernail (N.			
Y.) 475,	448		
v. Hyatt, 33 Ind. 309,	291		
v. Mattingly, 68 Ind. 271,	790		
v. Wolfe, 22 Mo. App. 191,	158		
Hyde v. Curling, 10 Mo. 359,	178		

Indianapolis, etc., Co. v. City of Lawrenceburgh, 37 Ind. 489,	505	Irwin v. Wickersham, 25 Pa. St. 316,	198,
v. Lewis, 119 Ind. 218,	708	Isham v. State, 1 Sneed, 111,	674, 199
v. McCaffrey, 62 Ind. 552,	780	Isler v. Bland, 117 Ind. 457,	266
v. McLin, 82 Ind. 435,	640	Israel v. Jackson, 93 Ind. 543,	32, 532, 626
v. Negley, 62 Ind. 178,	268	Ivens v. Cincinnati, etc., Co., 103 Ind. 27,	588
v. Petty, 30 Ind. 261,	394, 398	Ives v. Merchants' Bank, 12 How. 159,	310, 328
v. Pitzer, 109 Ind. 179, 527, 529,	737	Ivory v. Delore, 26 Mo. 505,	75
v. Risley, 50 Ind. 60,	72	Ivy v. Lusk, 11 La. Ann. 486,	135
v. Routledge, 7 Ind. 25,	287		
v. Rutherford, 29 Ind. 82,	514, 580		
v. Smythe, 45 Ind. 322,	295, 554		
v. Solomon, 23 Ind. 534,	419, 420, 422, 735		
v. Stout, 53 Ind. 143, 143, 297,	580		
v. Summers, 28 Ind. 521,	635		
v. Watson, 114 Ind. 20,	68		
v. Wyatt, 16 Ind. 204,	767		
Indianapolis, City of, v. McAvoy, 86 Ind. 587,	440		
v. Kollman, 79 Ind. 504,	757, 760		
v. Lawyer, 38 Ind. 348,	580		
v. Parker, 31 Ind. 230,	790		
v. Scott, 72 Ind. 106, 538, 577,	579		
Indianapolis v. Fairchild, 1 Ind. 315,	36		
v. Patterson, 112 Ind. 344,	108		
Inferior Court v. Monroe, 21 Ga. 174,	763		
Ingel v. Scott, 86 Ind. 518,	294, 774		
Ingraham v. State, 128 Ind. 225, 440,	592		
Ingraham, In re, 64 N. Y. 310,	514		
Ingram v. State, 24 Neb. 1,	557		
v. Wackernagel (Ia.), 48 N.W. Rep. 998,	549		
Insurance Co. v. Dunn, 19 Wall. 214,	72, 631		
v. Morse, 20 Wall. 445,	72		
v. Lea, 21 Wall. 158,	746		
Insurance Co. of N. A. v. For- cheimer, 86 Ala. 541,	597		
Insurance Co. of Pennsylvania v. O'Connell, 34 Ill. App. 357,	551		
International, etc., Co. v. State, 75 Tex. 356,	109		
v. Underwood, 64 Tex. 463,	539		
v. Underwood, 67 Tex. 589,	266		
Ipwich v. Essex Co., 10 Pick. 519,	648		
Ireland v. Emmerson, 93 Ind. 1,	692		
v. Palestine, etc., Turnpike Co., 19 Ohio St. 369,	28		
Iron Mountain Bank v. Armstrong, 92 Mo. 265,	128		
Irons v. Collins, 80 Ala. 108,	673		
Irrigation Resolutions, In re, 9 Col. 620,	5		
Irwin v. Anthony, 8 Ind. 470,	749		
v. Lowe, 89 Ind. 540,	368, 374		
v. Smith, 72 Ind. 482, 297, 755,	770, 771		
		J	
		J. Oberman Brewing Co. v. Ohler- king, 33 Ill. App. 26,	628
		Jackson v. Alabama, etc., Co., 58 Miss. 648,	72
		v. Botsford, 8 Blackf. 194,	615
		v. Bunnell, 113 N. Y. 216,	86
		v. Cole, 81 Mich. 440,	125
		v. Feather River, etc., Co., 14 Cal. 18,	555
		v. German Ins. Co., 27 Mo. App. 62,	624
		v. Goddard, 1 Mass. 230,	94
		v. Harby, 70 Tex. 410,	623
		v. Hardin, 83 Mo. 175,	699
		v. Hesketh, 2 Stark. 454,	615
		v. Hosmer, 14 Mich. 88,	132
		v. Myers, 120 Ind. 504,	74, 75
		v. Relf, 24 Fla. 198,	309
		v. Roe, 9 Johns. 77,	788
		v. Sharpe, 29 Ind. 167,	792
		v. Smith, 120 Ind. 520, 12, 286,	418, 420, 671
		v. State, 14 Ind. 327,	538
		v. State, 104 Ind. 516, 147, 284,	285, 419, 672
		v. State, 28 Tex. App. 143,	549
		v. Van Deverder, 76 Ind. 27,	172
		v. Wheeler, 6 Johns. 272,	34
		Jacksonville, etc., Co. v. Peninsular, etc., Co. (Fla.), 9 So. Rep. 661,	655
		Jackson School Tp. v. Farlow, 75 Ind. 118,	428, 514
		Jacobs v. Graham, 1 Blackf. 392, 101,	100, 349
		v. Morrow, 21 Neb. 233,	450, 681
		Jager v. Doherty, 61 Ind. 528,	113
		James v. Dexter, 112 Ill. 489,	639
		v. McWilliams, 6 Munf. (Va.) 501,	192
		v. Roberts, 78 Tex. 670,	315, 340
		v. Woods, 65 Miss. 528,	314
		Jamison v. Barelli, 20 La. Ann. 452,	468
		v. Board, 56 Ind. 466,	680,

TABLE OF CASES.

lxxiii

[References are to Pages.]

Janitor, In re, 35 Wis. 410,	9, 37	Jewell v. Chicago, etc., Co., 54 Wis.	580
Jaquay v. Hartzell, 1 Ind. App. 500,	708	610,	580
v. Cordesman, etc., Co., 106 Ind.		v. Parr, 13 Com. B. 909,	643
141,	689	Jewett v. Albany City Bank, 1 Clark	
Jaqueth v. Jackson, 17 Wend. 434,	111	(N. Y.), 59,	457
Jarboe v. Severin, 112 Ind. 572, 215,	412,	Joab v. Sheets, 99 Ind. 328,	88
532,	646	Jobbins v. Gray, 34 Ill. App. 208,	551
Jared v. Hill, 1 Blackf. 155,	439	Joerns v. La Nicca, 75 Ia. 705,	282
Jarvins v. Banta, 83 Ind. 528, 162,	172,	Johannes v. Yong, 42 Wis. 401,	66, 96
718		Johet, etc., Co. v. Shields, 134 Ill.	
v. Hamilton, 37 Wis. 87,	91	269,	641, 642
Joseph v. Schapper, 1 Ind. App. 154,	217	John v. Clayton, 1 Blackf. 54,	273
Jauncey v. Rutherford, 9 Paige, 273,	142	v. Farmers', etc., Bank, 2 Blackf.	
Jay v. Indianapolis, etc., Co., 17		367,	592
Ind. 262,	678	Johns v. Hedges, 60 Md. 215,	648
Jean v. Hennessy, 69 Ia. 373,	282	v. State, 104 Ind. 557,	252
Jeansch v. Lewis (S. D.), 48 N. W.		Johnson v. Ahrens, 117 Ind. 600,	636
Rep. 128,	581	v. Ballew, 2 Port (Ala.), 29,	763
Jefferson v. Chapman, 127 Ill. 438,	401	v. Bell, 10 Ind. 363, 743, 748, 759,	761
Jefferson Co. v. Ferguson, 13 Ill. 33,	523	v. Breedlove, 72 Ind. 368, 562, 565,	
Jefferson County v. Hawkins, 23		567, 608, 636	
Fla. 223,	514	v. Briscoe, 92 Ind. 367,	301, 397
Jeffersonville, etc., Co. v. Avery, 31		v. Commonwealth, 87 Ky. 189,	248
Ind. 277,	533	v. Conklin, 119 Ind. 109,	520, 638
v. Bowen, 40 Ind. 545,	539	v. Crawfordsville, etc., Co., 11	
v. Bowen, 49 Ind. 154,	178,	Ind. 280,	321, 635
v. Hendricks, 41 Ind. 48,	533	v. Culver, 116 Ind. 278, 356, 575,	623,
v. Lyon, 55 Ind. 477,	578		710
v. Swift, 26 Ind. 459,	195	v. D'Heur, 71 Ind. 199,	608
v. Worland, 50 Ind. 339,	525	v. Dellidge, 35 Mich. 436,	671
Jeffersonville, City of, v. Steamboat		v. Evans, 8 Gill. 155,	570
Ferryboat, etc., 35 Ind. 19,	479, 481	v. Gwin, 100 Ind. 466,	569
Jeffries v. Lamb, 73 Ind. 202,	115, 141	v. Herr, 88 Ind. 280,	455
v. Randall, 14 Mass. 205,	527	v. Hobart, 45 Fed. Rep. 542,	621
Jelley v. Gaff, 56 Ind. 371,	137, 520	v. Holliday, 79 Ind. 151,	529, 737
v. Roberts, 50 Ind. 1,	438, 764	v. Hosford, 110 Ind. 572,	399, 717
Jellison v. Goodwin, 43 Me. 287,	572	v. Inghram, 1 Grant's Case, 152,	639
v. Lafonta, 19 Pick. 244,	604	v. Jennings, 10 Gratt. 1,	763
Jemison v. Walsh, 30 Ind. 167,	294	v. Johnson, 115 Ind. 112,	162
Jenkins v. Corwin, 55 Ind. 21,	99, 162	v. Josephs, 75 Me. 545,	614, 615
v. Long, 23 Ind. 460,	178, 179, 181,	v. Jouchert, 124 Ind. 105,	274
192		v. Kohl, 55 Ind. 454,	268
v. Peckinpough, 40 Ind. 133,	354	v. Lynch, 87 Ind. 326,	146
v. Rice, 84 Ind. 342,	247, 294,	v. McCulloch, 89 Ind. 270, 745,	783
636		v. Macon, 1 Wash. (Va.) 4,	750
v. State, 78 Ind. 133,	704	v. Malloy, 74 Cal. 430,	217
v. Tobin, 31 Ark. 306,	572	v. Maples, 49 Ill. 101,	353
Jenks v. State, 39 Ind. 1,	759, 765	v. Maxwell, 87 N. C. 18,	615
Jenne v. Burt, 121 Ind. 275,	520	v. Miller, 43 Ind. 29,	150, 363
v. Marble, 37 Mich. 319,	274	v. Miller (Ia.), 48 N. W. Rep.	
Jenney v. Jenney, 14 Mass. 231,	141	1081,	636
Jennings v. Bank, 13 Col. 417,	411	v. Miller (Ia.), 47 N. W. Rep.	
v. Commonwealth, 17 Pick. 80,	674	903,	708
v. Durham, 101 Ind. 391,	625, 774	v. Moore, 112 Ind. 91,	178
Jerome v. McCarter, 21 Wall. 17,	316,	v. Nation,	134
341,	342	v. Northern, etc., Co., 39 Minn.	
Jessup v. City Bank, 15 Wis. 604,	495	30,	64
v. Eldridge, Coxé (N. J.), 401,	619	v. Pontious, 118 Ind. 270,	525
Jessup's Est., In re, 81 Cal. 408,	465	v. Prine, 55 Ind. 351,	708, 728
Jessup v. Spears, 38 Ark. 457,	127	v. Putnam, 95 Ind. 57,	708

[References are to Pages.]

Johnson v. Ramsay, 91 Ind. 189,	562	Jones v. Null, 9 Neb. 253,	75
v. Slaphey, 85 Ga. 576,	786	v. Osgood, 2 Seld. 233,	74
v. State, 2 Ind. 652,	538	v. Payne, 107 Ind. 307,	30
v. State, 43 Ark. 391,	777	v. Pethast, 72 Ind. 158,	39
v. State, 65 Ind. 269,	763	v. Rittenhouse, 87 Ind. 348,	53
v. State, 116 Ind. 374,	285	v. Snodgrass, 54 Mo. 598,	6
v. Stebbins, 5 Ind. 364,	401	v. State, 80 Ga. 640,	45
v. Stephenson, 104 Ind. 368,	104.	v. State, 2 Blackf. 475,	529, 53
	214, 263	v. State, 11 Ind. 357,	25
v. Thatcher, 7 Gray, 242; 12		v. State, 49 Ind. 549,	69
Gray, 198,	115	v. State, 89 Ind. 82,	78
v. Tyler, 1 Ind. App. 387,	620	v. State, 112 Ind. 193,	60
v. Unversaw, 30 Ind. 435,	294, 350	v. State, 118 Ind. 39,	702, 73
v. Williams, 28 Ark. 478,	112	v. Talbot, 4 Mo. 279,	66
Johnson School Tp. v. Citizens		v. Thompson, 12 Cal. 191,	11
Bank, 81 Ind. 515,	736	v. United States Slate Co., 16	
Johnston v. Flint, 75 Tex. 379,	345	How. Pr. 129,	63
v. Holmes, 32 S. C. 434,	675	v. Van Patten, 3 Ind. 107,	182
v. Jones, 1 Black. 209,	700		648, 74
v. Mason, 27 Mo. 511,	535	v. Wilder, 28 Minn. 238,	67
v. Morrow, 60 Mo. 339,	486	v. Woodstock Iron Co., 90 Ala.	
v. State, 128 Ind. 16,	9	545,	30
Johnston, etc., Co. v. Bartley, 94		v. Yetman, 6 Ind. 46,	4
Ind. 131,	702	Jonsson v. Lindstrom, 114 Ind. 152,	25
Joint School District v. Kemer, 68		Jordan, Ex parte, 94 U. S. 248,	11
Wis. 246,	66	v. Bowman, 28 Mo. App. 608,	14
Jolley v. Taylor, 1 Camp. 143,	697	v. De Heur, 71 Ind. 199,	608, 72
Jolly v. Ghering, 40 Ind. 139,	735	v. National Shoe, etc., Bank, 74	
v. Terre Haute, etc., Co., 9 Ind.		N. Y. 467,	41
417,	777	v. Quick, 11 Ia. 9,	77
Jones, In re, 33 Minn. 405,	83	v. St. Paul, etc., Co. 42 Minn.	
Jones v. Ahrens, 116 Ind. 490,	636	172,	72
v. Angell, 95 Ind. 376,	570, 786	Joseph v. Mathes, 110 Ind. 114,	67
v. Baird, 76 Ind. 164,	714, 715	v. Schnaider's Brewing Co. v.	
v. Black, 48 Ala. 540,	28	Levvie, 41 Mo. App. 584,	44
v. Butterworth, 3 N. J. L. 345,	736	Joseph Uhrig Brewing Co., In re,	
v. Cardwell, 98 Ind. 331,	604	11 Mo. App. 387,	12
v. Chicago, etc., Co., 42 Minn.		Joslin v. Grand Rapids, etc., Co.,	
183,	792	53 Mich. 322,	70
v. Christian, 24 Mo. App. 540,	760	Joslyne v. Eastman, 46 Vt. 258,	32
v. Doe, 1 Ala. 109,	296, 733, 765	Josuez v. Conner, 75 N. Y. 156,	7
v. Dowle, 9 M. & W. 19,	54	Jouchert v. Johnson, 108 Ind. 436,	63
v. Droneberger, 23 Ind. 74,	207, 208,	Joy v. State, 14 Ind. 139,	54
209, 307, 318, 325, 330,	331	Joyce v. Dickey, 104 Ind. 183, 91, 92,	10
v. Etheridge, 6 Port (Ala.), 208,	132	Judah v. Trustee, etc., 23 Ind. 272,	61
v. Foley, 121 Ind. 180,	165, 196	Judd v. Martin, 97 Ind. 173,	6
v. Fortune, 128 Ill. 518,	478	v. Small, 107 Ind. 398,	398, 52
v. Gregg, 17 Ind. 84,	589	Judge v. Ohm, 89 Cal. 134,	44
v. Hathaway, 77 Ind. 14, 398, 399,	635	Judge of Oneida C. P. v. People, 18	
v. Jones, 91 Ind. 378,	222, 225, 760	Wend. 79,	43
v. Jones, 108 N. Y. 415,	631	Judge of Probate v. Stone, 44 N. H.	
v. Julian, 12 Ind. 274,	581	593,	73
v. Keen, 115 Mass. 170,	634	Judson v. Love, 35 Cal. 463,	115, 14
v. Layman, 123 Ind. 569,	746, 774,	Judy v. Citizen, 101 Ind. 18,	34, 70
	782	v. Gilbert, 77 Ind. 96,	58
v. Lindsay, 98 Ind. 218,	536	Julian v. Beal, 34 Ind. 371,	57, 47
v. McGrew, 1 Blackf. 192,	404	v. Rogers, 87 Mo. 229,	209, 32
v. Malloy, 15 S. W. Rep. 198,	340	Julis v. Ingalls, 17 Abb. Pr. 448, n, 69	
v. Mathews (Miss.), 4 So. Rep.		June v. Payne, 107 Ind. 307,	212, 331
547,	488		332, 397, 63

TABLE OF CASES.

lxxv

[References are to Pages.]

Johnson v. Board, 95 Ind. 567,	592	Keesling v. Ryan, 84 Ind. 89,	159, 511
Justice v. Justice, 115 Ind. 201,	159	v. Watson, 91 Ind. 578,	566
K		Kegg v. Welden, 10 Ind. 550,	300, 630
Kabe v. The Vesal Eagle, 25 Wis.		Kehr v. Hall, 117 Ind. 405,	712
780		Keighler v. Savage, etc., Co., 12	
Kalamazoo, etc., Co. v. McAlister,		Md. 383,	21
56 Mich. 327,	619	Keiser v. Lines, 57 Ind. 431,	530
Kalchhoff v. Zoehrlaut, 43 Wis. 373,	692	v. Lines, 79 Ind. 445,	391
Kane v. Fielding, 50 Wis. 339,	537	v. Yandes, 45 Ind. 174,	735
Kane v. Graddon, 6 Blackf. 138,	116	Keisling v. Readle, 1 Ind. App. 240,	791
Kanawha v. State, 26 Ind. 225,	378	Keith v. Clark, 97 U. S. 454,	305, 666
Kanawha v. Castleman, 29 Mo.		Keitzinger v. Reynolds, 11 Ind. 545,	312
App. 658,	28, 293	Kellenberger v. Boyer, 37 Ind. 188,	598
Kanawha v. Armington, 58 Ind.		v. Perrin, 46 Ind. 282,	287, 769
357		Keller v. Boatman, 49 Ind. 101, 132,	448
Kansas City v. Allen, 28 Mo. App.		Keller v. Williams, 49 Ind. 504,	599
758		Kelley v. Adams, 120 Ind. 340,	604
Kansas City Court (Mo.), 16 S.W.		v. Bennett, 132 Pa. St. 218, 260,	344
Rep. 553,	40	v. Burnell, 14 Ind. 328,	789
Kansas City, etc., Co. v. Doggett,		v. Fitzell, 65 Cal. 87,	168
7 Miss. 44,	557	v. Love, 35 Ind. 106,	736
v. Smith, 90 Ala. 25,	738	Kellinger v. Roe, 7 Paige, 362,	143
Kansas, etc., Co. v. Couse, 17 Kan.		Kellogg v. Cochran, 87 Cal. 192,	470
640		v. Nelson, 5 Wis. 125,	537
Kaw v. Hawley (Kan.), 27 Pac. Rep.		Kellum v. Berkshire, etc., Co., 101	
733		Ind. 455,	34
Kay v. Martin, 15 How. 198,	72	Kelly v. Chicago, etc., Co., 70 Wis.	
Kay v. Karr, 19 N. J. Eq. 427,	147	335,	463
Kay v. Follett, 9 Col. 348,	447	v. Davis, 1 Head. 71,	547
Kay v. Kaster, 93 Ind. 581,	374	v. Israel, 11 Paige, 147,	129, 132
Kayakuma, etc., Co. v. Green Bay,		v. Murphy, 70 Cal. 560,	763
etc. Co. 75 Wis. 385,	601	v. Norwich, etc., Co. (Ia.), 47	
Kelley v. Brown (R. I.), 20 Atl. Rep.		N. W. Rep. 986,	663
620,	792	v. Troy, etc., Co., 3 Wis. 254,	617
Kelnaugh v. Jonesville, 24 Wis.		Kelsey v. Campbell, 38 Barb. 238,	210
483		v. Chicago, etc., Co. (S. D.),	
Kew Valley Life Ass'n v. Lemke,		45 N. W. Rep. 204,	675
2 Kan. 142,	631	v. Cooley, 58 Hun. 601,	554
Kew v. Riley (Ill.), 26 N. E. Rep.		v. Western, 2 N. Y. 500,	17
655		Kelso v. Wolf, 70 Ind. 105,	790
Kew v. Van Sickle, 74 Ind. 529,	708,	Kemmler, In re, 136 U. S. 436,	17
713,	718	Kemper v. Trustees, 17 Ohio, 293,	514
Kew v. Snodgrass, 12 Ore. 11,	750	Kendall v. Post, 8 Ore. 141,	26
Kew v. State, 44 Ind. 449,	678	v. United States, 12 Pet. 524,	12
Kew v. Umphries, 4 Ind. 492,	792	v. Wilkinson, 4 E. & B. 680,	333
Kew v. Kramer (Ind.), 28 N. E.		Kendell v. Judah, 63 Ind. 291,	781
Rep. 1121,	32	Kennegar v. State, 120 Ind. 176, 253,	527
Kew v. McDonald, 17 Ind. 518,	70	Kennedy v. Anderson, 98 Ind. 151,	511,
Kew v. Newcomer, 1 Md. 241,	704	678	
Kew v. Carpenter, 47 Ind. 597,	563	v. Divine, 77 Ind. 490,	120, 774
Kew v. Council Bluffs, 62 Ia. 450,	188	v. Hanner, 19 Cal. 374,	496, 497
Kew v. Newcomer, 1 Md. 241,	703	v. Holladay, 105 Mo. 24,	620
Kew v. Schnedler, 15 Mo. App. 590,	483	v. McNichols, 29 Mo. App. 11,	665
v. Whittinger, 40 Md. 489,	338	v. Moore, 17 S. C. 464,	616
Kew v. Ex parte, 21 Ala. 558,	555	v. Robinson, 70 Ind. 524,	404
Kew v. State, 8 Wis. 132,	679	v. Shaw, 38 Ind. 474,	763
Kew v. White, 136 Mass. 23,	208	v. State, 33 Ind. 439,	256
Kew v. Force, 89 Ind. 81, 70, 179,	451	v. State, 37 Ind. 355,	769
		v. State, 53 Ind. 542,	250, 291

[References are to Pages.]

Kennedy v. State, 62 Ind. 136,	258	Kimball v. Loomis, 62 Ind. 201,	2
v. State, 66 Ind. 370,	162	v. Rogers, 7 So. Rep. 241,	3
Kennell v. Judah, 63 Ind. 291,	761	v. Semple, 31 Cal. 662,	1
v. Smith, 100 Ind. 494,	373	v. Thompson, 4 Cush. 441,	5
Kenney v. Dodge, 101 Ind. 573,	394	v. Whitney, 15 Ind. 280,	520, 7
Kennicutt v. Parmalee, 109 N. Y.	518	Kimberly v. Arms Co., 40 Fed. Rep.	
650,		548,	450, 451, 4
Kenosha Stove Co. v. Shedd (Ia.),	738	Kimble v. Christie, 55 Ind. 140,	6
48 N. W. Rep. 933,	288,	v. Seal, 92 Ind. 276, 17, 32, 56,	5
Kent v. Lawson, 12 Ind. 675,	203, 288,	Kimbrell v. Rodgers, 90 Ala. 339,	2
299, 777,	786	Kimbrough v. Mitchell, 1 Head.	
v. Mahaffy, 2 Ohio St. 498,	430	(Tenn.) 539,	
Kentucky v. Dennison, 24 How. 66,	440	v. Pitts, 63 Ga. 496,	3
Kenworthy v. Williams, 5 Ind. 375,	689	Kimes v. St. Louis, etc., Co., 85 Mo.	
Kenzis v. Rhodes, 13 Abb. Pr. 337,	270	611,	483, 4
Keokuk, etc., R. R. Co. v. Donnell,	392	Kimple v. Conway, 69 Cal. 71,	
77 Ia. 221,	555	Kincaid v. Indianapolis Nat. Gas	
Kepler v. Conkling, 89 Ind. 392,		Co., 124 Ind. 577,	3
Kermeyer v. Kansas, etc., Co., 18	71	v. Nicely, 90 Ind. 403,	6
Kan. 215,	623	King, Ex parte, 27 Ala. 487,	1
Kern v. Bridwell, 119 Ind. 226,	539,	v. Ackley, 3 T. R. 250,	4
v. Hinderkoper, 103 U. S. 485,	631	v. Barnes, 113 N. Y. 476,	6
v. Maginniss, 41 Ind. 398,	75	v. Brewer, 19 Ind. 267,	3
Kernodle v. Caldwell, 46 Ind. 153,	507,	v. Enterprise Ins. Co., 45 Ind.	
	609	43,	510, 555, 6
v. Gibson, 114 Ind. 451, 168, 296,	508,	v. Hampton, 3 Hayw. (Tenn.)	
	682	60,	4
Kerr v. Lunsford, 31 W. Va. 659,	580	v. Hopkins, 57 N. H. 334,	
v. Martin, 122 Pa. St. 436,	325	v. Hunt, 4 B. & A. 430,	5
Kerstetter v. Raymond, 10 Ind. 199,	521	v. Hunter, 65 N. C. 603,	
Kershman v. Swehla, 62 Ia. 654,	490	v. Justices, etc., 5 Nev. & Man.	
Kershaw v. Wright, 115 Mass. 361,	765	139,	4
Kesler v. Kesler, 39 Ind. 153,	36	v. McCann, 25 Ala. 471,	3
v. Myers, 41 Ind. 543, 162, 164, 182,	183, 769, 770,	v. Rea, 13 Col. 69,	
	771	v. State, 15 Ind. 64,	3
Kessler v. State, 50 Ind. 229,	679	v. Sutton, 8 B. & C. 417,	5
Kester v. Stark, 19 Ill. 328,	599	v. Wilkins, 10 Ind. 216,	2
Ketcham v. Brazil, etc., Co., 88 Ind.		v. Worminghall, 6 M. & S. 350,	1
515,	525, 532, 567, 626, 647,	786	
v. Hill, 42 Ind. 64,	756	Kingen v. State, 45 Ind. 518,	6
Ke-tuc-e-mun-guah v. McClure, 122		v. State, 46 Ind. 132,	5
Ind. 541,	521	Kingman v. Paulson, 126 Ind. 507,	5
Key v. Robinson, 8 Ind. 368,	401		6
Keyes v. State, 122 Ind. 527,	253, 529	Kingsbury v. Buckner, 134 U. S. 650,	2
Keyser v. Farr, 105 U. S. 265,	457, 459	v. Kingsbury, 20 Mich. 212,	
v. Wells, 60 Ind. 261,	296	Kinkade v. Myers, 17 Ore. 470,	6
Kibby v. Cannon, 9 Ind. 371,	162	Kinnaman v. Kinnaman, 71 Ind. 417,	4
Kidd v. Curry, 29 Hun. 215,	497		622, 670, 7
Kidwell v. Kidwell, 84 Ind. 224,	505	Kinnard v. Carter, 64 Ind. 31,	6
Kiefer v. Winkens, 39 How. Pr. 176,	112,	Kinney v. Dodge, 101 Ind. 573, 395,	6
	142	v. Doe, 8 Blackf. 350,	
Kiernass v. Wolff, 56 Hun. 647,	168	v. Hickox, 24 Neb. 167,	1
Kilbourne v. Thompson, 103 U. S.		v. State, 117 Ind. 26,	7
168,	3	Kinsey v. Satterhwaite, 88 Ind. 342,	7
Kile v. Yellowhead, 80 Ill. 208,	126	Kinsley, City of, v. Morse, 40 Kan.	
Kiley v. Perrin, 69 Ind. 387,	276, 447	577,	5
Kille v. Reading Iron Works (Pa.),		Kions v. Day, 94 Ind. 500,	3
19 Atl. Rep. 547,	66	Kiphart v. Brenneman, 25 Ind. 152,	1
Killian v. Eigenmann, 57 Ind. 480,	692		3
Kitts v. Willson, 106 Ind. 147,	215	v. Bridwell, 15 Ind. 211,	

TABLE OF CASES.

lxxvii

[References are to Pages.]

Kirby v. Bowland, 60 Ind. 290,	178	Knox v. McFarren, 4 Col. 348,	177
v. Cannon, 9 Ind. 371,	172	v. Noble, 25 Kan. 449,	765
v. Holmes, 6 Ind. 133,	116, 287	v. Trofalet, 94 Ind. 346,	712, 719
v. Robbins, 13 Ind. 305,	284	v. Work, 2 Binn. 582,	793
Kirmer v. Milwaukee, etc., Co., 74		Knox County v. Aspinwall, 24 How.	
Wis. 470,	556	376,	440
Kirmer v. Wood, 48 Mich. 199,	64	v. Aspinwall, 21 How. 537,	285
Kirk v. State, 14 Ohio, 511,	619	Knox Co. Bank v. Lloyd, 18 Ohio	
Kirkpatrick v. Alexander, 60 Ind.		St. 353,	562
v. Armstrong, 79 Ind. 384,	397	Knusly v. Hire, 28 N. E. Rep. 195,	345
v. Cooper, 89 Ill. 210,	614	Koehler v. Adler, 78 N. Y. 287,	547
v. McDonald, 11 Pa. St. 387,	323	Koerner v. State, 96 Ind. 243, 233,	234, 248
v. Reeves, 121 Ind. 280,	371, 713	Kohler v. Montgomery, 17 Ind. 220,	102
v. Taylor, 118 Ind. 329,	63	Kohn v. Lucas, 17 Mo. App. 29,	767
Kirland v. State, 43 Ind. 146,	661	Koile v. Ellis, 16 Ind. 301,	665
v. Stumph, 73 Ind. 514,	268	Kolle v. Foltz, 74 Ind. 54,	748
Kirstein v. Madden, 38 Cal. 158,	523	Konor v. Happersett, 21 Wall. 162,	479
Kiser v. Beam, 117 Ind. 31,	480	Koon, Ex parte, 1 Denio, 644,	440
Kissel v. Anderson, 73 Ind. 485,	279,	Koonce v. Butler, 84 N. C. 221,	504
294, 511,	751	Koons v. Blanton (Ind.), 27 N. E.	
Kitch v. Otis, 79 Ind. 96,	70, 793	Rep. 334,	526, 625
Kitchen v. Randolph, 93 U. S. 86,	330,	v. Mellett, 121 Ind. 585, 120, 221,	448
	337	v. Price, 40 Ind. 164,	520
Kitsmiller v. Kitchen, 24 Iowa, 163,	147,	v. Williamson, 90 Ind. 599,	76
	671	Kopelke v. Kopelke, 112 Ind. 435,	687,
Kiser v. State, 12 Lea, 564,	534	692, 744	
Kissler v. Corydon, 53 Ind. 95,	71, 126,	Korrady v. Lake Shore, etc., Co.	
	287, 456	(Ind.), 29 N. E. Rep. 1069,	579, 709
Kisspies v. State, 106 Ind. 383,	162, 255	Kountze v. Omaha Co., 107 U. S.	
Klein v. Fischer, 30 Mo. App. 568,	397	378,	308
v. Hoffheimer, 132 U. S. 367,	568	Krack v. Wolf, 39 Ind. 88,	690
v. Russell, 19 Wall. 433,	643	Kraft-Holmes, etc., Co. v. Crow, 36	
Klein-schmidt v. McAndrews, 117		Mo. App. 288,	557
U. S. 282,	200, 741, 760, 767	Krall v. Libbey, 53 Wis. 292,	318
Kleyna v. Haskett, 112 Ind. 515,	147, 154,	Kramer v. Matthews, 68 Ind. 172,	53
	284, 774	Krapp v. Haner, 38 Kan. 430,	618
Kimple v. Boelter, 44 Minn. 172,	570	Kreite v. Kreite, 93 Ind. 583,	282
Kline v. Kline, 49 Mich. 419,	273	Kreitline v. Driskill, 106 Ind. 359,	74
Klinger v. Smith (Ind.), 29 N. E.		v. Franz, 106 Ind. 359,	52, 781
Rep. 364,	290	Kress v. State, 65 Ind. 106,	491
Kirk v. Cuseta, 30 Ga. 504,	73	Krewson v. Cloud, 45 Ind. 273,	567
Kisterman v. Olcott, 25 Neb. 382,	692	Krippendorf v. Hyde, 110 U. S. 276,	114
Krapp v. Banks, 2 How. 73,	50	Krug v. Davis, 85 Ind. 309,	146
v. Deyo, 108 N. Y. 518,	46, 78	v. Davis, 101 Ind. 75, 506, 508,	562,
v. Simon, 96 N. Y. 284,	401	629, 712	
Kearr v. Conaway, 53 Ind. 120, 121, 295,	299, 448, 533, 786	Kruidener v. Shields, 77 Ia. 504,	620
Kearland v. American, etc., Co.,		Krutz v. Craig, 53 Ind. 561,	782, 783
140 U. S. 592,	489	v. Griffith, 68 Ind. 444,	533
Knight v. Fisher, 15 Col. 176,	718	v. Howard, 70 Ind. 174, 299, 533,	786
v. Freeport, 13 Mass. 218,	621	Kshinka v. Cawker, 16 Kan. 63,	757
v. Low, 15 Ind. 374,	630	Kuh v. Metropolitan Ry. Co., 26 J.	
v. People, 11 Col. 308,	318	& S. (N. Y.) 138,	611
Knot v. Taylor, 99 N. C. 511,	281	Kuhlman v. Medlinka, 29 Tex. 385,	709
Kroup v. Piqua Bank, 1 Ohio St. 603,	61	Kuhnert v. Conde, 39 Kan. 265,	100
Krowles v. Dow, 22 N. H. 387,	569	Kuhns v. Gates, 92 Ind. 66,	571
v. State, 27 Tex. App. 593,	413	Kundinger v. Saginaw, 59 Mich. 355,	61
Kro v. Cleveland, 13 Wis. 245,	557	Kundolf v. Thalheimer, 12 N. Y.	
v. Exchange Bank, 12 Wall. 379,	136	591,	217

[References are to Pages.]

Kuntz v. Sumption, 117 Ind. 1, 5, 7, 121, 148	Lake Shore, etc., Co. v. Perkins, 25 Mich. 329,
Kurtz v. Carr, 105 Ind. 574, 748	v. Pinchin, 112 Ind. 592,
v. Frank, 76 Ind. 594, 401	v. Stupak, 123 Ind. 210, 575, 695, 6
Kusler v. Crofoot, 78 Ind. 597, 535	Lamance v. Byrnes, 17 Nev. 197,
Kyle v. Board, 94 Ind. 115, 561	Laman v. Crooker, 97 Ind. 163,
v. Frost, 29 Ind. 382, 215	Lamasco v. Brinkmeyer, 12 Ind. 349,
v. Kyle, 55 Ind. 387, 282, 285	Lambert v. Haskill, 80 Cal. 611,
v. Miller, 108 Ind. 90, 537	v. Merrill, 56 Vt. 464,
Kynaston v. Mayor, etc., 2 Stra. 1051, 718	Lamburth v. Dalton, 9 Nev. 64,
L	
L'Hommidieu v. Cincinnati, etc., Co., 120 Ind. 435, 52, 772	Lamon v. McKee, 7 Mackey, 447,
Labold v. Wilson, 4 Ohio C. C. 345, 756	Lamphier v. State, 70 Ind. 317, 529,
Lackawanna, etc., Co. v. Doak, 52 Pa. St. 379, 570	Lancaster, In re, Courts of, 4 Pa. L. Jr. Rep. 315,
Lace v. Fixen, 39 Minn. 46, 646	Lancaster v. Collins, 115 U. S. 222, 5
Lackey v. Hernby, 9 Ind. 536, 375, 628	v. Waukegan, etc., Co., 132 Ill. 492,
v. Pearson, 101 N. C. 651, 413	Landers v. Beck, 92 Ind. 49, 759, 7
Lacroix v. Camors, 34 La. Ann. 639, 467	v. George, 49 Ind. 309,
La Croix v. Commissioners, 50 Conn. 321, 61	v. State Island R. R. Co., 53 N. Y. 450,
Lacy v. Fairman, 7 Blackf. 558, 322	Landwerlen v. Wheeler, 106 Ind. 523, 251, 294, 368, 446, 565, 597, 7
Ladd v. Couzins, 35 Mo. 513, 456	Lane v. Boicourt, 128 Ind. 420, 5
Ladow v. Groom, 1 Denio, 429, 61	v. Crombie, 12 Pick. 177, 5
La Fayette, etc., Co. v. Adams, 26 Ind. 76, 572	v. Dorman, 3 Scam. (Ill.) 238, 1
La Fayette Bank v. Buckingham, 12 Ohio St. 419, 751	v. Duchac, 73 Wis. 646, 5
La Fayette, etc., Co. v. Geiger, 34 Ind. 185, 5	v. Fox, 8 Blackf. 58, 6
v. New Albany, etc., Co., 13 Ind. 90, 530	v. Innes, 43 Minn. 437, 1
La Fayette, City of, v. Allen, 81 Ind. 166, 716	v. Miller, 17 Ind. 58, 2
v. Weaver, 92 Ind. 477, 623	v. Old Colony, etc., Co., 14 Gray, 143,
La Follette v. Higgins, 169 Ind. 241, 279, 666, 682, 719	v. Pere Marquette, etc., Co., 62 Mich. 63,
Lagro, etc., Co. v. Eriston, 10 Ind. 342, 782	v. Schlemmer, 114 Ind. 296, 108, 21
Laindley v. Kline, 21 W. Va. 21, 444	v. State, 27 Ind. 108, 5
Lake v. Bender, 18 Nev. 361, 784	Lang v. Oppenheim, 96 Ind. 47, 6
v. Gibson, 2 Coms. 188, 414	v. Cox, 35 Ind. 470, 2
v. Halbert, 2 Dall. 41, 93	v. State, 67 Ind. 577,
v. Jones, 49 Ind. 297, 179	Langan v. Langan, 83 Cal. 618, 1
v. Lake, 99 Ind. 339, 32, 267, 274, 532	Langdon v. Bullock, 8 Ind. 341, 6
Lake, etc., Bank v. Judson, 122 N. Y. 278, 614	Lange v. Dammier, 119 Ind. 567, 2
Lake, Town of, v. Bok, 33 Ill. App. 45, 571	Langley v. Warner, 1 N. Y. 606, 21
Lake Erie, etc., Co. v. Acres, 108 Ind. 548, 402, 411, 790, 791	Langohr v. Smith, 81 Ind. 495, 7
v. Faught, 129 Ind. 257, 78	Langsdale v. Woolen, 99 Ind. 575, 51
v. Fix, 88 Ind. 381, 567, 625, 692, 759	Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127,
v. Griffin, 92 Ind. 487, 32, 215, 479, 532, 610	Lann v. People, 68 Ill. 303, 5
Lake Shore, etc., Co. v. Cincinnati, etc., Co., 116 Ind. 578, 38, 147, 284	Lantz v. Maffett, 102 Ind. 23, 12, 6
v. Foster, 104 Ind. 293, 640	Lapham v. Dreisvogt, 36 Mo. App. 275,
	La Porte, City of, v. Organ, 30 N. E. Rep. 2,
	Larey v. Baker, 85 Ga. 687,
	Larillian v. Lane, 8 Ark. 372,
	Larman v. Huey, 13 B. Mon. 436, 1

TABLE OF CASES.

lxxix

[References are to Pages.]

La Rose v. Logansport, etc., Bank, 102 Ind. 332,	757, 760	Le Guen v. Gouverneur, 1 Johns. Cas. 436,	455
Larsh v. Test, 48 Ind. 130,	120	Le Moyne v. Harding, 132 Ill. 78,	44
Larson, In re, 96 N. Y. 381,	13	Le Roy v. Clayton, 3 Sawy. 493,	12
La Rue v. Russell, 26 Ind. 386,	538	v. Platt, 4 Paige, 77,	593, 734
Laselle v. Wells, 17 Ind. 33,	533, 689	Leabo v. Goode, 67 Mo. 126,	545
Lassiter v. Jackman, 88 Ind. 118,	393,	Leach v. Blakely, 34 Vt. 134,	15, 34
	394, 395, 396	Leach v. Leach, 2 T. & C. (N. Y.) 657,	587
v. Simpson, 78 Ga. 61,	739	Leaf v. Butt, 1 Carr. & M. 451,	697
Latta v. Griffith, 57 Ind. 329,	179	Learmoth v. Veeder, 11 Wis. 138,	89
Latterett v. Cook, 1 Ia. 1,	568	Leard v. Leard, 30 Ind. 171,	57, 474
Latimer v. Sullivan, 30 S. C. 111,	736	Leary v. Dyson, 98 Ind. 317,	90
Latona, The, 3 Wash. Ty. 332,	123	v. Moran, 106 Ind. 560,	554
Landdale v. Findley, Hardin, 151,	344	v. New, 90 Ind. 502,	666
Laughlin v. City of Lamasco, 6 Ind. 223,	590	v. Smith, 81 Ind. 90,	268
Lavelle v. Skelly, 24 Hun. 642,	91	v. Territory, 3 Wash. Ty. 13,	453
Laverty v. State, 109 Ind. 217, 26,	394,	Leavitt v. Judge of Supr. Ct., 52 Mich. 595,	438
	395	Ledford v. Ledford, 95 Ind. 283, 536,	572
v. Woodward, 16 Ia. 1,	411	Lee Chuck v. Quan Wo Chung Co., 81 Cal. 222,	176
Law v. Jackson, 8 Cow. 746,	756	Lee v. Basey, 85 Ind. 543,	282
v. Nelson, 14 Col. 409,	208	v. Hassett, 39 Mo. App. 67,	545
v. Nelson (Col.), 24 Pac. Rep. 2,	323	v. Lord, 75 Wis. 35,	125
Lawler v. Alton, 8 Ir. L. 160,	338	v. Merrick, 8 Wis. 229,	556
v. Couch, 80 Ind. 369,	282	v. Stahl, 13 Col. 174,	492
v. McPheeters, 73 Ind. 577, 658, 689,	672	v. State, 88 Ind. 256,	774
v. Wife, 27 Tex. 250,	672	v. Stowe, 57 Tex. 444,	733
Lawless v. Harrington, 75 Ind. 379, 266, 279, 345, 768		v. Tillotson, 24 Wend. 337, 127,	414
Lawrence v. Ballou, 50 Cal. 258,	128	v. Watson, 1 Wall. 337,	46
v. Beecher, 116 Ind. 312, 73,	488,	Leech v. Perry, 77 Ind. 422,	70
	603	v. State, 78 Ind. 570,	432
v. Clark, 14 Mees. & W. 249,	697	Leedom v. Lambaert, 80 Pa. St. 381,	677
v. Commonwealth, 86 Va. 573,	239,	Leeds v. Boyer, 59 Ind. 289,	718
	254	v. Richmond, 102 Ind. 372,	63
v. Farley, 73 N. Y. 187,	515	Leedy v. Nash, 67 Ind. 311, 396,	736
v. Grambling, 13 S. C. 120,	411	Leese v. Sherwood, 21 Cal. 164,	76
v. Howell, 52 Ia. 62,	286	Leever v. Hamill, 57 Ind. 423,	296
v. Monroe, 43 Kan. 125,	408	Lefevre v. Johnson, 79 Ind. 554,	536
v. United States, 2 McLean, 581,	311	Leffel v. Obenchain, 90 Ind. 50, 207,	768,
v. Wood, 122 Ind. 452, 105, 263, 333,	453	Lefferts v. State, 49 N. J. L. 26,	775
	424	Lefler v. State, 122 Ind. 206,	253
v. Wilcock, 11 A. & E. 941,	424	Leftwich v. Commonwealth, 20 Gratt. 716,	248
Lawrenceburgh, etc., Co. v. Hinkle, 119 Ind. 47,	562, 775	Leftwich v. Leftwich, 4 Wall. 187,	770
v. Montgomery, 7 Ind. 474,	691	Legate v. Marr, 8 Blackf. 404,	312
v. Smith, 3 Ind. 253,	61	Legg v. Drake, 1 Ohio St. 286,	514
Lawson v. Bachman, 81 N. Y. 616,	697	Leggett v. Harding, 10 Ind. 414,	678
v. Glass, 6 Col. 134,	537	v. Humphreys, 21 How. 66,	311
v. Hilgenberger, 77 Ind. 22	687	v. Hyde, 58 N. Y. 272,	547
v. Moore, 44 Ala. 274,	70	Lehman v. Houks, 121 Ind. 541, 678,	689
v. Pulaski Co., 3 Ark. 1,	105	v. Rothbarth, 111 Ill. 194,	33
Lawton v. Case, 73 Ind. 60,	558	Leib v. Butterick, 68 Ind. 199,	521
Lay v. Lawson, 23 Ald. (Pa.) 377,	674	Leimpo v. State, 28 Tex. App. 179,	677
Layman v. Buckner, 60 Ind. 402,	296	Lemke v. Dageling, 52 Wis. 498,	481
v. Graybill, 14 Ind. 166,	180	Lennox v. Knox, etc., Co., 62 Me. 322,	787
v. Shultz, 60 Ind. 541,	565	Lentz v. Martin, 75 Ind. 228, 292,	326, 718

[References are to Pages.]

Leonard v. Armstrong, 73 Mich.	619	Liggett v. Firestone, 102 Ind.	514, 251,
577,	669	v. Hinkley, 120 Ind.	387, 374, 375
v. Blair, 59 Ind.	510,	Lilliensterne v. Lewis (Tex.), 12 S.	781
v. Gibson, 6 Ill. App.	503,	W. Rep.	750, 68
v. Warriner, 20 Wis.	41,	Lillard v. Ruckers, 9 Yerg.	64, 604
Lerch v. Emmett, 44 Ind.	331,	Lillie v. Trentman (Ind.), 29 N. E.	
Leschl v. Territory, 1 Wash. Ty.	13,	Rep.	405, 647
Leslie v. State, 83 Ind.	180,	Lilly v. Dunn, 96 Ind.	220, 671
Lesser v. Banks, 46 Ark.	482,	Limerick, Petitioner, In re, 18 Me.	
Lester v. Berkowitz, 125 Ill.	307,	183,	178
v. Brier, 88 Ind.	296,	Linahan v. Desmond, 150 Mass.	292, 636
v. Howard, 24 Md.	233,	Linard v. Crossland, 10 Tex.	462, 569
v. Lester, 70 Ind.	201,	Linck v. Schouel, 32 Ill. App.	17, 570
Lestrade v. Barth, 17 Cal.	285,	Lincoln v. Claflin, 7 Wall.	132, 746
Lett v. Horner, 5 Blackf.	296, 168,	v. Hapgood, 11 Mass.	350, 718
Leverick v. State, 105 Ind.	277, 254,	v. Iron Co., 103 U. S.	412, 581
Leveringe v. Dayton, 4 Wash. C.		v. Milstead, 38 Mo. App.	350, 447
C. 698,	754	Lincoln, etc., Works v. Hall,	27
Levi v. Karrick, 15 Ia.	444, 457,	Neb.	874, 94
Levy v. Chittenden, 120 Ind.	37, 520,	Lindley v. Dakin, 13 Ind.	388, 628
521, 524,	719	v. Kelley, 42 Ind.	294, 640, 644
v. State, 6 Ind.	281,	Lindsey v. Henderson, 27 Miss.	
Lewis v. Babcock, 18 Johns.	443,	502,	763
v. Bortsfeld, 75 Ind.	390, 393,	Line v. Huber, 57 Ind.	261, 297, 785
	637	Linnes v. Benner, 52 Ind.	195, 76
v. Brackenridge, 1 Blackf.	112,	Lingenfelter v. Simon, 49 Ind.	82, 603
v. Campau, 14 Mich.	458,	Linsman v. Huggins, 44 Ind.	474, 269
v. Darling, 16 How.	1,	Lipes v. Hand, 104 Ind.	503, 26
v. Edwards, 44 Ind.	333, 295,	Lipp v. Hunt, 30 Neb.	469, 494
v. Ewing, 70 Ind.	282,	Lipperd v. Edwards, 39 Ind.	165, 604
v. Godwin (Ind.), 27 N. E. Rep.		Lippincott v. Ledyard, 8 Phila.	18, 192
563,	161	Lisher v. Pratt, 9 Ia.	59, 793
v. Lewis, 30 Ind.	257,	List v. Jockheck (Kan.), 27 Pac.	
v. Lewis, 20 Mo. App.	546,	Rep.	184, 66
v. New York, etc., Co., 123 Ind.		v. Kortepeter, 26 Ind.	27, 615, 679
496,	729, 745	Lister v. Baker, 6 Blackf.	439, 793
v. Owen, 64 Ind.	446,	v. McNeal, 12 Ind.	302, 524
v. Prenatt, 24 Ind.	98,	v. Stanley, 1 Mod.	112, 102
v. St. Louis, etc., Co., 59 Mo.		Litchfield v. Richards Register,	
495,	494	etc., 9 Wall.	575, 435
v. State, 18 Tex. App.	401,	Litt v. Martindale, 18 C. B.	314, 10
v. Van Dusen, 25 Mich.	351,	Littan v. Wright School Tp., 127	
v. Varnum, 12 Abb. Pr.	305,	Ind.	81, 738
Lexington, etc., Co. v. Paver, 16		Littell v. Bradford, 8 Blackf.	185, 315
Ohio, 324,	615	Little v. Bowers, 134 U. S.	547, 14, 124
Leyner v. State, 8 Ind.	490, 255, 743,	v. Bunce, 7 N. H.	485, 495, 496
	745, 761, 777	v. Jacks, 68 Cal.	343, 208
Libby v. Husby, 28 Minn.	40,	v. State, 90 Ind.	338, 4
Lichtenfels v. State, 53 Ind.	161, 243,	Little Miami, etc., Co. v. Wetmore,	
	245, 246	19 Ohio St.	110, 662
Lichty v. Clark, 10 Neb.	472,	Little Rock, etc., Co. v. Cavenesse,	
Lick v. Diaz, 37 Cal.	437,	48 Ark.	106, 623
Lieb v. Lichtenstein, 121 Ind.	483,	v. Tankersly (Ark.), 14 S. W.	
Lienpo v. State, 28 Tex. App.	179, 252	Rep.	1099, 549
Life, etc., Ins. Co. v. Adams, 9 Pet.		Littleton v. Smith, 119 Ind.	230, 250,
573,	519	291, 590, 647,	668
v. Adams, 8 Pet.	306,	Littlefield v. Perry, 21 Wall.	205, 50
Life, etc., Co. v. Wilson, 8 Pet.	291,	Littlejohn v. Greeley, 13 Abb. Pr.	41, 616
Ligare v. California, etc., Co., 76		Livermore v. Campbell, 52 Cal.	76, 456
Cal. 610,	155		

TABLE OF CASES.

lxxx

[References are to Pages.]

Livesey v. Livesey, 30 Ind. 398,	393,	Loomis v. Wabash, etc., Co., 17	
	670	Mo. App. 340,	545
Livigood v. Livigood, 6 Blackf.		Looney v. Bugh, Minor (Ala.), 413,	770
	404	Lord Mohun's Case, 6 Mod. 59,	650
Livingston v. Dunlap, 99 N. C. 268,	508	Lord v. Goldberg, 81 Cal. 596,	78
v. Mayor, 8 Wend. 85,	26	v. Veazie, 8 How. 251,	124, 186
Lloyd v. Hannibal, etc., Co., 53		Loring, Ex parte, 94 U. S. 418,	435
Mo. 509,	539	v. Folger, 7 Gray, 505,	140
v. Reynolds, 26 Neb. 63,	443	Losey v. Bond, 94 Ind. 67,	112, 566
Lobb v. Lobb, 26 Pa. St. 327,	611	Lott v. Swezey, 29 Barb. 87,	497
Locke v. Merchants' Nat. Bank, 66		Lotz v. Briggs, 50 Ind. 346,	619, 758
Ind. 353, 403, 637, 638, 708, 718,	719	Loucheine v. Strouse, 46 Wis. 487,	452
Lockhart v. State, 92 Ind. 452, 255,	531,	Louden v. Loudon, 63 How. 411,	116
	737	v. Loudon, 65 How. Pr. 411,	270
Lockwood v. Dills, 74 Ind. 56,	724	Loudenback v. Lowry, 6 Ohio C.	
v. Quackenbush, 83 N. Y. 607,	413,	C. 65,	681
	587	Louders v. Beck, 92 Ind. 49,	759, 769
v. Rose, 125 Ind. 588, 536, 708,	788	Louisville, etc., Co. v. Ader, 110	
Lodge v. Tweell, 135 U. S. 232,	99	Ind. 376,	395
Lobb v. Mathis, 37 Ind. 306, 420,	421,	v. Balch, 105 Ind. 93, 663, 694,	709
	735	v. Boland, 70 Ind. 595, 159, 349,	351
Loewe v. Reismann, 8 Bradw. 525,	701	v. Buck, 116 Ind. 566,	716
Lifton v. Moore, 83 Ind. 112, 187,	188	v. Cauley, 119 Ind. 142,	371, 579,
Logan v. Harris, 90 N. C. 7,	77		580, 708
v. Kiser, 25 Ind. 393,	558	v. Corps, 124 Ind. 427,	393, 395
v. Logan, 77 Ind. 558,	120, 570	v. Crunk, 119 Ind. 542,	288
v. Pennsylvania Co., 132 Pa. St.		v. Donnegan, 111 Ind. 179, 368, 370,	446
403,	65, 84	v. Etzler, 119 Ind. 39,	19, 475
v. Vernon, etc., Co., 90 Ind. 552,	592	v. Falvey, 104 Ind. 409,	486, 577,
Logan Branch Bank, Ex parte, 1			653, 702
Ohio St. 433,	18, 430	v. Flannagan, 113 Ind. 488,	582, 696,
Logansport, City of, v. Dykeman,			709
116 Ind. 15,	529, 662	v. Fox, 101 Ind. 416,	391, 401, 418
v. Humphrey, 106 Ind. 146,	491	v. Frawley, 110 Ind. 18,	575, 581,
v. La Rose, 99 Ind. 117,	606		696, 708
v. Shirk (Ind.), 28 N. E. Rep.		v. Godman, 104 Ind. 490,	723
538,	558	v. Grantham, 104 Ind. 353, 692,	774
v. Wright, 25 Ind. 512,	748	v. Green, 120 Ind. 367, 708, 709, 710	
Logansport, etc., Co. v. Davidson,		v. Grubb, 88 Ind. 85,	572
51 Ind. 472,	757, 760	v. Harrigon, 94 Ind. 245,	757, 760
Lohman v. People, 1 N. Y. 379,	737	v. Harrington, 92 Ind. 457,	636
Lomax v. Mitchell, 93 Ill. 579,	769	v. Hart, 119 Ind. 273, 391, 575, 582,	
Londoner v. People, 15 Col. 557,	578		696, 709, 712, 716, 777
Long v. Emery, 49 Ind. 200,	99	v. Head, 80 Ind. 117,	766
v. Fox, 100 Ill. 43,	126	v. Hendricks, 128 Ind. 462, 620, 787,	788
v. Hitchcock, 3 Ohio, 274,	141		
v. McClure, 5 Blackf. 319,	101	v. Henly, 88 Ind. 535,	511, 605
v. State, 12 Ga. 293,	534	v. Hixon, 101 Ind. 337,	394
v. State, 46 Ind. 582, 256, 679,	768	v. Horton, 67 Ind. 546,	350
v. State, 95 Ind. 481, 250, 531,	579	v. Hubbard, 116 Ind. 193,	579, 662,
v. Straus, 107 Ind. 94,	305		676, 681, 708
v. Town of Brookston, 79 Ind.		v. Jackson, 64 Ind. 398,	349, 444
183,	162, 766	v. Jones, 108 Ind. 551,	570
v. Williams, 74 Ind. 115, 562,	749	v. Kane, 120 Ind. 140, 580, 694, 696,	771, 785
v. Highan, 89 Ind. 352, 170, 764,	774,		
	775	v. Krimming, 87 Ind. 351,	571
Lonsdale v. Brown, 4 Wash. C. C.		v. Lockridge, 93 Ind. 191,	90
141,	74	v. Nicholson, 60 Ind. 158,	630
Loomie v. Burt, 16 S. W. Rep. 439,	788	v. Orr, 84 Ind. 50,	571

[References are to Pages.]

Louisville, etc., Co. v. Overman, 88 Ind. 115,	524	Lucas v. Shepherd, 16 Ind. 368,	306
v. Peck, 99 Ind. 68,	393, 395,	v. Smith, 42 Ind. 105,	567
v. Pedigo, 108 Ind. 481,	579	v. Smith, 54 Ind. 530,	736
v. Reynolds, 118 Ind. 170,	587	v. State, 86 Ind. 180,	162
v. Rush, 127 Ind. 545,	627	Luck v. State, 96 Ind. 299,	531, 538, 579
v. Schmidt, 106 Ind. 73,	588	Lucketts v. Townsend, 3 Tex. 119,	666
v. Spain, 61 Ind. 460,	394	Lucy, The, 8 Wall. 307,	104
v. State, 25 Ind. 177,	591	Ludlam v. Broderick, 3 Gr. 269,	267
v. Stommel, 126 Ind. 35,	707	Ludlow v. Ludlow, 109 Ind. 199,	393.
v. Thompson, 107 Ind. 442,	554,		395
	786	v. Walker, 67 Ind. 353,	728
v. Turner, 81 Ky. 489,	758	Lufkins v. Collins (Idaho), 10 Pac. Rep. 300,	624
v. Wilson, 138 U. S. 501,	79	Luirance v. Luirance, 32 Ind. 198,	748
v. Wood, 113 Ind. 544,	187, 402, 414,	Lundberg v. Single Men's Endowment Association, 41 Minn. 505,	294
	537, 708	Luntz v. Greve, 102 Ind. 173, 52, 400,	562
v. Worley, 107 Ind. 320,	579,	Lures v. Botte, 26 Ind. 343,	777
	761	Lurton v. Carson, 2 Blackf. 464,	773
v. Wright, 115 Ind. 378,	747	Luthe v. Luthe, 12 Col. 429,	472, 475
Lounsbury v. Purdy, 18 N. Y. 515,	407,	Lutz v. Crawfordsville, 109 Ind. 466,	218
	521	Lybecker v. Murray, 58 Cal. 186,	513
Love v. Dickerson, 85 N. C. 5,	614,	Lycoming, etc., Co. v. Rubin, 79 Ill. 402,	657
v. Hall, 76 Ind. 326,	287, 525,	Lyman v. Redman, 23 Me. 289,	577
v. Mikols, 12 Ind. 439,	83	Lynam v. Buckner, 60 Ind. 402,	614
v. Tinsley, 32 W. Va. 25,	481	Lynch v. Dunn, 34 Cal. 518,	448
Loveland v. Gardner, 79 Cal. 317,	481	v. Jennings, 43 Ind. 276, 288, 748,	766
Lovell v. Martin, 12 Abb. Pr. 178,	733	v. Leurs, 30 Ind. 411,	554
v. State, 45 Ind. 550,	679	v. State, 9 Ind. 541,	534
Lovinger v. First Nat. Bank, 81 Ind. 354,	568, 610	Lyon v. Blossom, 4 Duer. (N. Y.) 318,	89
Low v. Adams, 6 Cal. 277,	334	v. Davis, 111 Ind. 384, 772, 774,	775
v. Crown Point Mining Co., 2 Nev. 75,	68, 74	v. Merritt, 6 Paige, 473,	493
Lowe v. Ryan, 94 Ind. 450,	548, 549	v. Travelers Ins. Co., 55 Mich. 141,	126
v. State, 46 Ind. 305,	408	Lyons v. Bain, 1 Wash. Ty. 482, 126,	350
Lowen v. Crossman, 8 Ia. 325,	666	v. People, 68 Ill. 271,	674
v. Knox, 10 Cal. 480,	109	v. Planters, etc., Bank, 86 Ga. 485,	581
Lowden v. Lowden, 58 Ind. 538, 370,	698	v. Teal, 28 La. Ann. 592,	549
Lower Chatham, In re, 35 N. J. L. 497,	26	v. Terre Haute, etc., Co., 101 Ind. 419,	640
Lower v. Franks, 115 Ind. 334,	603, 661,	Lyons, Town of, v. Cooledge, 89 Ill. 529,	672
	747	Lytle v. Lytle, 37 Ind. 281,	170
Lowery v. Carver, 104 Ind. 447,	771	v. Lytle, 94 N. C. 522,	496
v. Howard, 103 Ind. 440,	88		
Lowman v. Sheets, 124 Ind. 416,	694		
Lowndes v. Miller, 25 S. C. 119,	66		
Lownsbury v. Rakestraw, 14 Kan. 151,	201		
Lowrie v. France, 7 Neb. 191,	786		
v. Salz, 75 Cal. 349,	782		
Lowry v. Dutton, 28 Ind. 473,	567		
v. Francis, 2 Yerg. 534,	305		
v. McAllister, 86 Ind. 543,	566		
Loy v. Loy, 90 Ind. 404,	757, 760		
Luark v. Malone, 34 Ind. 444,	601, 603		
Lucas v. Beale, 10 C. B. 739,	602		
v. Board, 44 Ind. 524,	492		
v. Brooks, 18 Wall. 436,	369, 509,		
	691		
v. Hawkins, 102 Ind. 64,	88		

M

McAfee v. Reynolds (Ind.), 28 N. E. Rep. 423,	192, 475, 476,	481
McAllister v. Detroit, etc., Co., 85 Mich. 453,		656
v. McAllister, 12 Ired. L. 184,		657
v. State, 81 Ind. 256,	100, 101,	120
v. Willey, 60 Ind. 195,		298
McAlpine v. Sweetser, 76 Ind. 78,	147,	
	284,	504
v. Ziller, 17 Tex. 508,		656

TABLE OF CASES.

lxxxiii

[References are to Pages.]

McArthur v. Lane, 15 Me. 245,	604	McClure v. State, 77 Ind. 287,	531
v. Leffer, 110 Ind. 526,	632	v. State, 116 Ind. 169,	373
v. Schultz, 78 Ia. 364,	13, 158	v. State, 1 Yerg. 206,	528
McBride v. Lathrop, 24 Neb. 93,	508	v. Taylor, 38 Ind. 427,	448
v. Northern, etc., Co., 19 Ore.	64	v. White, 9 Ind. 208,	43
v. Settles (Tex.), 16 S. W. Rep.	518	McCole v. Loehr, 79 Ind. 430, 354,	661
422,	788	v. State, 10 Ind. 50,	47
v. Stradley, 103 Ind. 465,	532	McCollum v. Eager, 2 How. 61,	73
v. Thompson, 8 Ala. 650,	578	v. Uhl, 128 Ind. 304,	603
McCaffrey v. Corrigan, 49 Ind. 175,	488,	McComas v. Haas, 93 Ind. 276,	507,
595		563, 565,	609
McCall v. Hitchcock, 7 Bush. 615,	70	v. Haas, 107 Ind. 512,	702
v. Trevor, 4 Blackf. 496,	315	McComb v. Spangler, 71 Cal. 418,	489
McCallister v. Mount, 73 Ind. 559,	267,	McCombs v. Guild, 9 Lea. 81,	589
395, 689		McConnell v. Harrington, 108 Ind.	
McCalop v. Fluker, 12 La. Ann.	551,	405,	479
McCamack v. Earhart, 72 Ind. 24,	159	v. Kitchens, 20 So. Car. 430,	614
McCammack v. Clark, 16 Ind. 320,	601	v. Osage, 80 Ia. 293,	391
v. McCammack, 86 Ind. 387,	784,	v. Wall, 67 Tex. 352,	489
792		McCool v. State, 7 Ind. 378,	669
McCammon v. Cunningham, 108		McCorkle v. State, 14 Ind. 379, 248,	254
Ind. 545,	691	McCormack v. Phillips (Dak.), 34	
McCandless Tp. Road, In re, 110		N. W. Rep. 39,	260
Pa. St. 605,	8	McCormick v. Central R. R. Co.,	
McCann v. Cooley, 30 Neb. 552,	769	75 Cal. 506,	791
McCardle, Ex parte, 7 Wall. 506,	61,	McCormick, etc., Co. v. Gray, 100	
303		Ind. 285,	614, 615, 616
McCardle v. McGinley, 86 Ind. 538,	159,	v. Gray, 114 Ind. 340,	395, 702,
170		772, 790	
McCart v. Squire, 150 Mass. 484,	747	McCormick v. Hickey, 24 Mo. App.	
McCarthy v. Garroghty, 10 Ohio		362,	581
St. 438,	635	v. Hubbell, 4 Mont. 87,	317
v. Kitchen, 59 Ind. 500,	579	v. Hyatt, 33 Ind. 546,	397
McCarty v. Chicago, etc., Co., 34		v. Laughran, 16 Neb. 87,	731
I. App. 273,	678	v. Maas, 121 Ind. 132,	758
v. Hamaker. 82 Va. 471,	78	v. Smith, 127 Ind. 230,	662
v. State, 1 Blackf. 240,	308	v. Spencer, 53 Ind. 550,	294, 728
McCaskey v. Graff, 23 Pa. St. 321,	666	v. St. Louis, etc., Co., 26 Mo.	
McCauley v. Murdock, 97 Ind. 229,	791	App. 65,	29
McCaw v. Blewitt, 1 Bailey (S. C.)		v. Webster, 89 Ind. 105,	284
Ch. 98,	483	McCourtney v. Fortune, 42 Cal. 387,	91
McClain v. Sullivan, 85 Ind. 174,	295,	McCoy v. Able (Ind.), 30 N. E.	
296		Rep. —,	773
McClary v. State, 75 Ind. 260, 255,	579,	v. McCoy, 33 W. Va. 60, 46, 78,	491
620		v. State, 121 Ind. 160,	196, 758
McClean v. Hertzog. 6 S. & R. 154,	697	v. Trucks, 121 Ind. 292,	165
McClellan v. Bond, 92 Ind. 424,	687, 688	v. Walls, 30 N. E. Rep. —,	754
v. Binkley, 78 Ind. 503,	180	McCracken v. Cabell, 120 Ind. 266,	
McClolland v. Allison, 34 Kan. 155,	324	126, 350	
v. Louisville, etc., Co., 94 Ind.	276,	v. Superior Court, 86 Cal. 74,	319
562		McCraney v. Childs, 11 Ia. 54,	284
McClintock v. Theiss, 74 Ind. 200,	100,	McCray v. Humes, 116 Ind. 103,	669
293, 719		McCreary v. Cockrill, 3 Kan. 37,	763
McCloskey v. Indianapolis, etc.,		McCreery v. Everding, 44 Cal. 284,	140
Co. 67 Ind. 86,	405	McCrory v. Anderson, 103 Ind. 12,	320,
v. Indianapolis, etc., Co., 87		322, 662	
Ind. 20,	208, 318, 321	McCulloch v. Dodge, 8 Kan. 476, 68, 71	
McClure v. McClure, 19 Ind. 185,	393	v. Hollingsworth, 27 Ind. 115,	599
		McCullum v. Eager, 2 How. 61,	64
		McCurdy v. Love, 97 Ind. 62,	219, 225

[References are to Pages.]

McCurdy v. Middleton, 90 Ala. 99,	490	McGregor v. Hobbs, 125 Ind. 487,	393
McDaniel v. Lee, 37 Mo. 204,	590	v. Pearson, 51 Wis. 122,	112
v. Mattingly, 72 Ind. 349,	768	McGrew v. McCarty, 78 Ind. 496, 88,	558
v. Stokes, 19 S. C. 60,	745	McGrime v. State, 30 Ind. 140,	790
McDermitt v. Hubank, 25 Ind. 232,	509,	McGuffey v. McClain (Ind.), 30 N.	
	568	E. Rep. 296,	739
McDermott v. Iowa, etc., Co. (Ia.),		McHugh v. Chicago, etc., Co., 41	
47 N. W. Rep. 1037,	792	Wis. 75,	483
McDonald v. Carson, 95 N. C. 377,	697	McIlhaney v. Holland, 111 Pa. St.	
v. Early, 24 Neb. 818,	792	634,	93, 325
v. Elfes, 61 Ind. 279,	774	McIlvain v. Emery, 88 Ind. 298,	766
v. Geisendorff, 128 Ind. 153,	766	v. State, 80 Ind. 69,	610, 692, 698
v. Stader, 10 Ind. 171,	187,	McIlwaine v. Adams, 46 Ind. 580,	113,
v. Union, etc., Co., 42 Fed. Rep.	300		269
579,	582	M'Intire v. Young, 6 Blackf. 496,	792
McDonel v. State, 90 Ind. 320,	577	McIntosh v. McIntosh, 79 Mich.	
McDonal v. Fleming, 4 Ohio, 388,	765	198,	618
McDonough v. Nicholson, 46 Mo. 35,	70	McIntyre v. McIntyre, 24 Mo. App.	
McDowell v. Crawford, 11 Gratt.		166,	489
377,	535	McJilton v. Dove, 13 Ill. 486,	495
McDuffee v. Bentley, 27 Neb. 380,	736	McKim v. Thompson, 1 Bland. Ch.	
McElifpatrick v. Coffroth, 29 Ind. 37,	758	150,	82
McElfresh v. Guard, 32 Ind. 408,	648	McKee v. McDonald, 17 Ind. 518,	793
McElhoes v. Dale, 81 Ind. 67,	790	McKeen v. Board, 60 Ind. 280,	118, 756
McEndree v. McEndree, 12 Ind. 97,	106,	McKenzie v. Ballard, 14 Col. 426,	160
	349	v. Peck (Wis.), 42 N. W. Rep.	
McEneney v. Sullivan, 125 Ind. 407,	286	247,	475
McFadden v. Fritz, 110 Ind. 1,	398,	v. Rhodes, 13 Abb. Pr. 337,	116
	414,	v. State, 26 Ark. 334,	620
v. Wilson, 96 Ind. 253,	770	McKesson v. Sherman, 51 Wis. 303,	567
McFadin v. David, 78 Ind. 445,	636	McKernan v. Neff, 43 Ind. 503,	596
McFall v. Commonwealth, 2 Metcf.		McKinley v. First Nat. Bank, 118	
(Ky.) 394,	27	Ind. 375,	788
v. Howe Co., 90 Ind. 148,	566	v. Shank, 24 Ind. 258,	567
McFarland v. Hall, 17 Tex. 676,	75	McKinney v. Jones, 55 Wis. 39,	535
v. McFarland, 40 Ind. 458,	277	v. McKinney, 8 Ohio St. 423,	635
McFeters v. Pierson, 15 Col. 201,	746	v. Monongahela Co., 2 Harris	
McGarrahan v. New Idra Co., 49		(Pa.), 65,	26
Cal. 331,	456	v. Shaw, etc., Co., 51 Ind. 219,	761
McGarvey v. Ford (N. M.), 27 Pac.		v. Springer, 6 Ind. 453,	301, 648
Rep. 415,	682	v. State, 101 Ind. 355,	671
McGee v. Robbins, 58 Ind. 463,	608	v. State, 117 Ind. 26,	489
v. State, 103 Ind. 444,	554,	McKinsey v. McKee, 109 Ind. 209,	508
McGill v. Wallace, 22 Mo. 675,	414	McKnight v. Devlin, 52 N. Y. 399,	401
McGillis v. Bishop, 27 Ill. App. 53,	487	v. Dunlap, 4 Barb. 36,	587
McGinnis v. Gabe, 78 Ind. 457, 511,	734	McLaughlin v. Ward, 77 Ind. 383,	713
v. Mayor, etc., 6 Daly, 416,	521	McKnight v. Knisely, 25 Ind. 336,	82
McGlaughlin v. O'Rourke, 12 Ia.		McLain v. State, 18 Neb. 154,	617
459,	456,	McLana v. Russell, 29 Tex. 127,	323
McGlennan v. Mayowski, 90 Ind.		McLanahan v. Universal Ins. Co.,	
150,	88,	1 Pet. 169,	750
McGoldrick v. Slevin, 43 Ind. 522,	393	McLane v. Bonn, 70 Ia. 752,	61
McGowan v. State, 9 Yerg. 184,	578	McLaren v. Kehlor, 22 Wis. 297,	519
v. Wilmington, etc., Co., 95 N.		McLaughlin v. Child, 62 Ind. 412,	268
C. 417,	168,	v. Doherty, 54 Cal. 519,	96
McGowen v. Campbell, 28 Kan. 25,	534	v. Etchison, 127 Ind. 474,	504
McGown v. Remington, 12 Pa. St.		v. Janney, 6 Gratt. 609,	456
56,	32	v. State, 66 Ind. 193,	91, 241,
McGraw v. Franklin, 2 Wash. 17,	544,		243.
	549		246

TABLE OF CASES.

LXXXV

[References are to Pages.]

McLead v. Aetna Ins. Co., 107 Ind. 344,	108	Macklin v. Allenberg, 100 Mo. 337,	495
McLean v. Burbank, 12 Minn. 530,	624	v. New England, etc., Co., 33 La. Ann. 801,	704
v. Equitable, etc., Co., 100 Ind. 127,	644	Macklson v. Clegg, 95 Ind. 373,	682
McLean Co. v. Deposit Bank, 81 Ky. 254,	5	MacLachlan v. McLaughlin, 126 Ill. 427,	92
McLees v. Felt, 11 Ind. 218,	614, 615	Macnevin v. Macnevin, 63 Cal. 186,	68
McLellen v. Crofton, 6 Me. 307,	528	Macullar v. Wall, 6 Gray, 507,	535
McLennen v. Prentice, 79 Wis. 488,	490, 788	Madden v. State, 1 Kan. 340,	621
McLimans v. City of Lancaster, 57 Wis. 297,	517	Maddox v. Pulliam, 5 Blackf. 205,	287
McMahon v. Newcomer, 82 Ind. 565,	52	Madison, etc., Co. v. Trustees, 8 Ind. 528,	782
v. Works, 72 Ind. 19,	217	v. Whiteneck, 8 Ind. 217,	525
McMahon v. Sankey, 35 Ill. App. 341,	570	Madgett v. Fleenor, 90 Ind. 517,	562
v. Sankey, 133 Ill. 636,	624	Maghee v. Collins, 27 Ind. 83,	496
McMekin v. Richards, 81 Ga. 192,	601	Mahlman v. Williams (Ky.), 12 S. W. Rep. 335,	315
McMillan v. Baker, 92 N. C. 110,	489	Mahncke v. Tacoma, 1 Wash. 18,	86
v. Nye, 90 N. C. 11,	449	Mahon v. Mahon, 19 Ind. 324,	378, 632
McMillen v. Terrell, 23 Ind. 163,	636	Mahone v. Manchester, 111 Mass. 72,	72
McMannus v. Smith, 53 Ind. 211,	525	Mahoney v. Keane, 28 N. E. Rep. 915,	349
McMinn v. Patton, 92 N. C. 371,	317	v. Robbins, 49 Ind. 146,	294, 561
v. Whelan, 27 Cal. 300,	572, 618	Mahony v. Mahony, 41 La. Ann. 135,	472
McMullen v. Clark, 49 Ind. 77,	278	Main v. Ginthert, 92 Ind. 180,	81
McNamara v. Estes, 22 Ia. 246,	30, 653	Mainigault v. Holmes, 1 Bailey (S. C.) Eq. 278,	488
McNay v. Stratton, 109 Ill. 30,	61	Mairs v. Gallahue, 9 Gratt. 94,	663
McNeal v. Oats Co., 51 Vt. 316,	168	Makepeace v. Davis, 27 Ind. 352,	628
McNeely v. Holliday, 105 Ind. 324,	268	v. Lukens, 27 Ind. 435,	178
McNeil v. Home Ins. Co., 30 Mo. App. 306,	762	Malady v. McEnary, 30 Ind. 273,	689
McNulty v. Batty, 10 How. (U.S.) 71,	21	Malin v. Kinney, 1 Cain. Rep. 117,	634
McNutt v. Dare, 8 Blackf. 35,	704	Malone v. Hopkins, 49 Ga. 221,	781
v. McNutt, 116 Ind. 545,	391	v. McClain, 3 Ind. 532,	308, 339
McQuarrie v. Hildebrand, 23 Ind. 122,	590	Mallory v. Lamphear, 8 How. Pr. 491,	406
McQueen v. State, 82 Ind. 72,	251	Malott v. State, 26 Ind. 93,	247
v. Steward, 7 Ind. 535,	792	Manchester v. Dodge, 57 Ind. 584,	186
McQuery v. Gilleland (Ky.), 12 S. 1037,	420	Mand v. Trall, 92 Ind. 521,	572
McQuigg v. Dailey, 16 Ind. 324,	540	Mandeville v. Riggs, 2 Pet. 482,	604
McSweeney v. McMiller, 96 Ind. 298,	536	Mandlove v. Lewis, 9 Ind. 194,	601
McVey v. Heavenridge, 30 Ind. 100,	207, 313, 319	Maner v. State, 8 Tex. App. 361,	529
McVickar v. Wolcott, 4 Johns. 510,	455	Mangels v. Mangels, 8 Mo. App. 603,	160
McWhinney v. Briggs, 85 Ind. 535,	269	Manhattan Life Ins. Co. v. Doll, 80 Ind. 113,	766
McWhorter v. Heltzell, 124 Ind. 129,	215	Manifold v. Jones, 117 Ind. 212,	411
McWilliams v. Walthall, 77 Ga. 7,	492	Manly v. Hubbard, 9 Ind. 230,	628
Mahy v. Atkins, 10 Wall. 419,	483	Mann v. Aetna Ins. Co., 38 Wis. 114,	318
Mahy v. Baxter, 11 Heisk. 682,	9	v. Glover, 14 N. J. L. 195,	736
Mahy v. Ross, 1 Heisk. 769,	513	v. Haley, 45 Cal. 63,	98
McHall v. Richards, 116 U. S. 45,	450	v. Lewis, 13 W. Va. 215,	557
Mack v. Grover, 12 Ind. 254,	596, 603	v. Marsh, 35 Barb. 68,	604
v. Parks, 8 Gray, 517,	540	v. Maxwell, 83 Me. 146,	653
Mackey v. Baltimore, etc., Co., 18 Wash. Law Rep. 767,	639	v. Scott, 32 Ark. 593,	616
v. Commonwealth, 80 Ky. 345,	124	v. Thayer, 18 Wis. 479,	112
Mackison v. Clegg, 83 Ind. 135,	334, 335	Manning v. Gasharie, 27 Ind. 399,	579, 708, 729

[References are to Pages.]

Manning v. Gould, 90 N. Y. 476,	319	Martin v. Hunter, 1 Wheat. 304,	58,
Mannix v. State, 115 Ind. 246,	680	217, 479,	498
Mannsfield v. Allen, 85 Mo. 502,	487	v. Knouse, 2 Abb. Pr. 390,	269
Manny v. Glendinning, 15 Wis. 50,	611	v. Martin, 6 Blackf. 321,	304
Mansfield v. Shipp, 128 Ind. 55,	295,	v. Martin, 74 Ind. 207, 187, 193,	294,
554,	751	370,	687
Mansell v. Queen, 8 Ell. & B. 54,	679	v. Martin, 118 Ind. 227,	626
Mansur v. Churchman, 84 Ind. 573,	177,	v. Martin, 14 Ore. 165,	80
749		v. Matfield, 49 Cal. 42,	785
v. Streight, 103 Ind. 358,	394,	v. Martin, 74 Ind. 207,	159
Maple v. Beach, 43 Ind. 51,	604	v. Noble, 29 Ind. 216,	596
Maples v. Mackey, 15 Hun. 533,	286	v. Nugent (Mo.), 15 S. W. Rep.	
Marbury v. Madison, 1 Cranch.		422,	446
137,	14, 16, 160	v. Orr, 96 Ind. 491,	122, 154,
March v. State, 44 Tex. 64,	619	v. People, 54 Ill. 225,	620
Marcum v. Commonwealth (Ky.),		v. Reed, 9 Ind. 180,	101
1 S. W. Rep. 727	792	v. Smith, 57 Ind. 62,	374
Marcus v. State, 26 Ind. 101,	231,	v. State, 57 Ind. 62,	368
292,	718	v. St. Louis, etc., Co., 53 Ark.	
Marie v. Garrison, 83 N. Y. 14,	736	250,	176, 177, 178,
Marine Ins. Co. v. Hodgson, 6		775	
Cranch. 206,	515,	v. Windsor Hotel Co., 70 N. Y.	
520		101,	515
Mark v. Murphy, 76 Ind. 534,	599	v. Woodruff, 2 Ind. 237,	496
Markel v. Evans, 47 Ind. 326,	670	Martin, etc., Co. v. Waincott, 66	
Markland v. Albes, 81 Ala. 433,	758	Tex. 131,	266
Marks v. Jacobs, 76 Ind. 216,	690, 767	Martindale v. Brown, 18 Ind. 284,	64
v. State, 101 Ind. 353,	791, 793	v. Price, 14 Ind. 115,	403
v. Trustees, etc., 56 Ind. 288, 297,	785	Martineau v. Steele, 14 Wis. (2d	
Markson v. Haney, 47 Ind. 31,	298	ed.) 295,	558
Marley v. Hornaday, 69 Ind. 106,	775	Martinsville, Town of, v. Shirley,	
v. Noblett, 42 Ind. 85,	782	84 Ind. 546,	520, 521,
Marquadt v. Sieberling, 121 Ind.		78	
307,	747	Marton The D. R., 91 U. S. 365,	598
Marquess v. La Baw, 82 Ind. 550,	296	Marvin v. Taylor, 27 Ind. 73,	640
Marsh v. Nichols, 120 U. S. 598, 119,	132	Marx v. Crosian, 17 Ore. 393,	127
v. Richardson, 106 N. C. 539,	690	Massie v. Brady, 41 La. Ann. 553,	491
v. Terrell, 63 Ind. 363,	782, 789	Mason v. Burke, 120 Ind. 404,	91
v. Wade, 3 Wash. Ty. 477, 612,	639	v. Gibson, 13 Ill. App. 463,	562
Marshall v. Beeber, 53 Ind. 83, 297,	785	v. Mason, 102 Ind. 38,	271, 506,
v. Davies, 78 N. Y. 414,	700	v. Palmerton, 2 Ind. 117,	301
v. Gill, 77 Ind. 402,	215, 590	v. Smith, 11 Lea. 67,	312
v. Lewark, 117 Ind. 377,	678, 777	v. United States, 136 U. S. 581,	116
v. Mathers, 103 Ind. 458,	792	Mason, etc., District v. Griffin, 134	
v. Minter, 43 Miss. 666,	310	Ill. 330,	630
v. State, 1 Ind. 72,	591	Masonic Temple Co. v. Common-	
v. State, 2 Ind. 72,	438	wealth, 87 Ky. 349,	126
v. State, 101 Ind. 173,	771	Mateer v. Brown, 1 Cal. 221,	470
v. State, 123 Ind. 128, 255,	256, 257,	Masters v. Beckett, 83 Ind. 595,	399
690,	758	v. Templeton, 92 Ind. 447, 488,	595,
Marston, In re, 79 Me. 25,	225	596	
Martin v. Bank, 20 Ark. 636,	180	Masterson v. Herndon, 10 Wall.	
v. Cauble, 72 Ind. 67,	562, 715,	416,	116, 139
v. Elden, 32 Ohio St. 282,	703	v. Little, 75 Tex. 682,	601
v. Fielder, 82 Va. 455,	78	v. Williams (Tex.), 11 So. W.	
v. Fox, 40 Mo. App. 664,	265	Rep. 531,	74
v. Garver, 40 Ind. 351,	791, 792	Mather v. Chapman, 6 Conn. 54,	61
v. Hall, 26 Mo. 385,	532	Matheson v. Grant, 2 How. 263,	515
v. Harrison, 50 Ind. 270,	162, 762	Mathews v. Droud, 114 Ind. 268,	558,
v. Hazard Powder Co., 93 U.		682	
S. 302,	316	v. Morrison, 13 R. I. 309,	308
		v. Ritenour, 31 Ind. 31,	597

TABLE OF CASES.

lxxxvii

[References are to Pages.]

Mathews v. Story, 54 Ind. 417,	572	Meeker v. Gardelia, 1 Wash. 139,	581
Mathewson v. Stewart, 2 How. 263,	582	v. Shanks, 112 Ind. 207,	712
Mathie v. McIntosh, 40 Wis. 120,	13	Meeks v. Leach, 91 Ill. 323,	58
Mathis v. State, 18 Ga. 343,	680	Mellish v. Richardson, 7 B. & C.	
v. State, 94 Ind. 562,	672	819,	515, 520
Matlock v. Bank of Tennessee, 7		Melloh v. Demott, 79 Ind. 502,	34, 43
Yerg. 90,	312	Melson v. Dickson, 63 Ga. 682,	529
v. Todd, 25 Ind. 128,	215, 619	Meltenberger v. Logansport, etc.,	
Matson v. Swanson, 131 Ill. 255,	636	Co., 106 U. S. 286,	137
Matter of Application of Senate, 10		Memmler v. Roberts, 81 Ga. 659,	306
Minn. 78, 9 Col. 623,	4	Memory v. Niepert, 33 Ill. App.	
Mattinger v. Lake Shore, etc., Co.,		131,	628
117 Ind. 136,	196	Memphis, etc., Co. v. McCool, 83	
Mattingly v. Paul, 88 Ind. 95,	525, 526	Ind. 392,	613
Mattson v. Borgeson, 24 Ill. App. 79,	680	Mendenhall v. Treadway, 44 Ind.	
Maxam v. Wood, 4 Blackf. 297,	665	131,	769
Maxfield v. Freeman, 39 Mich. 64,	83	Menk v. Home, etc., Co., 76 Cal. 50,	790
Maxwell v. Boyne, 36 Ind. 120, 624,	626,	v. Steinfert, 39 Wis. 370,	559
	686	Mentz, Town of, v. Cook, 108 N.	
v. Campbell, 8 Ohio St. 265,	638	Y. 504,	593
v. Day, 45 Ind. 509,	524	Meracle v. Down, 64 Wis. 323,	655
v. Hannibal, etc., Co., 85 Mo. 95,	731	Meranda v. Spurlin, 100 Ind. 380,	300,
v. State, 89 Ala. 150,	612		548
v. Stewart, 21 Wall. 71,	266	Mercer v. Corbin, 117 Ind. 450,	165,
May v. Reed, 125 Ind. 199,	216, 416		196, 676
v. State, 14 Ohio, 461,	508	v. Mercer, 114 Ind. 558,	783
v. State Bank, 9 Ind. 233,	567	v. Patterson, 41 Ind. 440,	393
Mayer v. State, 48 Ind. 122,	408	v. Wholl, 5 Ad. & El. (N. S.)	
Mayer v. Goldsmith, 58 Ind. 94,	673	447,	615
Maxfield v. State, 110 Ind. 591,	535	Merchants' Bank v. State Bank, 10	
Mayhew v. Dunham, 138 Mass. 584,	190	Wall. 604,	416
Maynard v. Black, 41 Ind. 310,	541	Merchants', etc., Co. v. Joesting, 89	
Mayne v. Board, 123 Ind. 132,	61	Ill. 152,	769
Mayo v. Purcell, 3 Munf. (Va.) 243,	493	Meredith v. Chancey, 59 Ind. 466,	156
Mayor, etc., v. Shaw, 14 Ga. 162,	334	v. Lackey, 14 Ind. 529,	159, 403,
Mays v. Foster, 26 Kan. 518,	724		596, 683
v. Fritton, 20 Wall. 414,	731	v. Lackey, 16 Ind. 1,	403
v. Hedges, 79 Ind. 288,	613	v. State, 122 Ind. 514,	239, 256
v. Hoover, 112 Ind. 455,	531	Mergentheim v. State, 107 Ind. 567,	251
v. King, 28 Ala. 690,	324		536, 579, 699
Marysville v. Buchanan, 3 Cal. 212,	341	Meridian, etc., Bank v. Brandt, 51	
Marysville, etc., Co. v. Punnett, 15		Ind. 56,	599
B. Monr. 47,	73	Meriweather v. Whitley, 38 Tex.	
Mazeheitz v. Pimentel, 83 Cal. 450,	790	525,	92
Meade v. Bartlett, 77 Tex. 366,	314	Merle v. Andrews, 4 Tex. 200,	82
Meagher v. Morgan, 3 Kan. 372,	730	Mervin v. Universal, etc., Co., 85	
Meaux v. Meaux, 81 Ky. 475,	789	N. Y. 278,	559
Mechanics, etc., Co. v. Nichols, 16		Merrick v. State, 63 Ind. 327,	292, 718
N. J. L. 410,	792	Merrifield v. Weston, 68 Ind. 70,	469
Mechanics, etc., Bank v. Smith, 19		Merrill v. Lake, 16 Ohio, 373,	430
Johns. 115,	737	Merrills v. Adams, Kirby, 249,	224
Meichelke v. Bremer, 59 Wis. 57,	699	Merritt v. Cobb, 17 Ind. 314,	162
Medcalf v. Commonwealth, 84 Ky.		v. Baldwin, 6 Wis. 439,	677
485,	244	v. Pearson, 76 Ind. 44,	294
Medith v. Crawford, 34 Ind. 399,	689	v. Richey, 127 Ind. 400,	358
Medler v. Dunn, 26 Ind. 171,	579	v. Wells, 18 Ind. 171,	599, 603
v. State, 26 Ind. 171,	579, 769	v. White, 37 Miss. 438,	671
Medsker v. Pogue, 1 Ind. App. 197,	510	Mesa v. United States, 2 Black, 721,	104
Meek v. Spracher (Va.), 12 S. E.		Mescall v. Tully, 91 Ind. 96,	416, 587
Rep. 397,	653		

[References are to Pages.]

Messenger v. Kistner, 4 Binn. 97,	667,	Miller v. Carmichael, 98 Ind. 236,
	672	223, 226.
Meserve v. Clark, 115 Ill. 580,	317	v. Deaver, 30 Ind. 371,
Messick v. Midland R. R. Co., 128		v. Evansville National Bank, 99
Ind. 81,	507, 609	Ind. 272,
Meyer v. Fiegel, 38 How. Pr. 424,	407,	52.
	793	v. Graham, 17 Ohio St. 1,
v. Lane, 40 Kan. 491,	636	v. Hardin, 64 Mo. 545,
v. Lewis, 43 Mo. App. 417,	656	v. Hays, 20 Ind. 451,
v. State, 19 Ark. 156,	528	v. Holding, 5 Houst. (Del.) 494,
v. State, 125 Ind. 335,	336, 520	v. Hower, 2 Rawle. 53,
v. Stewart, 48 Md. 423,	224	v. Indianapolis, 123 Ind. 196,
v. Yesser, 32 Ind. 294,	767	v. Kolb, 47 Ind. 220,
Metcalf v. Watertown, 128 U. S.		v. Lively, 1 Ind. App. 6,
586,	418	v. Louisville, etc., Co., 128 Ind.
Metz, Town of, v. Cook, 108 N. Y.		97,
504,	734	v. McKenzie, 10 Wall. 582, 116
Metzler v. James, 12 Col. 322,	412	v. Montgomery, 78 N. Y. 282,
v. Metzler, 99 Ind. 384,	536	v. Morgan, 143 Mass. 25,
Miami, etc., Co. v. Baily, 37 Ohio		v. Noble, 86 Ind. 527,
St. 104,	539	v. O'Reilly, 84 Ind. 168, 320.
v. Wesler, 47 Ind. 65,	528, 531	
Midberry v. Collins, 9 Johns. 345,	441	v. Perry, 38 Ia. 303,
Middletown v. Quigley, 7 Halst.		v. Porter, 71 Ind. 521,
(N. J.) 352,	714	v. Powers, 18 Ind. 263,
Midland Ry. Co. v. Dickason, 29 N.		v. Royce, 60 Ind. 189, 179,
Rep. 775,	725	v. Seligman, 58 Ind. 460, 198.
Midland, etc., v. McCartney, 1 Neb.		v. Shackelford, 4 Dana, 264,
398,	673	v. Shall, 67 Barb. 446,
Midland R. W. Co. v. Wilcox, 111		v. Shields, 124 Ind. 166,
Ind. 561,	316, 342	v. Shriner, 87 Ind. 141, 170, 171
Michell v. Stinson, 80 Ind. 324,	168	v. State, 8 Ind. 325, 63, 232, 444
Michie v. Michie, 17 Gratt. 109,	103	v. State, 61 Ind. 503,
Michigan, etc., Co. v. Bivens, 13		v. State, 12 Wall. 159,
Ind. 263,	693	v. Thomas, 71 Cal. 406,
v. Doherty, 77 Mich. 359,	120	v. Voss, 40 Ind. 307, 692,
v. McDonough, 21 Mich. 165,	587	v. Wade, 87 Cal. 410,
v. Northern, etc., Co., 3 Ind. 239,	86	v. White River School Tp.,
Mickley v. Tomlinson, 79 Ia. 383,	123	101 Ind. 503,
Milburn Wagon Co. v. Kennedy, 75		Millani v. Togrini, 19 Nev. 133,
Tex. 212,	576	Millard v. Board, 116 Ill. 23,
Miles v. Buchanan, 36 Ind. 490, 284, 294,		Millerd v. Thorn, 56 N. Y. 402,
297, 300, 511,	638	Millett, Ex parte, 37 Mo. App. 76,
v. Douglass, 34 Conn. 393,	571	Milligan v. Poole, 35 Ind. 64,
v. Edsall, 7 Mont. 185,	581	v. State, 97 Ind. 355, 88
v. Jennings, 6 Mo. App. 589,	159	Millikan v. Patterson, 91 Ind. 515,
v. Loomis, 75 N. Y. 288,	704	v. State, 70 Ind. 283, 247, 368
v. Stevens, 3 Pa. St. 21,	568	
v. Vanhorn, 17 Ind. 245,	524, 761	Milliken v. Ham, 36 Ind. 166,
v. Wikel, 74 Ia. 712,	556	Millikin v. Houghton, 75 Cal. 539.
v. Wingate, 6 Ind. 458,	704	v. Osborne, 12 Ind. 480,
Millar v. Farrar, 2 Blackf. 219,	352	Milner, Ex parte, 6 Eng. L. & Eq
v. McAllister, 59 Ind. 491,	320	371,
Miller v. Adamson, 45 Minn. 99,	781	Milner v. Meek, 95 U. S. 252,
v. Arnold, 65 Ind. 488,	452	Million v. Board, 89 Ind. 5,
v. Baker, 20 Pick. 217,	750	Millior v. Board, 89 Ind. 105,
v. Billingsley, 41 Ind. 489,	597	Mills v. Brown, 16 Pet. 425, 62
v. Bottorf, 6 Blackf. 30,	284	Mills v. Buchanan, 36 Ind. 490,
v. Burton, 121 Ind. 224,	284	v. Conner, 1 Blackf. 2,
v. Camp, 28 Neb. 412,	93, 109	v. Hoag, 7 Paige, 18,
		v. Miller, 2 Neb. 299,

TABLE OF CASES.

lxxxix

[References are to Pages.]

Mills v. Rice , 3 Neb. 76, 634	Mister v. Corrigan , 17 Mo. App. 510, 160
v. Simmonds , 10 Ind. 464, 755, 769	Mizer v. Bristol , 30 Neb. 138, 615
v. State , 52 Ind. 187, 231, 783	Mix v. People , 86 Ill. 329, 326
v. Thurby , 11 How. Pr. 114, 733	v. People , 122 Ill. 641, 489
v. Winter , 94 Ind. 329, 375, 610, 699	Mobile, etc., Co. v. Jurey , 111 U. S. 584, 573
Millcap v. Stanley , 50 Ala. 319, 131	v. Ladd (Ala.) , 9 So. Rep. 169, 643
Milwaukee, etc., Co. v. Pabst , 64 Wis. 244, 96	v. McCarthy , 56 Pa. St. 359, 28
Mims v. State , 16 Ohio St. 221, 578	Mobley v. Slonaker , 48 Ind. 256, 413
Miner v. Louman , 66 Mich. 530, 623	v. State , 83 Ind. 92, 391, 691
v. Rogers , 65 Mich. 225, 339	Moe v. Moe , 39 Wis. 308, 450
v. Vedder , 66 Mich. 97, 579	Moffatt v. Fisher , 47 Ia. 473, 266
Mining Co. v. Taylor , 100 U. S. 37, 509, 573	Moffitt v. Wilson , 44 Ind. 476, 45
Minor v. Happersett , 21 Wall. 162, 58	v. Medsker Draining Co. , 48 Ind. 107, 397
Minor v. Hill , 58 Ind. 176, 488	Mogan v. Thompson , 13 Ore. 230, 760
Minneapolis v. Wilkin , 30 Minn. 140, 61	Mohney v. Redbank Tp. (Pa.) , 15 Atl. Rep. 891, 62
Minnesota, etc., Co. v. Doran , 17 Minn. 188, 616	Mohun's Case , 6 Mod. 59, 178
v. St. Paul Co. , 2 Wall. 609, 115	Molihan v. State , 30 Ind. 266, 250
Mint v. Mitchell , 30 Ind. 228, 545	Moll v. Benckler , 28 Wis. 611, 780
Minton v. Underwood, etc., Co. , 79 Wis. 646, 549	Moller v. Tuska , 87 N. Y. 166, 589
Minturn v. Farmers, etc., Co. , 3 Seld. 498, 597	Monnett v. Hemphill , 110 Ind. 299, 125, 494
Mires v. Alley , 51 Ind. 507, 566	Montana Ry. Co. v. Warren , 137 U. S. 348, 628
Mitchell v. American Ins. Co. , 51 Ind. 396, 446	Monroe v. Adams Ex. Co. , 65 Ind. 60, 163
v. Bunch , 2 Paige Ch. 606, 420	v. Paddock , 75 Ind. 422, 282
v. Colglazier , 106 Ind. 464, 712	v. Snow , 33 Ill. App. 230, 762
v. Dibble , 14 Ind. 526, 202	Montgomery v. Gorrell , 49 Ind. 230, 173, 511
v. Friedley , 126 Ind. 545, 653, 716	v. Leavenworth , 2 Cal. 57, 111
v. Gregory , 94 Ind. 363, 212, 331, 332	v. Swindler , 32 Ohio St. 224, 615
v. Lincoln , 78 Ind. 531, 181, 192	v. Wasem , 116 Ind. 343, 147
v. McCabe , 10 Ohio. 405, 638	Montgomery Co. v. Auckley , 103 Mo. 492, 650
v. Monette , 37 Ala. 49, 546	Montmorency, etc., Co. v. Rock , 41 Ind. 263, 687, 712, 748
v. Overman , 103 U. S. 62, 178, 650	Montsesson v. Randle , Buller N. P. 328, 622
v. Robinson , 80 Ind. 281, 626	Moody v. Fleming , 4 Ga. 115, 438
v. Stinson , 80 Ind. 324, 159, 161, 511	v. Pomeroy , 4 Denio, 115, 619
v. Tomlinson , 91 Ind. 157, 537, 678	v. Rowell , 17 Pick. 490, 537
v. United States , 9 Pet. 711, 456	v. Sewall , 14 Me. 295, 602
v. Wiles , 59 Ind. 364, 435	v. State , 84 Ind. 433, 681
Mitcheson v. Foster , 3 Metcf. (Ky.) 324, 20	v. Vreeland , 7 Wend. 55, 267, 344
Mitts v. McMorran , 85 Mich. 94, 659	Moon v. Jennings , 119 Ind. 130, 780
Missouri v. First National Bank , 74 Ill. 217, 3	Mooney v. Hough , 84 Ala. 80, 556
Missouri, etc., Co. v. Chicago, etc., Co. , 132 U. S. 191, 750	v. Kinsey , 90 Ind. 33, 570, 761, 793
v. Holley , 30 Kan. 465, 580	v. Maas , 22 Ia. 380, 672
v. Lamothe , 76 Tex. 219, 682	Moore, Estate of , 68 Cal. 394, 224
v. Munkers , 11 Kan. 223, 529	Moore v. Alerton (Tex.) , 15 S. W. Rep. 70, 315
v. Palmer , 19 Kan. 471, 201	v. American, etc., Co. , 60 Hun. 582, 490
v. Vandeventer , 26 Neb. 222, 391	v. Barnett , 17 Ind. 349, 685
Missouri Pacific Ry. Co. v. Hays , 15 Neb. 224, 774	v. Boner , 7 Bush. 26, 78
v. Johnson , 72 Tex. 95, 539	v. Boyd , 95 Ind. 134, 562
v. Schoennens , 37 Mo. App. 612, 547	v. Brown , 81 Ga. 10, 455, 576
Missouri River Tel. Co. v. First Nat. Bank , 74 Ill. 217, 532	

[References are to Pages.]

- Moore v. Damon, 4 Mo. App. 111, 306
 v. Ellis, 18 Mich. 77, 61, 91
 v. Floyd, 4 Ore. 260, 126, 350
 v. Gamgee L. R., 25 Q. B. 244, 630
 v. Gentry, 25 S. C. 334, 601
 v. Gilbert, 46 Ia. 508, 675
 v. Harland, 107 Ind. 474, 271
 v. Held, 73 Ia. 538, 122
 v. Henry, 18 Mo. App. 35, 191
 v. Jordan, 65 Tex. 395, 461
 v. Lewis, 76 Mich. 300, 123
 v. Lynn, 79 Ind. 299, 571
 v. McDonald, 68 Md. 321, 619
 v. McGuire, 26 Ala. 461, 116
 v. Philadelphia Bank, 5 S. & R. 41, 528, 791
 v. Read, 1 Blackf. 177, 292, 712, 718
 v. Robbins, 18 Wall. 588, 499
 v. Ross, 11 N. H. 547, 663
 v. Sargeant, 112 Ind. 484, 526, 533, 639
 v. Shields, 121 Ind. 267, 658, 659, 691
 v. Seaton, 31 Ind. 11, 52
 v. State, 63 Ga. 165, 178
 v. State, 65 Ind. 213, 162, 762
 v. State, 72 Ind. 358, 437
 v. State, 114 Ind. 414, 73, 791
 Moores v. McConnell, 17 La. Ann. 84, 483
 v. National Bank, 104 U. S. 625, 614
 Moormen v. Shockney, 95 Ind. 88, 288
 v. Wood, 117 Ind. 144, 587
 Moral School Tp. v. Harrison, 74 Ind. 93, 562
 Mordecai v. Lindsay, 19 How. 199, 478
 Mordhorst v. Nebraska Tel. Co., 28 Neb. 610, 699
 Morehouse v. Heath, 99 Ind. 509, 535
 Morford v. White, 53 Ind. 547, 589
 v. Woodworth, 7 Ind. 83, 578
 Morgan, Ex parte, 114 U. S. 174, 435, 436
 Morgan v. Bell, 41 Kan. 345, 792
 v. Durfee, 69 Mo. 469, 643
 v. Hays, 91 Ind. 132, 178, 775
 v. Incorporated, etc., Co., 64 Ind. 213, 525
 v. Keenan, 27 S. C. 248, 68
 v. Lake Shore, etc., Co. (Ind.), 28 N. E. Rep. 548, 591
 v. Reynolds, 1 Mont. 163, 54
 v. State, 12 Ind. 448, 677
 v. State, 13 Ind. 215, 541
 v. State, 31 Ind. 193, 510, 555, 613
 Moriarty v. McDevitt, 46 Minn. 136, 718
 Morisey v. Swinson, 104 N. C. 55, 665, 681
 Morklar v. Lewis, 40 Ind. 1, 784
 Morley v. Liverpool, etc., Co., 85 Mich. 210, 579
 Morningstar v. Cunningham, 110 Ind. 328, 159, 508
 v. Musser (Ind.), 28 N. E. Rep. 1119, 579
 Morrill v. Richey, 18 N. H. 295, 579
 Morris, Ex parte, 9 Wall. 605, 579
 Morris v. Angle, 42 Cal. 236, 579
 v. Beall, 85 Ala. 598, 579
 v. Buckeye Engine Co., 78 Ind. 86, 579
 v. Gilmer, 129 U. S. 315, 514
 v. Graves, 2 Ind. 354, 514
 v. Lachman, 68 Cal. 109, 514
 v. Morris, 119 Ind. 341, 514
 v. Ogle, 56 Ga. 592, 514
 v. Platt, 32 Conn. 75, 514
 v. Rexford, 18 N. Y. 552, 514
 v. Runnels, 12 Tex. 176, 514
 v. State, 1 Blackf. 37, 231
 v. State, 7 Blackf. 607, 535
 v. State, 94 Ind. 565, 535
 v. Stern, 80 Ind. 227, 535
 v. Thomas, 17 Ill. 112, 535
 v. Wells, 54 Hun. 634, 535
 Morrison v. Hedenberg (Ill.), 27 N. E. Rep. 460, 535
 v. Jacoby, 114 Ind. 84, 265
 v. Judge, 14 Ala. 182, 265
 v. Lelew, 17 Mo. App. 633, 265
 v. Morrison, 16 Hun. 507, 265
 v. State, 40 Ark. 448, 265
 v. State, 76 Ind. 335, 251, 623
 Morrissey v. People, 11 Mich. 327, 251
 Morrow v. Comm'rs, 21 Kan. 484, 251
 v. State, 48 Ind. 432, 251
 v. Sullender, 4 Neb. 374, 224
 v. Walker, 10 Ark. 569, 224
 v. Weed, 4 Ia. 77, 147, 284
 Morse v. Morse, 25 Ind. 156, 554
 v. Stockman, 65 Wis. 36, 554
 v. Woodworth (Mass.), 27 N. E. Rep. 1010, 554
 Mortimer v. Nash, 17 Abb. Pr. 229, n., 554
 Moses v. Julian, 45 N. H. 52, 554
 v. Macferlane, 2 Burr. 1005, 554
 v. Risdon, 46 Ia. 251, 554
 v. Vroman, 5 Wis. 147, 554
 v. Wooster, 115 U. S. 285, 554
 Mosher v. State, 14 Ind. 261, 554
 Mosier v. Duckworth (Ind.), 30, 554
 v. Stoll, 119 Ind. 244, 548, 622
 Moss v. State, 101 Ind. 321, 554
 v. Witness Printing Co., 64 Ind. 125, 554
 Moulder v. Kempff, 115 Ind. 459, 8, 554
 Moulton v. Baer, 78 Ga. 215, 554
 Moultrie v. Dixon, 26 S. C. 296, 554

TABLE OF CASES.

xci

[References are to Pages.]

Mount v. Slack, 39 N. J. Eq. 230,	224,	Murray v. Abbott, 61 Wis. 198,	580
	225	v. Berdell, 98 N. Y. 480,	496
v. Van Ness, 34 N. J. Eq. 523,	225	v. Charleston, 96 U. S. 432,	395
Mountjoy v. State, 78 Ind. 172,	232	v. Ebright, 50 Ind. 362,	603, 782
Moyer v. Brand, 102 Ind. 301,	505, 603,	v. Fry, 6 Ind. 371,	679
	606, 607, 608	v. Phillips, 59 Ind. 56,	483
v. Strahl, 10 Wis. 83,	93	v. Scribner, 70 Wis. 228,	67
v. Swygart, 21 Ill. App. 497,	33, 44	v. State, 26 Ind. 141,	250, 691
Morie v. Landers, 78 Cal. 99,	122	v. Usher, 117 N. Y. 542,	745
Mudget v. Kent, 18 Me. 349,	232	v. Williamson, 79 Ind. 287,	379, 446
Mulcahey v. Givens, 115 Ind. 286,	61	Murrell v. Smith, 51 Ala. 301,	489
Muldoon v. Blackwell, 84 N. Y. 646,	414	Murrill v. Murrill, 90 N. C. 120	490
Muler v. Evansville Nat. Bank, 99		Murry v. Burris, 6 Dak. 170,	392
Ind. 272,	532	Muscoe v. Commonwealth, 86 Va.	
Mulhern v. Press, etc., Co., 53 N. J.			443,
L. 150,	633	Musgrove v. Glasgow, 3 Ind. 31,	327
Mulhollin v. Ward, 7 Ind. 646,	536	Musselman's Appeal, 101 Pa. St. 165,	13
Mull v. McKnight, 67 Ind. 525,	159, 161,	Musselman v. Cravens, 47 Ind. 1,	597
	164, 172, 334, 462	v. Kent, 33 Ind. 452,	736
Mullany v. First Nat. Bank, 89 Ind.		v. Musselman, 44 Ind. 106,	521, 545,
424,	765		786
Mullary v. Caskaden, Minor (Ala.),		v. Pratt, 44 Ind. 126,	534, 571
20,	183, 184	v. Wise, 84 Ind. 248,	403, 572
Mullen v. Morris, 2 Pa. St. 85,	619	Musser v. Hawood, 23 Mo. App. 495,	494
v. State, 34 Ind. 540,	4	Mussina v. Cavazos, 20 How. 280,	92,
Mullendore v. Scott, 45 Ind. 113,	404		116, 137
v. Silvers, 34 Ind. 98,	736	Mutual Life Ins. Co. v. Snyder, 93	
Mullikin v. Bloomington, 72 Ind. 161,	285	U. S. 393,	643, 662
Mullin v. Atherton, 61 N. H. 20,	494, 496	Mutual, etc., Co. v. Cannon, 48 Ind.	
Mullinix v. State, 10 Ind. 5,	232, 254		264,
Mumford v. Thomas, 10 Ind. 167,	628	Myer v. Moon, 45 Kan. 580,	580
v. Wordwell, 6 Wall. 423,	695		634
Munly v. State, 7 Blackf. 593,	527	Myers v. Conway, 62 Ind. 474,	766
Muncey v. Joest, 74 Ind. 409,	147, 284,	v. Crow, 113 N. Y. 608,	413
	286	v. Duabenbiss, 84 Cal. 1,	596
Munday v. Collier, 52 Ark. 126,	639	v. Field, 37 Mo. 434,	586
Munson v. Blake, 101 Ind. 78,	123	v. Kendrick, 13 Ia. 599,	483
v. Lock, 48 Ind. 116,	268	v. Lawyer, 99 Ind. 237,	187
Murdock v. Brooks, 38 Cal. 596,	323	v. McDonald, 68 Cal. 162,	499
v. Cincinnati, 39 Fed. Rep. 891,	121	v. Mitchell (S. Dak.), 46 N.W.	
v. Clarke, 90 Cal. 427,	624	Rep. 246,	669
v. Cox, 118 Ind. 266,	19, 395,	v. Moore, 28 N. E. Rep. 724,	521
v. District of Columbia, 23 Ct.		v. Murphy, 60 Ind. 282,	625, 686
of Cl. 41,	98	v. State, 115 Ind. 554,	520
v. Martin, 132 Pa. St. 86,	76	Mygatt v. Ingham, Wright (Ohio),	
v. Memphis, 20 Wall. 590,	92		176,
Murphy v. Clayton, 51 Ind. 147,	675	Myrick v. Meritt, 22 Fla. 335,	674
v. Commonwealth, 23 Gratt. 660,	674		
v. Consolidated, etc., Co., 32			
Ill. 612,	315	N. P. Terminal Co. v. Lowenberg,	
v. King, 6 Mon. 30,	65	11 Ore. 286,	447
v. Lambert, 59 Ind. 477,	636	Naffzieger v. Reed, 98 Mo. 87,	669
v. Ross, 2 Wash. 327,	446	Nalker v. State, 102 Ind. 502,	517
v. Steele, 51 Ind. 81,	324	Nalley v. State, 28 Tex. App. 387,	622
v. State, 97 Ind. 579,	250	Nance v. Metcalfe, 19 Mo. Ap. 183,	414
v. Teter, 56 Ind. 545,	736	Nash v. Caywood, 39 Ind. 457,	687
v. Tilly, 11 Ind. 511,	162, 601,	Nashua Savings Bank v. Lovejoy,	
v. United States, 104 U. S. 464,	127	1 N. Dak. 211,	630
Murphrey v. Wood, 2 Jones (N. C.),		National Bank v. Dunn, 106 Ind.	
L. 63,	115		110,
			271, 734

[References are to Pages.]

National Bank v. Jarvis, 26 W. Va. 785,	71	New Albany, etc., Co. v. Day, 117 Ind. 337,	
v. Omaha, 96 U. S. 737,	208	v. Huff, 19 Ind. 444,	
National Banking, etc., Co. v. Knap, 55 Mo. 154,	64	v. Welsh, 9 Ind. 479,	284.
National, etc., Bank v. McConnell (Ala.), 9 So. Rep. 149,	544	New Albany v. White, 100 Ind. 206.	
National City Bank v. New York, etc., Exchange, 97 N. Y. 645,	463	New Albany, City of, v. McCulloch, 127 Ind. 500,	579, 678.
National Benefit Asso. v. Grauman, 107 Ind. 288,	678	New England Iron Co. v. New York Loan Co., 55 How. Pr. 351,	
Nations v. Johnson, 24 How. 195,	134	New Era Life Asso. v. Weigle, 128 Pa. St. 577,	
Nave v. First Nat. Bank, 87 Ind. 204,	146	New Haven v. Whitney, 36 Conn. 373,	
v. Flack, 90 Ind. 205, 535, 577,	700	New Home Life Asso. v. Hagler, 23 Ill. App. 457,	
v. Hadley, 74 Ind. 155,	604	New Orleans v. Scalzo, 41 La. Ann. 1141,	
v. Nave, 12 Ind. 1,	777	New Orleans Ins. Co. v. Albros. Co., 112 U. S. 506,	212
v. Wilson, 33 Ind. 294,	563	New Orleans, etc., Co. v. Bosworth, 8 La. Ann. 80,	
Nay v. Byers, 13 Ind. 412,	197	v. Crescent City Co., 33 La. Ann. 934,	
Naugle v. State, 101 Ind. 284,	568	New Orleans, City of, v. Whitney, 138 U. S. 595,	
Naylor v. Moody, 2 Blackf. 247,	321	New York, etc., Co., Matter of, 35 Hun. 575,	
v. Sidener, 106 Ind. 179,	81	v. Auer, 106 Ind. 219,	
Neagle, In re, 4 Sawy. 232,	7	v. Doane, 105 Ind. 92,	98
Neal v. Field, 68 Ga. 534,	127	v. Fifth Nat. Bank, 118 U. S. 608,	
v. Mills, 5 Blackf. 208,	718	v. Fifth Nat. Bank, 135 U. S. 432,	
v. State, 49 Ind. 51,	604	v. Gallagher, 79 Tex. 685, 581,	
Nealis v. Dicks, 72 Ind. 374,	6	v. Schuyler, 17 N. Y. 592,	
Nealley v. Greenough, 25 N. H. 325,	697	v. Wilson, 8 Pet. 291,	
Nearing v. Belt, 5 Hill, 291,	617	New York Elevated R. R. Co. v. Fifth Nat. Bank, 118 U. S. 608,	
Nebraska, etc., Co. v. Maxon, 23 Neb. 224,	669	Newark, etc., Co. v. Perry Co., 30 Ohio St. 120,	
Needham v. Webb, 20 Ind. 213,	403	Newberry v. Furnival, 56 N. Y. 638,	
Needless v. Burk, 98 Mo. 474,	491	Newby v. Myers, 44 Kan. 477,	
Neel v. City of Toledo, 5 Ohio C. C. 203,	545	v. Warren, 24 Ind. 161,	
Neff v. Clute, 12 Barb. 466,	401	Newcomb v. Horton, 18 Wis. 566,	
v. Reed, 98 Ind. 341, 217, 300,	539,	v. Newcomb, 13 Bush. 544,	
Neidefer v. Chastain, 71 Ind. 363,	588,	v. White (N. M.), 23 Pac. Rep 671,	
Neilson v. Chicago, etc., Co., 58 Wis. 516,	635	Newcome v. Wiggins, 78 Ind. 306,	
v. Commercial Mutual Ins. Co., 3 Duer, 455,	539	Newcomer v. Hutchins, 96 Ind 119,	368, 569, 610
Neigler v. Harris, 115 Ind. 560,	190	Newell v. Ayers, 32 Me. 334,	
Nellis v. Lathrop, 22 Wend. 121,	723	Newell v. Gatling, 7 Ind. 147, 64, 8;	
Nelson v. Brown, 20 Ind. 74,	56	Newhouse v. Miller, 35 Ind. 463, 39.	
v. Davis, 35 Ind. 474,	599	Newkirk v. State, 27 Ind. 1,	
v. State, 2 Swan, 237,	599	Newman, Ex parte, 14 Wall. 152,	
v. Tenney, 113 N. Y. 616,	538	Newman v. Hammond, 46 Ind. 111,	
v. Warren (Ala.), 8 So. Rep. 413,	449	v. Kiser, 128 Ind. 258,	
v. Welch, 115 Ind. 270,	746	v. Kiser (Ind.), 26 N. E. Rep 1006,	126, 228, 351
v. Wilson, 75 Ia. 710,	622, 786		
Neptune v. Taylor, 108 Ind. 459,	402		
Nesbit v. Miller, 125 Ind. 106,	558		
New v. New, 127 Ind. 576,	736		
v. Walker, 108 Ind. 365,	554		
New Albany, etc., Co. v. Callow, 8 Ind. 471,	608, 636		
v. Combs, 13 Ind. 490,	196, 628		
	378, 632		

TABLE OF CASES.

xciii

[References are to Pages.]

Newman v. Manning, 89 Ind. 422,	734	North, etc., Co. v. Crayton, 86 Ga.	
Newton v. Newton, 12 Ind. 527,	690	499,	581
v. Newton, 46 Minn. 33,	546, 655	North American Ins. Co. v. Forc	
v. Tyner, 128 Ind. 466,	743	heimer, 86 Ala. 541,	484
v. Whitney, 77 Wis. 515,	787	North Vernon, City of, v. Voegler,	
Niklaus v. Roach, 3 Ind. 78,	603	103 Ind. 314,	588
Nichol v. Henry, 89 Ind. 54,	353	Northam v. Gordon, 23 Cal. 255,	495
v. Thomas, 53 Ind. 42,	162, 172,	Northcutt v. Buckles, 60 Ind. 577,	63,
	525, 759	64,	687
Nichols v. Cito, 132 Ill. 91,	44	Northern Ind. R. Co. v. Michigan	
v. Cornelius, 7 Ind. 611,	88	Central R. Co., 2 Ind. 670,	332, 333,
v. Glover, 41 Ind. 24,	480	604	
v. Nichols, 96 Ind. 433,	282	Northern Pac., etc., Co. v. Holmes,	
v. State, 65 Ind. 512,	163, 580, 619,	3 Wash. Ty. 543,	556
	766, 786	Northern R. R. Co. v. Herbert, 116	
v. State, 127 Ind. 406,	247, 255,	U. S. 642,	573
	408, 672	Northwestern, etc., Co. v. Blanken-	
v. White, 85 N. Y. 531,	657	ship, 94 Ind. 535,	785
Nicholson v. Stephens, 47 Ind. 185,	217	v. Hazelett, 105 Ind. 217,	251, 368,
Nickless v. Pearson, 126 Ind. 477,	491,	374, 446,	784
	688	v. Landes, 6 Minn. 564,	334
Nicodemus v. Simons, 121 Ind. 564,	718	Northwestern Mutual, etc., Co. v.	
Nietert v. Trentman, 104 Ind. 390,	282	Heimann, 94 Ind. 24,	580
Nill v. Comparat, 16 Ind. 107,	463	Norton v. Moshier (Ill.), 28 N. E.	
Nitchie v. Earle, 117 Ind. 270,	128, 548,	Rep. 463,	492
	610, 712	v. State, 106 Ind. 163,	162, 232,
Niven v. Burke, 82 Ind. 455,	744	253	603
Nixon v. Beard, 111 Ind. 137,	535, 562	Norvell v. Hittl., 23 Ind. 346,	
v. Campbell, 106 Ind. 47,	508, 554,	Norwood v. Kenfield, 30 Cal. 393,	555
	562	Norwich, etc., Co. v. Worcester,	
v. Hammond, 12 Cush. 285,	232	147 Mass. 518,	610
Noakes v. Morey, 30 Ind. 103,	624, 686	Norwich, Mayor of, v. Berry, 4	
Noble v. Blount, 77 Mo. 235,	545	Burr. 2277,	650
v. Bourke, 44 Mich. 193,	348	Nowlin v. Whipple, 89 Ind. 490,	288, 368
v. Dickson, 48 Ind. 171,	784	Nowling v. McIntosh, 89 Ind. 593,	589
v. Enos, 19 Ind. 72,	694	Nudd v. Burrows, 91 U. S. 426,	9
v. Murphy, 27 Ind. 502,	101, 467	Nugen v. Laduke, 87 Ind. 482,	393
Noblesville, etc., Co. v. Gause, 76		Numan v. Valentine, 83 Cal. 588,	124,
Ind. 142,	535	125	
v. Lechr, 124 Ind. 79,	708	Numbers v. Bowser, 29 Ind. 491,	567
v. Teter, 1 Ind. App. 322,	759	Nutter v. Junction R. Co., 13 Ind.	
v. Vestal, 118 Ind. 80,	690	479,	354
Noe v. State, 92 Ind. 92,	530	v. State, 9 Ind. 178,	255, 782
Noll v. Smith, 68 Ind. 188,	328	Nutting v. Loesance, 27 Ind. 37,	281, 768
Nonesuch, The, 9 Wall. 504,	134	Nye v. Lewis, 65 Ind. 326,	757, 761
Noon v. Lanahan, 55 Ind. 262,	683	v. Lowry, 82 Ind. 316,	535
Noonan v. Hlsley, 22 Wis. 27,	658	Nysegwander v. Lowman, 124 Ind.	
Norbury v. Meade, 2 Bligh. 261,	17	584,	146, 285, 520, 635
Nord v. Martz, 56 Ind. 531,	179		
Norden v. Jones, 33 Wis. 600,	587		
Nordyke, etc., Co. v. Dickson, 76			
Ind. 188,	294		
v. Van Sant, 99 Ind. 188,	640		
Norfolk Southern R. Co. v. Ely, 95			
N. C. 77,	61		
Norman v. Winch, 65 Ia. 263,	561		
Norris v. Dodge, 23 Ind. 190,	287		
v. State, 95 Ind. 73,	253		
North v. State, 107 Ind. 356,	592		

O

O'Boyle v. Shannon, 80 Ind. 159,	62
O'Brien v. Browning, 49 How. Pr.	
109,	269
v. Commonwealth (Ky.), 12 S.	
W. Rep. 471,	530
v. Gaslin, 24 Neb. 559,	491
v. Peterman, 34 Ind. 556,	295, 751
v. State, 63 Ind. 242,	407
v. State, 125 Ind. 38,	672, 680

[References are to Pages.]

O'Brien v. Vulcan Iron Works, 7 Mo. App. 257,	528, 621	Ohio, etc., Co. v. Nickless, 73 Ind. 382,	373, 56.
O'Callahan v. Bode, 84 Cal. 489,	570, 574, 666	v. Trowbridge, 126 Ind. 391,	
O'Connell v. Gillespie, 17 Ind. 459,	34, 43	v. Voight, 122 Ind. 288,	
v. O'Leary, 151 Mass. 83,	491	v. Walker, 113 Ind. 196,	73
O'Connor v. Guthrie, 11 Ia. 80,	619	Ohm's Est., In re, 82 Cal. 160,	
O'Dea v. State, 57 Ind. 31,	792	Oiler v. Bodkey, 17 Ind. 600,	
O'Dell v. Carpenter, 71 Ind. 463,	281	Old v. Mohler, 122 Ind. 594,	283
O'Donald v. Constant, 82 Ind. 212,	172, 747	Oldenberg v. Devine, 40 Minn. 400,	
O'Donnell v. Segar, 25 Mich. 367,	703	Olds v. Deckman, 98 Ind. 162, 16.	
O'Dowd v. Russell, 14 Wall. 402,	139	v. State, 6 Blackf. 91,	
O'Hara v. MacConnell, 93 U. S. 150,	129	Olds Wagon Co. v. Benedict, 2 Neb. 372,	
O'Hare v. People, 40 Ill. 533,	254	Oliver v. Depew, 14 Ia. 490,	
O'Kane v. Daly, 63 Cal. 317,	122	v. Pate, 43 Ind. 132,	53
O'Leary v. Iskey, 12 Neb. 136,	411	v. Phelps, Spencer (N. J.), 180	
v. Sloo, 7 La. Ann. 25,	30	Ollam v. Shaw, 27 Ind. 388, 533, 680	
O'Neal v. Wade, 3 Ind. 410,	547	Olmstead v. Abbott, 61 Vt. 281,	
O'Neill v. Calhoun, 67 Ill. 219,	619	Olney v. Hatcliff, 37 Hun. 286,	
O'Neil v. Chandler, 42 Ind. 471,	174, 446	Olson v. Solverson, 71 Wis. 663,	
v. New York, etc., Co., 115 N. Y. 579,	391	Olvey v. Jackson, 106 Ind. 286,	
O'Neill v. Jones, 43 N. Y. 84,	550	Omaha, etc., Co. v. Tabor, 13 Col. 41,	
O'Reilly v. Edington, 96 U. S. 724,	208, 212, 318, 324	Oneal v. State, 47 Ga. 229,	
v. New York, etc., Co. (R. I.), 17 Atl. Rep. 906,	143	Onondaga, etc., Co. v. Minard, N. Y. 98,	
O'Shea v. Kirkes, 8 Abb. Pr. 69,	603	Ophir, etc., Co. v. Carpenter, 6 Nev. 393,	
O'Sullivan v. O'Connors, 22 Hun. 137,	325	Opdyke v. Marble, 44 Barb. 64,	
v. Roberts, 39 N. Y. 360,	652	Opp v. Ten Eyck, 99 Ind. 345, 213	
Oakland Paving Co. v. Bogge, 79 Cal. 439,	481	v. Ward, 125 Ind. 241,	
Ober v. Indianapolis, etc., Co., 13 Mo. App. 81,	770	Oppenheim v. Pittsburg, etc., Co. 85 Ind. 471,	147, 187
Oberfelder v. Kavanaugh, 29 Neb. 427,	774	Opinion of Justices, 21 N. E. Rep. 439, 23 Fla. 297, 49 Mo. 216, 7 Ky. 621,	
Obernalte v. Edgar, 28 Neb. 70,	537	Oregon, etc., Co. v. Barlow, 3 Ore. 311,	
Ochs v. People, 124 Ill. 399,	528, 559	Oregonian Ry. Co. v. Oregon, etc. Co., 27 Fed. Rep. 277,	
Odell v. Carpenter, 71 Ind. 463,	282	Ormes v. Dauchy, 82 N. Y. 443,	
v. Reynolds, 40 Mich. 21,	647	Orr v. Fleek, 111 Ind. 40,	
Oder v. Commonwealth, 80 Ky. 32,	160	v. Miller, 98 Ind. 436, 88, 61	
Oelricks v. Spain, 15 Wall. 211,	32	v. Worden, 10 Ind. 553,	
Ogborn v. Hoffman, 52 Ind. 439,	759	Orth v. Dorschlein, 32 Mo. 366,	
Ogden v. Saunders, 12 Wheat. 213,	58	Ortman v. Dixon, 9 Cal. 23,	
Ogilvie v. Richardson, 14 Wis. 157,	467	Orton v. Tilden, 110 Ind. 131, 248	
Ogle v. Dill, 55 Ind. 130,	85, 300, 345, 625, 692, 719	Osborn v. Sutton, 108 Ind. 443,	
Ohio v. Cowles, 5 Ohio St. 87,	638	v. United States Bank, 9 Whea. 738,	1
Ohio, etc., Co. v. Collarn, 73 Ind. 261,	674	v. Kline, 18 Neb. 344,	
v. Dooley, 32 Ill. App. 228,	571	v. Poe, 6 Humph. 111,	
v. Hardy, 64 Ind. 454,	313, 321	v. State, 128 Ind. 129	
v. Hays, 35 Ind. 173,	748	Osborne & Co. v. Williams, 37 Minn. 507,	
v. Hemberger, 43 Ind. 462,	297	Oscanyan v. Arms Co., 103 U. S. 261,	410
v. McCartney, 121 Ind. 385,	345, 746, 782		

XCV

Good v. Jones, 60 N. H. 543,	592
v. State, 64 Wis. 472,	679
Kokosh, etc., Co. v. Germania, etc.,	
Co. 71 Wis. 454,	568
Ostrander, Ex parte, 1 Denio, 679,	440
Ostrander v. Clark, 8 Ind. 211,	521
v. Weber, 114 N. Y. 95,	729
Oswald v. Wolf, 25 Ill. App. 501,	44
Ous v. De Boer, 116 Ind. 531.	147,
	285, 488
Otter Creek, etc., Co. v. Raney, 34	
Ind. 329,	624, 686
Ottaw v. Davis, 27 Ill. 466,	577
Over v. Schiffing, 102 Ind. 191,	588, 691,
	699, 702
v. Shannon, 75 Ind. 352,	507, 562,
	608, 609
Overly v. Tipton, 68 Ind. 410,	599,
Overton v. Overton, 17 Ind. 226, 45,	50
Owen v. Cooper, 46 Ind. 524,	179
Owen v. Going, 13 Col. 290,	383
v. Phillips, 73 Ind. 284,	566
Owen School Tp. v. Hay, 107 Ind.	
351,	394, 396
Peters v. Branson, 28 Mo. App. 584,	79
v. Crossett, 104 Ill. 468,	98
v. Mitchell, 33 Tex. 225,	74
Orings v. Kincannon, 7 Pet. 399,	139
Orne v. Going, 7 Col. 85,	68, 71
<p style="text-align:center;">P</p>	
Pacey v. Powell, 97 Ind. 371,	53
Packard v. Backus, 78 Wis. 188,	663
v. Mendenhall, 42 Ind. 598,	393
Packet Co. v. Sickles, 19 Wall. 611,	769
Pacific R.R. Co., In re, 32 Fed. Rep.	
241,	26
Pacific, etc., Co. v. Bolton, 89 Cal.	
154,	319
Pacific Exp. Co. v. Malin, 132 U. S.	
531,	761
Padgett v. State, 93 Ind. 396,	335, 462
Page, Estate of, 57 Cal. 238,	761
Page v. Commonwealth, 27 Gratt.	
954,	679
v. Latham, 60 Cal. 601,	447
v. Sumpter, 53 Wis. 652,	485
Pahmeyer v. Groverman, 60 Ind. 7,	261
Page v. O'Neal, 12 Cal. 483,	736
v. Fazzackerly, 36 Barb. 392,	402
Paine v. Cowdin, 17 Pick. 142,	463
v. Moorland, 15 Ohio, 435,	285,
	435, 672
v. Woolley, 80 Ky. 568,	127
Painter v. Guirl, 71 Ind. 240,	46
Palairot's Appeal, 67 Pa. St. 479,	105
Palmer v. Arthur, 131 U. S. 60, 636,	653
v. Chicago, etc., Co., 112 Ind.	
250,	644, 723
Palmer v. Conant, 58 Hun. 333,	
v. Davis, 28 N. Y. 242,	604
v. Hayes, 112 Ind. 289,	563
v. Oakley, 2 Doug. (Mich.),	
433,	421
v. Pittsburgh, etc., Co., 112 Ind.	
260,	640
v. Rogers, 70 Ia. 381,	459
Pam v. Vilmar, 54 How. Pr. 235,	593
Pamer v. Rombauer, 41 Kan. 295,	
21 Pac. Rep. 784,	146
Panton v. Manley, 89 Ill. 458,	454
Pape v. Wright, 116 Ind. 502, 702,	739
Park v. Balentine, 6 Blackf. 223,	604
Parker, Ex parte, 120 U. S. 737, 435,	636
Parker, Ex parte, 131 U. S. 221,	436
Parker v. Bates, 29 Kan. 597,	793
v. Clayton, 72 Ind. 307, 393, 394,	396
v. Commonwealth, 8 B. Mon. 30,	674
v. Courtney, 28 Neb. 605,	496
v. Cutler Milldam Co., 20 Me.	
353,	27
v. Dacres, 2 Wash. Ty. 440,	261
v. Enslow, 102 Ill. 272,	539
v. Georgia, etc., Co., 83 Ga. 539,	
	537, 662
v. Hastings, 12 Ind. 654,	398
v. Horne, 38 Miss. 215,	140
v. Hubble, 75 Ind. 580, 19, 476,	718
v. Indianapolis Nat. Bank, 126	
Ind. 595,	30
v. McAllister, 14 Ind. 12,	420
v. Meadows, 86 Tenn. 181,	482
v. Medsker, 80 Ind. 155,	507, 666
v. Morrill, 2 Phil. 453,	17
v. Morrill, 106 U. S. 1,	444
v. People, 13 Col. 155,	545, 679
v. Reay, 76 Cal. 103,	789
v. Remington, etc., Co., 24 Kan.	
31,	200, 201
v. Richardson, 46 Kan. 283,	546
v. Russell, 3 Blackf. 411,	43
v. Small, 58 Ind. 349,	604
v. State, 81 Ga. 332,	520
v. State, 78 Ind. 259,	251, 252
v. Urie, 21 Pa. St. 305,	192
v. Winnipiseogee Co., 2 Black,	
545,	594
Parks v. Barney, 55 Cal. 239,	109
v. Boston, 15 Pick. 198,	539
v. Hazlerigg, 7 Blackf. 536,	313
v. Ross, 11 How. 362,	480
v. Young, 75 Tex. 278,	615
Parratt v. Neligh, 7 Neb. 456,	751
Parmelee v. Fischer, 22 Ill. 212,	666
Parmater v. State, 102 Ind. 90,	708
Parmlee v. Sloan, 37 Ind. 469,	570
Parsley v. Eskew, 73 Ind. 558,	45
Parson v. Haskell, 30 Ill. App. 444,	383
Parsons v. Hedges, 15 Ia. 119,	545

[References are to Pages.]

Parsons v. Loyd, 3 Wills, 341,	286	Payne v. Niles, 20 How. U. S. 219,	
v. Milford, 67 Ind. 489,	69	Peabody v. Phelps, 9 Cal. 213,	
v. Platt, 37 Conn. 563,	792	v. Sweet, 3 Ind. 514,	
v. Stockbridge, 42 Ind. 121,	784	Pearce v. Pettit, 85 Tenn. 724,	
Partridge v. Gilbert, 3 Duer, 184,	625	Pearcy v. Michigan, etc., Co., 111	
Pass v. Payne, 63 Miss. 239,	312	Ind. 59,	
Pasour v. Lineberger, 90 N. C. 159,	459	Pearson v. Carlton, 18 S. C. 47,	
Passmore v. Passmore, 113 Ind. 237,	508	v. Darrington, 32 Ala. 227,	
Patapsco, The, 12 Wall. 451,	50	v. Household, etc., Co., 78 Tex.	
Paul v. Davis, 100 Ind. 422,	474	385,	
Pauley v. Cauthorn, 101 Ind. 91,	599	v. Pearson, 125 Ind. 341, 216,	
Paulman v. Claycomb, 75 Ind. 64,	622	v. Pierson, 128 Ind. 479,	
Paulsen v. Manske, 126 Ill. 72,	269	Peck v. Board, 87 Ind. 221,	
Pavey v. American Ins. Co., 56		v. Courtis, 31 Cal. 207,	
Wis. 221,	692	v. Childers, 73 Mo. 484,	
v. Pavey, 30 Ohio St. 600,	635	v. Hensley, 51 Ind. 344,	
v. Wintrode, 87 Ind. 379, 773, 774		v. Louisville, etc., Co., 101 Ind	
Pawling v. United States, 4 Cranch.	219,	366,	
Paxton v. Daniel, 1 Wash. 16,	633	v. Sanderson, 18 How. 42,	
Pate v. First Nat. Bank, 63 Ind. 254,	413	v. Sims, 120 Ind. 345,	
v. Moore, 79 Ind. 20,	69	v. Strauss, 33 Cal. 678,	
v. Roberts, 55 Ind. 277,	483	v. Vandenburg, 30 Cal. 11,	
v. Tait, 72 Ind. 450,	670	v. Yong, 1 How. 250,	125
Paterson v. Hopkins, 23 Mich. 541,	83	Peden v. King, 30 Ind. 181,	724
Pattee v. State, 109 Ind. 545, 239,	254	v. Mail, 118 Ind. 556,	
Patten v. Belo, 79 Tex. 41,	655	v. Noland, 45 Ind. 354, 276, 508	
Patterson v. Ball, 19 Wis. 243,	689	Pedigo v. Grimes, 113 Ind. 148,	
v. Churchman, 122 Ind. 379, 696,	771	700	
v. Copeland, 52 How. Pr. 460,	601	Pedrick v. Post, 85 Ind. 255,	
v. Crawford, 12 Ind. 241,	589	Peed v. Brenneman, 72 Ind. 288,	
v. Hamilton, 26 Hun. 665, 138,	143	616	
v. Indianapolis, etc., Co., 56		Peebles v. Rand, 43 N. H. 337,	
Ind. 20,	269, 689	Peele v. State, 118 Ind. 512, 108	
v. Jack, 59 Ia. 632,	789	Peery v. Greensburgh, etc., Co., 43	
v. Lord, 47 Ind. 203,	300, 345	Ind. 321,	562, 605
v. Philbrook, 9 Mass. 151,	61	Pegram v. Carson, 18 How. Pr. 519	
v. Prior, 18 Ind. 440,	589	Peirce v. Higgins, 101 Ind. 178,	
v. Rowly, 65 Ind. 108,	126	Pelham v. Page, 6 Ark. 535,	
v. Scottish-American Co., 107		Pemberton v. Johnson, 113 Ind. 538	
Ind. 497,	268, 297, 418	Pence v. Christman, 15 Ind. 257,	
v. State, 70 Ind. 341,	530	v. Garrison, 93 Ind. 345, 480,	626
v. Stiles, 6 Ia. 54,	391	v. Langdon, 99 U. S. 578,	
v. Woodland, 28 Neb. 250, 92, 109		v. State, 110 Ind. 95,	256
Pattison v. Bacon, 12 Abb. Pr. 142,	733	Pendergast v. Hodge, 21 Mo. App	
v. Shaw, 6 Ind. 377,	596	138,	
v. Smith, 93 Ind. 447,	81	Penhryn Slate Co. v. Meyer, 1	
v. Vaughan, 40 Ind. 253,	399	Daly, 61,	
Patton v. Gash, 99 N. C. 28,	401	Penn v. Lord Baltimore, 1 Ves. St	
v. Hamilton, 12 Ind. 256,	561	444,	
Patrick v. Graham, 132 U. S. 627,	570	Pennington v. Nave, 15 Ind. 323,	
v. Jones, 21 Ind. 249,	638	v. Streight, 54 Ind. 376,	
Patry v. Chicago, etc., Co., 77 Wis.		Pennock v. McCormick, 120 Mass	
218,	581	275,	
Payne v. First Nat. Bank, 43 Mo.		Pennsylvania, etc., Co. v. Cook, 12	
App. 377,	571	Pa. St. 170,	
v. Flournoy, 29 Ark. 500,	635	v. Dean, 92 Ind. 459,	
v. Hardesty (Ky.), 14 S. W.			
Rep. 348,	545, 654		
v. June, 92 Ind. 252,	53, 572		

TABLE OF CASES.

xcvii

[References are to Pages.]

Pennsylvania R. R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445,	26	People v. Dulaney, 96 Ill. 503,	591
Pennsylvania Co. v. Gallentine, 77 Ind. 322,	266, 279	v. Durfee, 62 Mich. 487,	535
v. Holderman, 69 Ind. 18, 183, 184,	606	v. Eldrige, 7 How. Pr. 108,	96
v. Marion, 104 Ind. 339,	486, 562, 663	v. Evans, 72 Mich. 367,	656
v. Nations, 111 Ind. 203,	791	v. Ferris, 35 N. Y. 125,	90
v. Newmeyer, 28 N. E. Rep. 860,	541	v. Flack, 15 Daly, 442,	446
v. Niblack, 99 Ind. 149, 187, 296,	768	v. Garcia, 25 Cal. 531,	681
v. Poor, 103 Ind. 553,	562, 565	v. Garnett, 130 Ill. 340,	435
v. Rooney, 89 Ind. 453,	403, 545	v. Gaunt, 23 Cal. 156,	578
v. Roy, 102 U. S. 451,	658, 659	v. Genet, 59 N. Y. 80,	248
v. Stegemeier, 118 Ind. 305,	35	v. Goldenson, 76 Cal. 328,	617
v. Weddle, 100 Ind. 138,	691	v. Gonzales, 35 N. Y. 49,	656
Perobscot, etc., Co. v. Weeks, 52 Me. 456,	667	v. Hagar, 52 Cal. 171,	147, 285
Price v. Wallis, 37 Miss. 172,	457	v. Hall, 48 Mich. 482,	700, 704
Piscicola v. Reese, 20 Fla. 437,	272	v. Hawes, 25 Ill. App. 326,	438
People v. Alpin, 86 Mich. 393,	578	v. Hawkins, 46 N. Y. 9,	438
v. Anderson, 44 Cal. 65,	623	v. Hillhouse, 80 Mich. 580,	612
v. Anthony, 25 Ill. App. 532,	438, 757	v. Hillsdale, etc., Co., 2 Johns. 190,	592
v. Arceo, 32 Cal. 40,	531	v. Honeyman, 3 Den. 121,	529
v. Bachman (Cal.), 23 Pac. Rep. 1090,	383	v. Hoyt, 4 Utah, 247, 528, 530,	736
v. Barker, 60 Mich. 277,	254, 528	v. Johnson, 38 N. Y. 63,	497
v. Beaver, 83 Cal. 419,	164, 254	v. Judge of Wayne Co., 1 Mich. 359,	436
v. Board, 23 Ill. App. 386,	666, 679	v. Judges, 2 Johns. Cas. 68,	435
v. Board, 100 Ill. 495,	58, 479	v. Justice, 20 Wend. 663,	440
v. Board, 60 Hun. 486,	592	v. Keeler, 99 N. Y. 463,	3
v. Boggs, 20 Cal. 432,	619	v. Keenan, 13 Cal. 581,	534
v. Bonds, 1 Nev. 33,	618	v. Kelly, 94 N. Y. 526,	534
v. Bonney, 19 Cal. 426,	538	v. Kelly, 35 Hun. 295,	572
v. Brennan, 79 Mich. 362, 239,	257	v. Kennedy, 57 Hun. 532,	787
v. Buddensieck, 103 N. Y. 487,	538	v. Knight, 2 Caines, 98,	34
v. Burns, 78 Cal. 645,	125	v. Leaton, 25 Ill. App. 45, 121	320, 321
v. Callaghan, 4 Utah, 49,	239	Ill. App. 666,	438
v. Carnal, 6 N. Y. 463,	230	v. Lee, 14 Cal. 510,	34
v. Carty, 77 Cal. 213,	617	v. Leonard, 11 Johns. 504,	497
v. Center, 61 Cal. 191,	780	v. Livingston, 80 N. Y. 66,	269
v. Chalmers, 5 Utah, 201,	617	v. Lynch, 54 N. Y. 681,	249
v. Chen Sing Wing, 88 Cal. 268,	661	v. McKay, 18 Johns. 212,	255
v. Ching Hing Chang, 74 Cal. 359,	610	v. McKenna, 58 Hun. 609,	3
v. City of Syracuse, 78 N. Y. 56,	516	v. Maynard, 14 Ill. 419,	601
v. Clark, 7 N. Y. 385,	232	v. Mayor, etc., 32 Barb. 35,	737
v. Cline, 83 Cal. 374,	251	v. Mathes, 4 Wend. 229,	669
v. Coffman, 59 Mich. 1,	578	v. Mellon, 40 Cal. 648,	232
v. Collins, 75 Cal. 411,	610	v. Merrill, 14 Kern (N. Y.), 74,	700, 704
v. Collins, 19 Wend. 56,	436	v. Millard, 53 Mich. 63,	690
v. Cornetti, 92 N. Y. 85,	250	v. Miller, 4 Utah, 410,	127
v. Corning, 2 Coms. (N. Y.) 9,	230	v. Mills, 109 N. Y. 69,	617
v. Curling, 1 Johns. 320,	674	v. Montague, 71 Mich. 447,	571
v. Davidson, 30 Cal. 379,	31	v. Muller, 96 N. Y. 408,	569
v. District Court, etc., 14 Col. 396,	439	v. Mullings, 83 Cal. 138,	127, 415
v. Doe, 1 Mich. 451,	736	v. Murray, 5 Hill. 468,	145
		v. Nash, 1 Idaho, 206,	738
		v. Nelson, 85 Cal. 421,	232
		v. Nestle, 19 N. Y. 583,	5
		v. Nevada, 6 Cal. 143,	255
		v. Noonan, 60 Hun. 578,	469, 618
		v. Northey, 77 Cal. 618,	164, 578
		v. O'Brien, 88 Cal. 483,	619
		v. Page, 1 Idaho, 102,	

[References are to Pages.]

People v. Rector, etc., 6 Abb. Pr. 177,	696, 697	Perkins v. Fourniquet, 14 How. 328, 4	
v. Redinger, 55 Cal. 290,	248	v. Hayward, 124 Ind. 445, 168, 21	
v. Reed, 81 Cal. 70,	713	508, 548, 669, 713, 7	
v. Rensselaer, etc., Co., 15		v. Marrs, 15 Col. 262,	
Wend. 113,	28	Perrin v. Johnson, 16 Ind. 72,	
v. Reynolds, 16 Cal. 128,	736	Perry, Ex parte, 102 U. S. 183,	
v. Rose, 52 Hun. 33,	739	Perry v. Bailey, 12 Kan. 539,	
v. Samario, 84 Cal. 484,	176	v. Burton, 126 Ill. 599,	
v. Schad, 58 Hun. 571,	787	v. Makemson, 103 Ind. 300,	
v. Scharnweber, 119 Ill. 445,	623	v. Tupper, 70 N. C. 538,	
v. Sing Lum, 61 Cal. 538, 252,	681	Perryman v. Greenville, 51 Ala.	
v. Soy, 57 Cal. 102,	529	507,	127, 4
v. Stimer (Mich.), 46 N. W.		Persons v. Alsip, 2 Ind. 67,	
Rep. 28,	66	v. McKibben, 5 Ind. 261,	
v. Superior Court, 5 Wend. 114,	516	Perteet v. People, 70 Ill. 171,	
v. Superior Ct., 19 Wend. 68,	435	Peru v. Beares, 55 Ind. 576,	
v. Supervisors, 20 Mich. 95,	61	Petefish v. Watkins, 124 Ill. 384,	
v. Swift, 59 Mich. 529,	437	Peterman v. Ott, 45 Ind. 224,	
v. Tarbell, 17 How. Pr. R. 120,	146	Peters v. Banta, 120 Ind. 416, 266, 1	
v. Taylor, 36 Cal. 255,	573	394, 7	
v. Taylor, 34 Barb. 481,	648	v. Guthrie, 119 Ind. 44,	527, 6
v. Teague, 106 N. C. 571,	775	v. Lane, 55 Ind. 391, 624, 686, 7	
v. Terrell, 58 Hun. 602,	661	Peterson v. Gresham, 25 Ark. 380,	
v. Tibbitts, 19 N. Y. 523,	27	v. Hutchison, 30 Ind. 38, 510, 5	
v. Toal (Cal.), 23 Pac. Rep. 203,	65	v. Ottawa, 41 Kan. 293,	
v. Sackett, 14 Mich. 320, 663,	792	v. Swan, 119 N. Y. 662,	
v. Tracy, 1 Denio, 617,	440	v. Toner, 80 Mich. 350,	
v. Turcott, 65 Cal. 126,	577	Petry v. Ambroscher, 100 Ind. 510,	
v. Von, 78 Cal. 1,	252	Pettigrew v. Barnum, 11 Md. 434,	
v. Waite, 70 Ill. 25,	592	7	
v. Wallace, 80 Cal. 158,	659	Pettis v. Johnson, 56 Ind. 139,	
v. Walter, 68 N. Y. 403,	392	Petty v. Trustees, etc., 95 Ind. 278,	
v. Wheatley, 88 Cal. 114,	787	Pettygrove v. Rothschild, 2 Wash.	
v. Wiley, 3 Hill, 194,	556	6,	
v. Wilkinson, 60 Hun. 582,	739	Peyton v. Kruger, 77 Ind. 486,	
v. Williams, 24 Cal. 31,	680	Pfeiffer v. Crane, 89 Ind. 485,	68.
v. Wilson, 26 Cal. 127,	112		
v. Wilson, 64 Ill. 195,	7	Pharo v. Johnson, 15 Ia. 560,	
v. Wilson, 55 Mich. 506,	617	Phelan v. Boylan, 25 Wis. 679,	
v. Woodside, 72 Ill. 407,	668	v. San Francisco, 9 Cal. 15,	
People's Bank v. Shyrock, 48 Md.		Phelps v. Mayer, 15 How. 160,	
427,	192	v. Osgood, 34 Ind. 150,	
People's Co. v. Babinger, 40 La.		v. Phelps, 17 Md. 120,	
Ann. 247,	308	v. Smith, 116 Ind. 387, 108, 3	
People's Savings Bank v. Finney,			
63 Ind. 460, 117, 154, 361,	443	v. Tilton, 17 Ind. 423, 782, 7	
People's Savings, etc., Co. v. Spears,		Philadelphia, City of, v. Campbell,	
115 Ind. 297, 296, 725,	751	11 Phila. 162,	
Peoria, etc., Co. v. Walser, 22 Ind.		Philadelphia, etc., Co. v. Harper, 29	
73,	688	Md. 330,	
Pepper v. Dunlap, 5 How. 51,	499	v. Little, 41 N. J. Eq. 519,	
Peralta v. Adams, 2 Cal. 594,	440	v. Shipley, 72 Md. 88,	
v. Castro, 15 Cal. 511,	224	v. Stimpson, 14 Pet. 448,	
Perdue v. Aldridge, 19 Ind. 290,	524	v. Waterman, 54 Pa. St. 337,	
Perkins v. Bakron, 39 Mo. App. 331,	756	Phillip v. Gallant, 62 N. Y. 256,	
v. Bates, 61 Tex. 190,	449	Phillips v. New York, etc., Co., 53	
v. Burley, 64 N. H. 524,	622	Hun. 634,	
v. Ermel, 2 Kan. 325,	614	Philips, etc., Co. v. Seymour, 91 U.	
v. Fourniquet, 6 How. 206,	74	S. 646,	

TABLE OF CASES.

xcix

[References are to Pages.]

Phillips v. Preston, 11 How. 294,	115	Pittsburgh, etc., Co. v. Van Houten,	
v. Shelton, 6 Ia. 545,	112	48 Ind. 90,	177, 469, 609
Philippi v. McLean, 5 Mo. App.	98	v. Williams, 74 Ind. 462,	373
Philipsburgh Bank v. Fulmer, 2		Pitzer v. Indianapolis, etc., Co., 80	
Vr (N. J.) 52,	620, 621	Ind. 569, 625, 686, 692, 714, 750,	759, 763
Philpot v. Taylor, 75 Ill. 312,	704	Pixley v. Van Nostern, 100 Ind. 34,	597
Phoenix Ins. Co. v. Moog, 81 Ala.	618	Place v. Minster, 65 N. Y. 89,	699
335		Plainfield v. Plainfield, 67 Wis. 525,	187
v. Readinger, 28 Neb. 587,	763, 789	Plank v. Jackson (Ind.), 27 N. E.	
Physio-Medical College v. Wilkin-		Rep. 1117,	164
son, 89 Ind. 23,	52	Plant v. Edwards, 85 Ind. 588,	640
Pick v. Rubicon, etc., Co., 27 Wis.	538	Platner v. Platner, 78 N. Y. 90,	411
433		Planter's Bank v. Neely, 7 How.	
Pickens v. Hobbs, 42 Ind. 270,	530, 531	(Miss.) 80,	456
Pickering v. State, 106 Ind. 228,	154,	Planters Ins. Co. v. Cramer, 47	
285, 419, 672		Miss. 200,	14, 20, 160
Pico v. Cuyas, 48 Cal. 639,	497	Platt v. Chicago, etc., Co., 74 Ia. 127,	63
Piedmont Mfg. Co. v. Buxton, 105		v. Continental Ins. Co., 62 Vt.	
N. C. 74,	64, 99	166,	666, 682
Piel v. Braver, 30 Ind. 332,	295	v. Manning, 34 Fed. Rep. 817,	630
Pierce v. Bicknell, 11 Kan. 262,	635, 736	Platter v. Board, 103 Ind. 360,	62, 215,
v. George, 30 Mo. App. 650,	44	286, 419, 526, 625,	686
v. McConnell, 7 Blackf. 170,	732	Pleasant v. State, 15 Ark. 624,	538
v. State, 67 Ind. 354,	529, 679	Pleasants v. Fant, 22 Wall. 116,	416, 480,
v. State, 75 Ind. 199,	256	643, 702	
v. Wilson, 48 Ind. 298,	294	v. Vevay, etc., Co., 42 Ind. 301,	85, 86
Pierre v. West, 29 Ind. 266,	14, 112, 198	Pledger v. State, 77 Ga. 242,	547
Pierson v. Hart, 64 Ind. 254,	118	Pleyte v. Pleyte, 15 Col. 44, 125,	177
v. McCahill, 22 Cal. 127,	523	Plummer v. Mold, 22 Minn. 1,	635
v. McCahill, 23 Cal. 249,	456	Plunkett v. Minneapolis, etc., Co.,	
Pigg v. State, 9 Ind. 363,	64, 232	79 Wis. 222,	634
Piggott v. Ramey, 1 Scam. 145,	516	Plymouth, City of, v. Fields, 125	
Pike v. Evans, 15 Johns. 210,	405,	Ind. 323,	758
550, 793		Pochelu v. Catonnet, 40 La. Ann.	
v. Megoun, 44 Mo. 491,	58, 479	327,	46
Pinkham v. McFarland, 5 Cal. 137,	513	Poindexter v. Greenhow, 84 Va. 441,	438
Piper v. White, 56 Pa. St. 90,	700	v. Greenhow, 114 U. S. 270,	305
Pipkin v. Allen, 29 Mo. 229,	75	Pointer v. State, 89 Ind. 255,	672
Piqua Bank v. Knoup, 6 Ohio. 342,	19	Poland v. Miller, 95 Ind. 387,	570
Pireaux v. Simon, 79 Wis. 392,	658	Polin v. State, 14 Neb. 540,	744
Pittman v. Myrick, 16 Fla. 401,	324	Pomeroy v. Baddeley, Ryan &	
Pittnam v. Wakefield (Ky.), 13 S.		Moody, 430,	538
W. Rep. 525,	17	Pollard v. King, 63 Ill. 36,	353
Pitts v. Tilden, 2 Mass. 118,	310	Pollard v. Wegener, 13 Wis. 569,	668
Pittsburgh, etc., Co. v. Adams, 105		Polleys v. Black River, etc., Co., 113	
Ind. 151,	579	U. S. 81,	96
v. Board, 28 W. Va. 264,	62	v. Swope, 4 Ind. 217,	638
v. Conway, 57 Ind. 52,	699	Ponca, Village of, v. Crawford, 18	
v. Hixon, 110 Ind. 225, 288, 491,	786	Neb. 551,	700
v. Martin, 82 Ind. 476,	520	Poole v. Chicago, etc., Co., 2 Mc-	
v. Noel, 77 Ind. 110,	535, 678, 690	Crary, 251,	620
v. Porter, 32 Ohio St. 328,	621	v. Fluger, 11 Pet. 185,	701
v. Probst, 30 Ohio St. 104,	769	Poorman v. Mills, 43 Cal. 323,	479
v. Ruby, 38 Ind. 294,	470, 693, 695	Pope v. Dinsmore, 8 Abb. Pr. 429,	407
v. Spencer, 98 Ind. 186,	708, 709	Poppenhusen v. Seeley, 41 Barb.	
v. Sponier, 85 Ind. 165,	574, 788	450,	337
v. Swinnv, 91 Ind. 399, 128, 350, 352		Porche v. La Blanche, 12 La. Ann.	
v. Thornburgh, 98 Ind. 201,	394	778,	763

TABLE OF CASES.

[References are to Pages.]

Poree's Succession, 27 La. Ann.		Powers v. Yonkers, 114 N. Y. 145,	
463,	599	Pracht v. Whittridge, 44 Kan. 710,	7
Port v. Russell, 36 Ind. 60,	759	Prather v. Rambo, 1 Blackf. 189,	5
Porter v. Brackenridge, 2 Blackf.			7
385,	635	Pratt v. Allen, 95 Ind. 404,	251, 7
v. Choen, 60 Ind. 338, 469, 623,	760,	v. Burhans, 47 N. W. Rep. 1064,	3
	786	v. Kendig, 128 Ill. 293,	
v. Foley, 21 How. 393,	477	v. Rice, 7 Nev. 123,	1
v. Grimsley, 98 N. C. 550,	483	v. Western Stage Co., 26 Ia.	
v. Holloway, 43 Ind. 35,	102	241,	210, 3
v. Parker, 6 Tex. 23,	334	Pray v. Wasdell, 146 Mass. 324,	3
v. Pierce, 120 N. Y. 217,	103	Pregnall v. Miller, 26 S. C. 600,	4
v. Purdy, 29 N. Y. 106,	286	Prentice v. Kimball, 19 Ill. 319,	6
v. Rummery, 10 Mass. 64,	132	v. Rice, 2 Doug. (Mich.) 296,	
v. State, 2 Ind. 435, 250, 538,	579,	Prentiss v. Paisley, 25 Fla. 927,	6
	669	Presbury v. Com., 9 Dana, 203,	5
v. Throop, 47 Mich. 313,	617	President, etc., v. Hamilton, 34	
v. Waltz, 108 Ind. 40,	580,	Ind. 506,	5
v. Western, etc., Co., 97 N. 66,	402	Pressley v. Harrison, 102 Ind. 14,	2
Portis v. State, 27 Ark. 360,	579	v. Lamb, 105 Ind. 171,	
Portland Co. v. United States, 15		Preston v. Fryer, 38 Md. 221,	2
Wall. 1,	369	v. Sanford, 21 Ind. 156,	525, 6
Portoues v. Holmes, 33 Ill. App.		v. Wright, 60 Ia. 351,	6
312,	729	Preszinger v. Harness, 114 Ind. 491,	2
Poseyville, Town of, v. Lewis, 126		Price v. Baker, 41 Ind. 570,	150, 2
Ind. 80,	707	v. Brown, 98 N. Y. 388,	6
Post v. Losey, 111 Ind. 75,	327	v. Commonwealth, 77 Va. 393,	7
v. Manhattan Ry. Co., 125 N.		v. Johnson County, 15 Mo. 433,	5
Y. 697,	729	v. State, 74 Ind. 553,	241, 2
Poteet v. County Commrs., 30 W.		Priddy v. Dodd, 4 Ind. 84,	296, 534, 6
Va. 58,	438,	Pride v. Wormwood, 27 Ia. 257,	5
Potter v. Chicago, etc., Co., 22 Wis.		Priest v. State, 68 Ind. 569,	6
615,	485	Prince v. Bates, 19 Ala. 105,	1
v. McCormack, 127 Ind. 439,	719	Princeton v. Manck, 35 Ind. 51,	
v. Merchants' Bank, 28 N. Y.		Princeton, School Town of, v. Geb-	
641,	670	hart, 61 Ind. 187,	7
v. Owens, 18 Ind. 383,	628	Prindle v. Campbell, 7 Mackey, 598,	7
v. Smith, 36 Ind. 231,	597	Pringle v. Leverich, 97 N. Y. 181,	6
Potts v. Felton, 70 Ind. 166,	401,	Proctor v. De Camp, 83 Ind. 559,	6
Pouder v. Tate, 96 Ind. 330,	81	v. Owens, 18 Ind. 21,	5
Poullain v. Poullain, 79 Ga. 11,	782	Prootus v. Holmes, 33 Ill. App. 312,	5
Pounds v. Chatham, 96 Ind. 342,	82	Protector, The, 11 Wall. 82,	1
Powell v. Ashlock, 21 Ill. App. 176,	666	Prout v. Berry, 2 Gill. (Md.) 147,	3
v. Augusta, etc., Co., 77 Ga. 192,	739	Providence, etc., Co. v. Goodyear,	
v. Bunger, 91 Ind. 64,	171	6 Wall. 153,	
v. Jopling, 2 Jones L. 400,	517	v. Martin, 32 Md. 310,	657, 6
v. Powell, 104 Ind. 18,	217, 647,	Providence Rubber Co. v. Good-	
v. State, 13 Tex. App. 244,	538	year, 9 Wall. 788,	4
v. Sturtevant, 85 Ala. 243,	269	Providence-Washington Ins. Co. v.	
v. Waldron, 89 N. Y. 328,	414	Wager, 37 Fed. Rep. 59,	2
Powers v. Evans, 72 Ind. 23,	775	Provines v. Heaston, 67 Ind. 482,	6
v. Fletcher, 84 Ind. 154,	687,	Pruitt v. Edinburg, etc., Co., 71	
v. Johnson, 86 Ind. 298,	723	Ind. 244,	2
v. Mitchell, 77 Me. 361,	740	Pryce v. Security Ins. Co., 29 Wis.	
v. Nesbit, 127 Ind. 497,	781	270,	4
v. New Haven, 120 Ind. 185,	274	Pudney v. Burkhart, 62 Ind. 179,	6
v. Provident Institution, 122		Puett v. Beard, 86 Ind. 104,	394, 6
Mass. 443,	190		686, 6
v. State, 87 Ind. 144, 167, 247,	251,	Pugh v. Calloway, 10 Ohio St. 488,	
252, 256, 368, 375, 674,	767		

TABLE OF CASES.

ci

[References are to Pages.]

Pulliam v. Christian, 6 How. 209,	74	Radcliff v. Radford, 96 Ind. 482,	644
v. Mendenhall, 120 Ind. 279, 626,	650	Rade, In re, 9 N. Y. Supp. 812,	13
Pulte v. Wayne Circuit Judge, 47		Radford v. Folsom, 123 U. S. 725,	92, 96
Mich. 646,	325	Ragan v. Cuyler, 24 Ga. 397,	496
Purdue v. Stevenson, 54 Ind. 161,	393,	v. Haynes, 10 Ind. 348,	420
	397	Ragsdale v. Matthews, 93 Ind. 589,	791
Purdy v. Rahl (Cal.), 21 Pac. Rep.		Rahm v. Deig, 121 Ind. 283,	216, 615
971,	383	Railton v. Gander, 126 Ill. 219,	156
Purple v. Harrington, 119 Ind. 164,	637	Railroad Co. v. Bradleys, 7 Wall.	
Putnam v. Boyer, 140 Mass. 235,	208,	575,	98
	318, 449	v. Fraloff, 100 U. S. 24,	416, 643
v. Hannibal, etc., Co., 22 Mo.		v. Gibbes, 24 So. Car. 60,	410
App. 589,	789	v. Harris, 7 Wall. 574,	337
v. Lewis, 1 Fla. 455,	75	v. Howard, 7 Wall. 392,	601
v. Tennyson, 50 Ind. 456,	563	v. Johnson, 15 Wall. 8,	132
v. Wise, 1 Hill, 234,	587	v. Koontz, 104 U. S. 5,	631
Pyles v. Adams, 97 Ind. 605,	229	v. Mississippi, 102 U. S. 135,	631
		v. Morey, 47 Ohio St. 207,	630
		v. Pratt, 22 Wall. 123,	573
		v. Schute, 100 U. S. 644,	341, 342
		v. Swasey, 23 Wall. 405,	68
		v. Winslow, 66 Ill. 219,	657
		Railsback v. Greve, 49 Ind. 271,	337
		v. Greve, 58 Ind. 72,	307, 312
		v. Walke, 81 Ind. 409,	167, 696
		Railway Co., Ex parte, 103 U. S.	
		794,	439
		Railway Co., Ex parte, 101 U. S.	
		711,	435, 439
		Railway Co. v. McCarthy, 96 U. S.	
		258,	128
		Rainey v. State, 53 Ind. 278,	792
		Rainforth v. People, 61 Ill. 365,	619
		Ralif v. Baldwin, 29 Ind. 16,	281
		Ralston v. Moore, 105 Ind. 243,	562, 703
		Ramsey v. Bush, 27 Ia. 17,	682
		Randall's Case, 2 Mod. 308,	272
		Randall v. Hunter, 69 Cal. 80,	122
		Randles v. Randles, 63 Ind. 93,	524
		v. Randles, 67 Ind. 434,	336, 462
		Randleman, etc., Co. v. Simmons,	
		97 N. C. 89,	392
		Randolph, Ex parte, 2 Brock. 447,	9, 28
		Randolph v. Hahn, 33 S. C. 609,	446
		- v. Lampkin (Ky.), 14 S. W.	
		Rep. 538,	787
		v. Mauck, 78 Mo. 468,	91
		Random v. Toby, 11 How. 493,	232
		Rankin v. Central, etc., Co., 73 Cal.	
		96,	114
		Ransom v. Henderson, 114 Ill. 528,	271
		Rany v. Governor, 4 Blackf. 2,	284
		Rapp v. Kester, 125 Ind. 79,	665, 679
		v. Reehling, 122 Ind. 255,	80
		Rardin v. Walpole, 38 Ind. 146,	294, 751
		Rariden v. Rariden (Ind.), 28 N. E.	
		Rep. 701,	526, 625
		Rasor v. Qualls, 4 Blackf. 286,	588
		Rater v. State, 49 Ind. 507,	793
		Rathburn v. Wheeler, 29 Ind. 601,	748

Q

Qualter v. State, 120 Ind. 92,	103, 253
Quan Wo Chung v. Laumeister, 83	
Cal. 384,	439, 496
Quarl v. Abbott, 102 Ind. 233,	146,
	148, 154, 285, 418
Quebec Bank v. Carroll (S. D.), 44	
N. W. Rep. 723,	65
Queen v. Buckinghamshire, El. &	
B. 260,	128
v. Charlesworth, 1 B. & S. 460,	541
v. Eastern Counties Ry. Co.,	
10 Ad. & El. 531,	433
v. Hepburn, 7 Cranch. 290,	527
v. Martin L. R., 1 Cr. C. Res.	
378,	539
v. Liverpool, 15 Q. B. (N. S.)	
1070,	128
v. Lord's Commr's, etc., 10 A.	
& E. 179,	435
v. Lord Stewart of Old Manor	
Hall, 10 A. & E. 248,	435
Queen Ins. Co. v. Studebaker, etc.,	
Co., 117 Ind. 416,	279, 391, 738
Quick v. Brenner, 101 Ind. 230, 274,	712
v. State, 73 Ind. 147,	241
Quill v. Gallivan, 108 Ind. 235,	296,
	595, 716, 751, 768
Quimby v. Boyd, 8 Col. 194,	637
v. Boyd, 128 U. S. 488,	418
v. Hopping (N. J.), 19 Atl.	
Rep. 193,	78
v. Hopping, 52 N. J. L. 117,	46
Quirk v. Clark, 7 Mont. 31,	636

R

Rabb v. Graham, 43 Ind. 1,	131, 360
Rabun County v. Habersham Coun-	
ty, 79 Ga. 248,	418
Racer v. Baker, 113 Ind. 177,	300, 777

[References are to Pages.]

Ratliff v. Baldwin, 29 Ind. 16,	179	Reeder v. Maranda, 55 Ind. 239,	1
v. Stretch, 117 Ind. 526,	288	v. Maranda, 66 Ind. 485,	413, 5
Ratliffe v. Huntly, 5 Ired. L. 545,	701	v. Sayre, 70 N. Y. 180,	5
Rauber v. Sundback (S. Dak.), 46		Rees v. City, 19 Wall. 107,	
N. W. Rep. 927,	643	Reese v. Beck, 9 Ind. 238,	69, 229, 4
Rauck v. State, 110 Ind. 384,	255	v. Smith, 95 N. Y. 645,	1
Rawlins v. Fuller, 31 Ind. 255,	597	v. State, 8 Ind. 416,	
Rawson v. Adams, 17 Johns. 130,	134	Reeves v. Andrews, 7 Ind. 207,	3
Ray v. Detchon, 79 Ind. 56,	279	v. Plough, 41 Ind. 204, 624, 648,	7
v. Dunn, 38 Ind. 230,	480	Regan v. McMahan, 43 Cal. 626,	1
v. Law, 3 Cranch. 179,	134	Regenstein v. Pearlstein, 30 S. C.	
v. Northup, 55 Wis. 396,	519	192,	5
v. Ray, 1 Idaho (N. S.), 705,	326	Regina v. Bertrand, 10 Cox C. C.	
v. Rowley, 1 Hun. 614,	672	618,	2
v. Thompson, 26 Mo. App. 431,	790	v. Murphy L. R., 2 Q. C. 535,	2
Rayle v. Indianapolis, etc., Co., 40		Reid v. Houston, 49 Ind. 181,	171, 17
Ind. 347,	87		2
Raymond v. Butterworth, 139 Mass.		v. Morton, 119 Ill. 118,	1
471,	271	Reiley v. Burton, 71 Ind. 118,	1
v. Richmond, 76 N. Y. 106,	210, 448	Reilly v. Bader, 46 Minn. 212,	6
v. Simonson, 4 Blackf. 77,	589	Reineke v. Wurgler, 77 Ind. 468,	7
v. Thexton, 7 Mont. 299,	789	Reinhold v. State (Ind.), 30 N. E.	
Rea v. Missouri, 17 Wall. 532,	536	Rep. 306,	6
v. Scully, 76 Ia. 343,	610	Reitan v. Goebel, 35 Minn. 384,	3
Read v. Cambridge, 124 Mass. 567,	619	Reitz v. State, 33 Ind. 187,	5
v. Gooding, 20 Fla. 773,	65	Remington v. Bailey, 13 Wis. 332,	6
v. Nichols, 118 N. Y. 224,	747	Removal Cases, 100 U. S. 457,	
Ready v. Shamokin, 137 Pa. St. 92,	544	Reacher v. Anderson, 93 N. C. 105,	
Reagan v. Copeland, 78 Tex. 551,	265	v. Anderson, 95 N. C. 208,	6
Real Del Monte, etc., Co. v. Thomp-		Renihan v. Wright, 125 Ind. 536,	6
son, 22 Cal. 542,	663	Renn v. Samos, 42 Tex. 104,	
Reams v. State, 23 Ind. 111,	408	Renner v. Ross, 111 Ind. 269,	1
Record v. Ketcham, 76 Ind. 482,	524	Rennick v. Chandler, 59 Ind. 354,	7
Rector v. Rotton, 3 Neb. 171,	73		6
Reddington v. Hamilton, 8 Blackf.		Repath v. Walker, 13 Col. 109,	6
62,	665	Republic Life Ins. Co. v. Swigert,	
Redelsheimer v. Miller, 197 Ind.		(Ill.), 25 N. E. Rep. 680,	5
485,	707	Resolutions, Irrigation, In re, 9	
Redinbo v. Fretz, 99 Ind. 458,	163, 693	Col. 620,	
Redman v. State, 28 Ind. 205,	533, 534	Resolutions, Senate, In re, 21 Pac.	
v. Taylor, 3 Ind. 144,	524	Rep. 470; 9 Col. 623,	4
Red River, etc., Bank v. Freeman		Respublica v. Clarkson, 1 Yeates	
(S. D.), 46 N. W. Rep. 36,	65	(2d), 46,	4
Reed v. Bagley, 24 Neb. 332,	668	Rettig v. Newman, 99 Ind. 424,	5
v. Cates, 11 Col. 527,	630	Reubel v. Preston, 5 East. 291,	2
v. Chicago, etc., Co., 71 Wis.		Reynes v. Dumont, 130 U. S. 354,	4
399,	518	Reynolds v. Baldwin, 93 Ind. 57,	6
v. Creditors, 37 La. Ann. 907,	208		6
v. Dongan, 54 Ind. 306,	562	Reynolds v. Copeland, 71 Ind. 422,	5
v. Finton, 63 Ind. 288,	599, 601	v. Harris, 14 Cal. 667,	495, 4
v. Garr, 59 Ind. 299,	599	v. Hennessy (R. I.), 20 Atl.	
v. Higgins, 86 Ind. 143,	681	Rep. 307,	1
v. Hubbard, 1 Gr. (Ia.) 153,	770	v. Hosmer, 45 Cal. 616,	4
v. Reed, 44 Ind. 429,	64, 229	v. Lamsbury, 6 Hill. 534,	406, 7
v. Sering, 7 Blackf. 135,	45, 50	v. Rogers, 5 Ohio. 171,	5
v. Spayde, 56 Ind. 394,	289, 785	v. Stansbury, 20 Ohio. 244,	6
v. Vaughan, 15 Mo. 137,	421	v. State, 61 Ind. 392,	217, 5
v. Worland, 64 Ind. 216,	756	v. State, 27 Neb. 90,	5
Reeder v. Lander, 7 Bush. 598,	340	v. Sutliff, 71 Ia. 549,	4
v. Machen, 57 Md. 56,	79	v. United States, 98 U. S. 145,	2

TABLE OF CASES.

ciii

[References are to Pages.]

Rex v. Congers , 8 Q. B. 981,	435	Richmond Street Ry. Co. v. Reed ,	
<i>v. Justices of Monmouth</i> , 7		83 Ind. 9,	491
<i>Dowl. & Ry.</i> 334,	435	Richter v. Koster , 45 Ind. 440,	783
<i>v. Mansbey</i> , 6 T. R. 619,	750	Rickard v. State , 74 Ind. 275,	620
<i>v. Peters</i> , 1 Burr. 568,	512	Ricker v. Powell , 100 U. S. 104,	451
<i>v. Wilkes</i> , 4 Burr. 2527,	512, 513	Ricketts v. Dorrell , 55 Ind. 470,	215
<i>v. Young</i> , 1 Burr. 556,	512	<i>v. Dorrell</i> , 59 Ind. 427,	736
Rhine v. Morris , 96 Ind. 81,	743, 765	<i>v. Harvey</i> , 106 Ind. 564,	570
Rhode Island v. Massachusetts , 12		<i>v. Spraker</i> , 77 Ind. 371,	285, 517,
<i>Pet.</i> 657,	9, 12		590, 591
<i>v. Massachusetts</i> , 13 <i>Pet.</i> 23,	633	Ricketson v. Compton , 23 Cal. 636,	114
Rhoades v. Delaney , 50 Ind. 468,	156	Ridabock v. Levy , 8 Paige, 197,	315
Rhodes v. Green , 36 Ind. 7,	535, 536	Ridenhour v. Kansas City, etc., Co. ,	
<i>v. Mummery</i> , 48 Ind. 216,	401	102 Mo. 270,	628
<i>v. Piper</i> , 42 Ind. 474,	174	Ridenour v. Beekman , 68 Ind. 236,	154,
<i>v. Russell</i> , 32 S. C. 585,	646	292, 361, 443,	718
<i>v. State</i> , 128 Ind. 189,	648, 530	<i>v. Miller</i> , 83 Ind. 208,	293, 718
Rhyné v. Guevara , 67 Miss. 139,	56	<i>v. Wherritt</i> , 30 Ind. 485,	601
Rials v. Powell (Ga.) , 9 S. E. Rep.		Ridgeway v. Dearing , 42 Ind. 157,	393
613,	615	Ridgway v. Ewbank , 2 Moody &	
Rice v. Boyer , 108 Ind. 472,	589	<i>Rob.</i> 217,	615
<i>v. City of Evansville</i> , 108 Ind. 7,	709	Riehl v. Evansville Foundry , 104	
<i>v. Cunningham</i> , 29 Cal. 492,	677	Ind. 70,	397, 398, 405, 550.
<i>v. Hall</i> , 21 Ill. App. 288,	33	Rielay v. Whitcher , 18 Ind. 458,	635
<i>v. Rice</i> , 6 Ind. 100,	580	Rigg v. Parsons , 29 W. Va. 522,	481
<i>v. Rice</i> , 13 Ind. 562,	314	Riggenberg v. Hartman , 102 Ind.	
<i>v. State</i> , 7 Ind. 332,	37	387,	533
<i>v. State</i> , 16 Ind. 298,	527	Rigler v. Rigler , 120 Ind. 431,	158,
<i>v. State</i> , 3 Tex. App. 451,	572	287, 728,	758
<i>v. Turner</i> , 72 Ind. 559,	287, 728	Riggs v. Johnson County , 6 Wall.	
Rich v. Starbuck , 45 Ind. 310,	169, 378	166,	12, 440
Richey v. Bly , 115 Ind. 232,	404	<i>v. Sterling</i> , 60 Mich. 643,	536
Riche v. State , 59 Ind. 121,	786	<i>v. Wilson</i> , 30 So. Car. 172,	610
Richards v. Bestor , 90 Ala. 352,	733	Rigsbee v. Bowles , 17 Ind. 167,	286
<i>v. Nixon</i> , 20 Pa. St. 19,	616	Rikoff v. Brown, etc., Co. , 68 Ind.	
<i>v. Lake Shore, etc., Co.</i> , 25 Ill.		388,	470
App. 344, 124 Ill. 516,	13	Riley v. Mitchell , 38 Minn. 9,	307
Richardson v. Denison , 1 Aik. (Vt.)		<i>v. Murray</i> , 8 Ind. 354, 261, 263,	363
210,	765	<i>v. Schawacker</i> , 50 Ind. 592,	599
<i>v. Green</i> , 130 U. S. 104,	124, 154	<i>v. State</i> , 88 Ala. 193,	535
<i>v. Houk</i> , 45 Ind. 451,	70, 287, 728,	<i>v. State</i> , 95 Ind. 446,	253, 579
	761	<i>v. Watson</i> , 18 Ind. 296,	689
<i>v. Jones</i> , 78 Ind. 240,	603	<i>v. Waugh</i> , 8 Cush. 220,	346
<i>v. Pate</i> , 93 Ind. 423,	150	Rinehart v. Bowen , 44 Ind. 353, 85,	757
<i>v. Richardson</i> , 82 Mich. 305,	340	<i>v. Vail</i> , 103 Ind. 159, 219, 222, 225,	226, 228
<i>v. Richardson</i> , 83 Mich. 653,	315	Ring v. Mississippi River Bridge	
<i>v. Rogers</i> , 37 Minn. 461,	97	Co., 57 Mo. 496,	311
<i>v. Seybold</i> , 76 Ind. 58,	279	Ringenger v. Hartman , 124 Ind.	
<i>v. Snider</i> , 72 Ind. 425,	635	186,	265, 345, 785
<i>v. State</i> , 55 Ind. 381,	374	Ringle v. Bicknell , 32 Ind. 369, 637,	648
<i>v. St. Joseph Iron Co.</i> , 5		<i>v. First Nat. Bank</i> , 107 Ind. 425,	790
<i>Blackf.</i> 146,	675, 683	Rinker v. Bissell , 90 Ind. 375,	597
<i>v. Weare</i> , 62 N. H. 80,	624	Rio Grande, The , 19 Wall. 178,	50, 79.
<i>v. Woodring</i> , 74 Ia. 149,	401	Rising Sun, etc., Co. v. Conway , 7	
Richmond v. Atkinson , 58 Mich.		Ind. 187,	689
413,	538	Risser v. Hoyt , 53 Mich. 185,	5
<i>v. Tallmage</i> , 16 Johns. 307,	638	Ritch v. Eichelberger , 13 Fla. 169,	495
Richmond, City of, v. Davis , 103		Ritchmyer v. Ritchmyer , 50 Barb.	
Ind. 449,	513	55,	604

[References are to Pages.]

Rivers v. Olmstead, 66 Ia. 186,	448	Robinson v. Snyder, 74 Ind. 110,	603, 712, 724,
Roanoke v. Karn, 80 Va. 589,	348	v. State, 1 Lea. 673,	
Roback v. Powell, 36 Ind. 515, 404,	405	v. Suter, 15 Mo. App. 599,	
Robb v. Ankeny, 4 Watts. & S. 128,	673	Robinius v. Lister, 30 Ind. 142,	
Roberts, Ex parte, 15 Wall. 384,	439	Robinson, etc., Works v. Chandler,	
v. Abbott, 127 Ind. 83,	595, 604	56 Ind. 575,	
v. Cooper, 20 How. 467,	492	Roblin v. Gagy, 35 Ill. App. 537,	
v. Evans, 43 Cal. 380,	587	Roby v. Pipher, 109 Ind. 345,	
v. Graham, 6 Wall. 578,	398, 405,	Rochester v. Levering, 104 Ind. 562,	
	550	Rochester, School Town of, v.	
v. Johnstown Bank, 60 Hun.	792	Shaw, 100 Ind. 268,	622,
576,	718	Rockland Water Co. v. Pillsbury,	
v. Lindley, 121 Ind. 56, 19, 475,	572	60 Me. 420,	
v. Nodwift, 8 Ind. 339,		Rodd v. Heartt, 17 Wall. 354,	
v. Ogdensburg, etc., Co., 29	539	Rodefer v. Fletcher, 89 Ind. 563,	
Hun. 154,	769	Rodenwald v. Edwards, 77 Ind. 221,	
v. Parvish, 17 Ore. 583,	393	Roderigras v. East River, etc., Co.,	
v. Porter, 78 Ind. 130,	688	63 N. Y. 460,	
v. Smith, 34 Ind. 550,	674	Rodgers v. Hoenig, 46 Wis. 361,	
v. State, 14 Ga. 8,	691	v. Russell, 11 Neb. 361,	
v. State, 83 Ga. 166,	541	Rodman v. Harvey, 102 N. C. 1,	
v. State, 111 Ind. 340,	111	v. Nathan, 45 Mich. 607,	
v. Taylor, 4 Port (Ala.), 421,	273,	v. Rodman, 54 Ind. 444,	
Robertson v. Caldwell, 9 Ind. 514,	545, 550	Roe v. Kansas City, etc., Co., 100	
	354, 478	Mo. 190,	
v. Cease, 97 U. S. 646,	462	Rogan v. Haynes, 10 Ind. 348,	
v. Davidson, 14 Minn. 554,	335	Rogers v. Abbott, 37 Ind. 138,	
v. Davis, 14 Minn. 554,	643	v. Beach, 115 Ind. 413,	
Robertson v. Edelhoff, 132 U. S. 614,	781	v. Beauchamp, 102 Ind. 33,	
v. Garshwiler, 81 Ind. 463, 732,	504	v. Gooding, 2 Mass. 475,	
v. Huffman, 92 Ind. 247,	480	v. Goodwin, 2 Man. 475,	
v. Huffman, 101 Ind. 474,	149	v. Leyden, 127 Ind. 50,	
v. O'Riley, 14 Col. 441,	444	v. The Marshall, 1 Wall. 644,	
v. Smith, 109 Ind. 79, 218, 392,			
v. Smith (Ind.), 28 N. E. Rep.	306, 307	v. Maxwell, 4 Ind. 243,	
857,	735	v. Overton, 87 Ind. 410,	282,
v. State, 109 Ind. 79, 5, 13, 122,		v. Rogers, 78 Ga. 688,	
v. Van Cleave (Ind.), 26 N. E.	781	v. Rogers, 46 Ind. 1,	
Rep. 899,		v. Rogers, 14 Wend. 131,	
Robbins v. Alton, etc., Co., 12 Mo.	788	v. Smith, 17 Ind. 323,	
380,	296	v. Union, etc., Co., 111 Ind. 343,	
v. Magee, 96 Ind. 174,	682	215, 274,	
v. Neal, 10 Ia. 560,	615		
v. Spencer, 121 Ind. 594,	7	v. Weil, 12 Wis. 664,	
Robinson, Ex parte, 19 Wall. 505,		Rohlfing v. Lightbody, 36 Kan. 500,	
Robinson v. Anderson, 106 Ind. 152,	757,	Rohn v. Harris, 31 Ill. App. 26,	
	758	Rolf v. Pillond, 16 Neb. 21,	
v. Brown, 74 Ind. 365,	146	Rolfe v. Rumsford, 66 Me. 564,	
v. Bank, 18 Ga. 65,	127	Rollins v. State, 62 Ind. 46,	570,
v. Board, 37 Ind. 332,	111		
v. Ferry, 11 Conn. 460,	700, 701	Roloson v. Herr, 14 Ind. 539,	
v. Johnson, 61 Ind. 535,	757, 758	Roman v. Meyer, 84 Ind. 390,	
v. Keith, 25 Ia. 321,	411	Romaine v. State, 7 Ind. 63,	
v. Magarity, 28 Ill. 423,	134	v. Craelle, 80 Cal. 626,	
v. Oceanic, etc., Co., 112 N. Y.		Rooke's Case, 3 Coke Rep. 100 a,	
315,	444	Rooney v. Milwaukee, etc., Co., 65	
v. Rippey, 111 Ind. 112,	265, 630	Wis. 397,	658.
v. Roberts, 16 Fla. 156,	304	Root v. Stevenson, 24 Ind. 115,	
v. Shanks, 118 Ind. 125,	568, 610	Roots v. Tyner, 10 Ind. 87,	
v. Shatzley, 75 Ind. 461,	419		

TABLE OF CASES.

CV

[References are to Pages.]

Rorer Iron Works v. Trout, 83 Va.	610	Ruffing v. Tilton, 12 Ind. 259, 266, 277, 679, 694	
Rosa v. Prather, 103 Ind. 191,	108	Ruffner v. Hill, 31 W. Va. 428,	469
Rose v. Allison, 41 Ind. 276,	378	Ruger v. Burgan, 10 Ind. 451,	788
v. Baker, 99 N. C. 323,	132	Rule v. Gumaer (Col.), 21 Pac. Rep.	86
v. Comstock, 17 Ind. 1,	603		
v. Duncan, 43 Ind. 512,	687, 748	Rumsey, etc., Co. v. Baker, 33 Mo.	
v. Garrett, 91 Mo. 65,	494	App. 239,	455
v. Tyrrell, 25 Wis. 563,	92	Rundell v. Kalbfus, 125 Pa. St. 123,	673
Rosenbaum v. McThomas, 34 Ind.	790	Rundles v. Jones, 3 Ind. 35,	276, 349
Rosenberg v. Frank, 58 Cal. 387,	31	Runnels v. Kaylor, 95 Ind. 503,	179, 181
Rosenfield v. Condict, 44 Tex. 464,	72	Runnells v. Moffat, 73 Mich. 188,	775
v. Goldsmith (Ky.), 12 S. W.		Runnion v. Crane, 4 Blackf. 466,	520
Rep. 928,	481	Runyon v. Bennett, 4 Dana, 598,	334
Rosenthal v. Chisum, 1 N. M. 637,	731	v. Hale, 10 Ark. 476,	496
Rosenweig v. Frazer, 82 Ind. 342,	785	Rupert v. Martz, 116 Ind. 72,	282
Ross v. Citizens' Ins. Co., 7 Mo.		Ruschaupt v. Carpenter, 63 Ind.	
App. 575,	414	359,	207, 213, 315, 317, 330
v. Davis, 97 Ind. 79,	26	Rush v. Gray, 74 Ind. 231,	220, 221
v. McGowen, 58 Tex. 603,	469	v. French, 1 Ariz. 99, 729, 738,	740
v. Murphy, 55 Mo. 372,	6	v. Thompson, 112 Ind. 158,	404,
v. Swiggett, 16 Ind. 433,	312	536, 562, 565,	608
v. Thompson, 78 Ind. 90,	561	Rushfeldt v. Shave, 37 Minn. 282,	266
Rosser v. Barnes, 16 Ind. 502,	580	Rushville Gas Co. v. Rushville, 121	
v. McColly, 9 Ind. 587,	534	Ind. 206,	265
Rosch v. McCarty, 102 Ind. 461	268	Russell v. Bartlett, 9 Wis. 556,	325
Rohan v. Stoeber, 81 Ind. 145,	569	v. Branham, 8 Blackf. 277,	730
Roth v. Palmer, 27 Barb. 652,	587	v. Clark, 7 Cranch. 69,	604
Rothrock v. Perkinson, 61 Ind. 39,	167,	v. Harrison, 49 Ind. 97,	268
	615	v. Lathrop, 122 Mass. 300,	68
		v. Loring, 3 Allen, 121,	634
		v. Nall, 79 Tex. 664,	792
Roslain v. McDowall, 1 Bay. 490,	310	v. Rosenbaum, 24 Neb. 769,	412
Round v. State, 14 Ind. 493,	281, 665,	Rutherford v. Fisher, 4 Dall. 22,	73
	767, 769	Ryan v. Bindley, 1 Wall. 66,	51
Roush v. Emerick, 80 Ind. 551,	403	v. Burkam, 42 Ind. 507,	764
Rousseau v. Corey, 62 Ind. 250, 203,	777	v. Couch, 66 Ala. 244,	538
Rout v. King, 103 Ind. 555,	608	v. Hurley, 119 Ind. 115,	562, 565,
v. Ninde, 111 Ind. 597, 8, 533,	769		606, 608
v. Woods, 67 Ind. 319,	370	v. Kock, 17 Wall. 19,	266, 369
Routh v. Agricultural Bank, 12 S.		v. Rockford Ins. Co., 77 Wis.	611,
& M. 161,	611		625
Rowe v. Beckett, 30 Ind. 154, 215,	525	Ryman v. Clark, 4 Blackf. 329,	101
v. Peabody, 102 Ind. 198,	606	Ryman v. Crawford, 86 Ind. 262,	570,
Rowell v. Klein, 44 Ind. 290,	626		750, 765
Roy v. Haviland, 12 Ind. 364,	599		
v. Rowe, 90 Ind. 54,	124		
v. State, 58 Ind. 378,	368, 379		
v. Union, etc., Co. (Wyo.), 26			
Pac. Rep. 996,	546, 654, 761		
Rozier v. Williams, 92 Ill. 187,	208		
Rubey v. Shaw, 51 Mo. 116,	64		
Rubush v. State, 112 Ind. 107, 408,	668		
Ruch v. Biery, 110 Ind. 444,	226		
Ruckman v. Allwood, 44 Ill. 184,	349		
v. Demarest, 110 U. S. 400,	115		
Rudd v. Woolfolk, 4 Bush. 555,	291		
Ruddell v. Tyner, 87 Ind. 529, 640,	645		
Rudolph v. Vanderlen, 92 Ind. 34,	622		
Ruff v. Ruff, 85 Ind. 431,	640		

S

S. S. Osborne, The, 105 U. S. 447,	208
Sacramento Savings Bank v. Spencer, 53 Cal. 737,	672
Sadler v. Sadler, 16 Ark. 628,	656
Sagasser v. Wynn, 88 Ind. 226,	379
Sage v. Brown, 34 Ind. 464,	624
v. Central R. Co., 93 U. S. 412,	
330, 332, 337	
v. Iowa, etc., Co., 93 U. S. 412,	388
v. Railroad Co., 96 U. S. 712,	116
v. State, 127 Ind. 15,	529, 578, 622
Salander v. Lockwood, 66 Ind. 285,	
	163, 693

[References are to Pages.]

Saline Co., In re, 45 Mo. 52,	9	Sawyer. Ex parte, 21 Wall. 235,
Salisbury v. Howe, 87 N. Y. 128,	413	Sawyer v. Chambers, 43 Barb. 622, 1
v. Bartleson, 39 Minn. 365,	675	v. Chicago, etc., Co., 22 Wis.
Salles v. Butler, 27 N. Y. 638,	96	402.
Salmon v. Pierson, 8 Md. 297.	114	Sawyer v. Sargent, 65 Cal. 259,
Saltsburg Gas Co. v. Borough, etc.,		Sayers v. First Nat. Bank, 89 Ind.
138 Pa. St. 250,	591	230.
Saltmarsh v. Tuthill, 12 How. 387,	456	Sayre v. Sayre, 17 N. J. Eq. 349,
Sammons v. Newman, 27 Ind. 508,	306	Saxon v. Boyce, 1 Bailey (S. C.), 66,
Sample v. State, 104 Ind. 289,	253	v. State, 116 Ind. 6, 160, 176.
Sampson v. Welsh, 24 How. (U.		Scarborough v. Pargond, 108 U. S.
S.) 207,	62, 134	567.
Samuels v. Blanchard, 25 Wis. 329,	413	Scarlett v. Snodgrass, 92 Ind. 262,
Sanborn v. Webster, 2 Minn. 323,	483	Schafer v. Smith, 68 Ind. 226,
Sanchez v. Roach, 5 Cal. 248,	115, 140	v. State, 49 Ind. 460,
Sander, etc., Co. v. Yesler (Wash.),		Schartzer v. Love, 40 Cal. 93,
27 Pac. Rep. 269,	66	Schee v. McQuillken, 59 Ind. 269,
Sanders v. Farrell, 83 Ind. 28,	769, 770	
v. Johnson, 6 Blackf. 50,	517	Scheible v. Slagle, 89 Ind. 323, 334,
v. Loy, 45 Ind. 229,	70, 783	462, 580,
v. Loy, 61 Ind. 298,	69	v. Law, 65 Ind. 332,
v. Peck, 30 Ill. App. 238,	490	Schellhous v. Ball, 29 Cal. 605,
v. Peck, 131 Ill. 407,	490	Scherer v. Ingerman, 110 Ind. 428.
v. Reister, 1 Dak. 151,	571	Schiffer v. Adams, 13 Col. 572, 120.
v. Sanders, 30 So. Car. 207.	616	Schindler v. Westover, 99 Ind. 395,
v. Scott, 68 Ind. 130,	370	Schirmeier v. Baecker, 20 Ill. App.
v. State, 85 Ind. 316,	6, 231	373.
v. Wakefield, 41 Kan. 11,	518	Schlemmer v. Myerstein, 19 How.
Sandford v. Sandford, 58 N. Y. 67,	112	Pr. 412,
v. Tucker, 54 Ind. 219,	169	Schlicht v. State, 56 Ind. 173, 254,
Sandford Tool Co. v. Mullen, 1 Ind.		Schlotter v. State, 127 Ind. 493.
App. 204,	647	Schlunger v. State, 113 Ind. 295,
San Diego, etc., Co. v. Neale, 88		291, 647, 668,
Cal. 50,	415, 526, 550	Schmied v. Keeney, 72 Ind. 309,
Sandon v. Proctor, 7 B. & C. 800,	533	Schmidt v. Collev, 29 Ind. 120,
Sands v. Woods, 1 Ia. 263.	770	v. Gilson, 14 Wis. 514,
San Francisco, City of, v. Itsell, 133		v. Wright, 88 Ind. 56, 149,
U. S. 65,	17	Schmitt v. Schmitt, 32 Minn. 130,
Sankey v. Sankey, 8 Ala. 601,	483	Schmitz v. Lauferty, 29 Ind. 400,
San Mateo v. Southern Pacific R.		715.
R. Co., 116 U. S. 138,	125, 444	Schmohl v. Fusco, 13 N. Y. Supp.
Sanxay v. Hunger, 42 Ind. 44,	277, 752	583,
Sargent v. Cunningham (Cal.), 25		Schmurr v. Stuts, 119 Ind. 429,
Pac. Rep. 677.	736	Schnartzer v. Love, 40 Cal. 93,
v. Flaid, 90 Ind. 501,	128	Schnewind v. Hacket, 54 Ind. 248,
v. Roberts, 1 Pick. 337,	619	Schnied v. Keeney, 72 Ind. 309,
v. State, 96 Ind. 63,	248	Schnitzins v. Bailey (N. J.), 18 Atl.
Sassengut v. Posey, 67 Ind. 408,	774	Rep. 192,
Sater v. State, 56 Ind. 378,	679	Schnurr v. Stults, 119 Ind. 429, 708.
Satterlee v. Bliss, 36 Cal. 489,	167	Schoeffler v. State, 3 Wis. 823.
Sauer v. Griffin, 67 Mo. 654,	311	Scholey v. Halsey, 72 N. Y. 378,
Sauls v. Freeman (Fla.), 4 So. Rep.		v. Rew, 23 Wall. 331,
577,	469	School District v. Cooper, 29 Neb.
Saunders v. Heaton, 12 Ind. 20,	767	433.
v. Waggoner, 82 Va. 316,	78	School Manual, In re, 63 N. H. 574
Savage v. Maresch, 3 Wash. Ty. 259,	266	School Town v. Gebhart, 60 Ind.
v. State, 19 Fla. 561,	294	187,
Savannah v. Jessup, 106 U. S. 563,	114	Schooner Constitution v. Wood-
Savings, etc., Co. v. Horton, 63 Cal.		worth, 2 Ill. 511,
310,	96	Schoonover v. Irwin, 58 Ind. 287,

TABLE OF CASES.

cvii

[References are to Pages.]

Scamover v. Reed, 65 Ind. 313,	757	Scotten v. Divelbiss, 46 Ind. 301, 318,	319
Schultz v. McPheeters, 79 Ind. 373,	57	v. Divelbiss, 60 Ind. 37,	452
Scouton v. Kilmer, 8 How. Pr.		v. Longfellow, 40 Ind. 23,	511
327,	589	v. Randolph, 96 Ind. 581,	172
Stackengast v. Ealy, 16 Neb. 510,	523	Scotton v. Mann, 89 Ind. 404,	295, 603
Stichte v. Stites, etc., 127 Ind.		Scovell v. Kingsley, 7 Conn. 284,	702
472,	177, 469	Scovern v. State, 6 Ohio St. 288,	168,
Steiber v. Butler, 84 Ind. 576,	580,		508
	686	Scoville v. Chapman, 17 Ind. 470,	299,
Stieber v. Richmond, 73 Wis. 5,	413		786
Stroeder v. Merchants Ins. Co.,		Scripps v. Reilly, 35 Mich. 371,	617,
104 Ill. 71,	12		703, 704
v. Rock Island, etc., Co., 47 Ia.		Scriven v. Hursh, 39 Mich. 98,	76
355,	539	Scroggs v. Stevenson (N. C.), 12	
v. Schmidt, 71 Cal. 399,	96	S. E. Rep. 1031,	491
v. Schweizer, 60 Cal. 467,	475	v. Stevenson, 100 N. C. 354,	683
Steff v. Ranson, 79 Ind. 458,	395	Seager v. Aughe, 97 Ind. 285,	159, 170,
Stellies v. Keiser, 95 Ind. 159,	379		511
Stultz v. Cremer, 59 Ia. 182,	692	Sealy v. California, etc., Co., 19	
v. McLean (Cal.), 18 Pac. Rep.		Ore. 94,	633
775,	74	Searl v. Smith, 15 Ind. 23,	767
Stulze v. McLeary, 73 Tex. 92,	436	Searle v. Whipperman, 79 Ind. 424,	
Stunck v. Gegenseitiger, etc., 44		126, 284, 285, 287, 295, 399, 595, 599,	728
Wis. 369,	481	Searles v. Averhoff, 28 Neb. 668,	102
Stuster v. Wingert, 30 Kan. 529,	537	Seavey v. Maples, 94 Ind. 205,	735
Stuykill County v. Boyer, 125		v. Walker, 108 Ind. 78,	703
Pa. St. 226,	418	Security Co. v. Arbuckle, 123 Ind.	
Stwab v. Charles Parker Co., 55		518,	156, 475, 650
Conn. 370,	667	Seekell v. Norman, 78 Ia. 254,	615, 624
v. City of Madison, 49 Ind. 329,	591	Segelke v. Finan, 48 Hun. 310,	582
v. Coots, 48 Mich. 116,	682	Segler v. Coward, 24 So. Car. 119,	111
Schwarm v. State, 81 Ind. 247,	379	Seibert v. State, 95 Ind. 471,	256
Schwarz v. Oppold, 74 N. Y. 307,	635	Seifert v. Brooks, 34 Wis. 443,	148
Schweichart v. Stuewe, 75 Wis.		Seifrath v. State, 35 Ark. 412,	789
157,	126	Seig v. Long, 72 Ind. 18,	178, 775
Seely v. Finton, 39 Ind. 275, 599,	601,	Seivers v. McCall, 1 Ind. 393,	524
	603	Selking v. Jones, 52 Ind. 409,	268
Seefeld v. Whitelegge, 49 N. Y.		Selkirk v. Cobb, 13 Gray. 313,	731
259,	521	Sellers v. Foster, 27 Neb. 1,	557
Seott v. Allen, 1 Tex. 508,	71	v. Union Lumber Co., 36 Wis.	
v. Board, 101 Ind. 42,	545, 767	398,	68
v. Burton, 6 Tex. 322,	68	Semmes v. United States, 91 U. S.	
v. Crawford, 12 Ind. 410,	215	21,	476
v. Indianapolis Wagon Works,		Semple, etc., Co. v. Thomas, 10 Mo.	
45 Ind. 75,	509	App. 457,	100
v. Jones, 4 Taunt. 865,	697	Senate Resolutions, In re, 21 Pac.	
v. Kelly, 22 Wall. 57,	249	Rep. 470,	5
v. Marchant, 88 Ind. 349,	312	Senter v. De Bernal, 38 Cal. 637,	111,
v. Milton (Fla.), 7 So. Rep. 32,	314		122, 152
v. Minneapolis, etc., Co., 42		Sentinel Co. v. Thomson, 38 Wis.	
Minn. 179,	293	489,	635
v. Scott, 23 Ga. 102,	590	Sering v. Doan, 23 Ind. 455,	571
v. Scott, 124 Ind. 66,	623, 689	Sessions v. Pintard, 18 How. 106,	328
v. Stetler, 128 Ind. 385,	507, 609	Seward v. Clark, 67 Ind. 289,	219, 223
v. Yolo County, etc., 75 Cal.		v. Corneau, 102 U. S. 161,	212,
114,	436		313, 324
v. Zartman, 61 Ind. 328,	394, 396	v. Hayden, 105 Mass. 158,	101
Scott's Succession, 41 La. Ann. 668,	78	v. Jackson, 8 Cow. 406,	709
Scotland County v. Hill, 112 U. S.		v. Malotte, 15 Cal. 304,	556
123,	699, 703	Sexton v. Pike, 13 Ark. 193,	594

[References are to Pages.]

Seymour v. Board, 40 Wis. 62,	519	Shelly v. Vanarsdoll, 23 Ind. 543,	
v. Freer, 5 Wall. 822,	324	Shelton v. Van Kleeck, 106 U. S.	404,
Seymour, etc., Co. v. Brodhecker		532,	
(Ind.), 30 N. E. Rep. —, 754,	770	v. Wade, 4 Tex. 148,	
Seymour, City of, v. Cummins, 119		Shenners v. West Side, etc., Co., 78	
Ind. 148,	765	Wis. 382,	
Shackman v. Little, 87 Ind. 181,	511	Shepard v. New York, etc., Co., 60	
Shafer v. Ferguson, 103 Ind. 90,	729	Hun. 584,	
v. Newlan, 29 Ill. 44,	483	v. Brenton, 20 Ia. 41,	
Shaffer v. State, 27 Ind. 131,	541	Shepherd v. Dodd, 15 Ind. 217,	
Schafer v. State, 49 Ind. 460,	606	v. Groff, 34 W. Va. 123,	
Shane v. Lowry, 48 Ind. 171,	687	v. Lanfear, 5 La. 336,	
Shank v. Fleming, 9 Ind. 189,	616	v. Missouri, etc., Co., 85 Mo.	
Shannon v. Cavazos, 131 U. S. App.		629,	
LXXI,	448	v. Pepper, 133 U. S. 626,	
v. Hay, 106 Ind. 589,	19	v. State, 64 Ind. 43,	
v. Marselis, Saxt. (N. J.) 413,	134	Sheppard v. Collins, 12 Ia. 570,	
v. Spencer, 1 Blackf. 120,	271	v. Shelton, 34 Ala. 652,	
Sharon v. Sharon, 68 Cal. 326,	208	v. Wilson, 6 How. 260,	
v. Sharon, 79 Cal. 633,	569	Shepperd v. Brown, 30 W. Va. 13,	
Sharp v. Brunnings, 35 Cal. 526,	672	Sherlock v. Alling, 44 Ind. 184,	
v. Malia, 124 Ind. 407,	713	v. First Nat. Bank, 53 Ind. 73,	
v. Miller, 57 Cal. 415,	327	Shercliff v. State, 96 Ind. 369,	
v. Moffitt, 94 Ind. 240,	455	Sherman v. Hogland, 73 Ind. 472,	
Sharpe v. Clifford, 44 Ind. 346,	394	v. McKeon, 38 N. Y. 266,	
v. Graydon, 99 Ind. 232,	698	v. Nixon, 37 Ind. 153,	179
v. Harding, 21 Ind. 334,	309	v. Palmer, 37 Mich. 509,	
v. Jones, 3 Murphy (N. C.), 306,	119	v. Windsor, etc., Co., 57 Vt. 57	
v. Kelley, 5 Denio, 431,	34	Sherry v. Foreman, 6 Blackf. 56,	
v. Sharpe, 27 Ind. 507,	186	v. State Bank, 6 Ind. 397,	
v. Trever, 8 Minn. 273,	793	v. Winton, 1 Ind. 96,	
Shatto v. Crocker, 87 Cal. 629,	739	Shew v. Hews, 126 Ind. 474, 416, 527	
Shaughnessy v. St. Louis, etc., Co.,		Shewalter v. Bergman, 123 Ind.	
7 Mo. App. 591,	767	155,	13, 165, 196, 420, 758, 760
Shaw v. Binkard, 10 Ind. 227,	162	v. Williamson, 125 Ind. 373,	
v. Bryan, 39 Mo. App. 523,	655	Sheward v. Citizen's Water Co	
v. Fleming, 5 Houst. 155,	496	(Cal.), 27 Pac. Rep. 439,	
v. Hoadley, 8 Blackf. 165,	596	Shidler v. State (Ind.), 28 N. E	
v. Merchants' Nat. Bank, 60		Rep. 537,	
Ind. 83,	11, 163, 218,	Shields v. Arnold, 1 Blackf. 109,	
v. New York, etc., Co., 150		v. McMahan, 101 Ind. 591,	162
Mass. 182,	690	v. State, 95 Ind. 299,	530
v. Newsom, 78 Ind. 335,	178	Shileto v. Thatcher, 43 Ohio St. 63	
v. Padley, 64 Mo. 519,	191	Shillern v. May, 6 Cranch. 267,	
v. Williams, 87 Ind. 158,	156	Shimer v. Butler University, 87 Ind	
Shea's Appeal, 121 Pa. St. 302,	535	218,	
Shea v. Quintin, 30 Iowa. 58,	147	Shine v. Kentucky, etc., Co., 8	
Shearouse v. Smith, 83 Ga. 520,	68	Ky. 177,	
Sheehan v. People, 131 Ill. 22,	691	Shinkle v. First Nat. Bank, 23 Ohio	
Sheeks v. Fillior, 29 N. E. Rep. 443,	431	St. 516,	355
Shreeley v. Wiggs, 32 Mo. 398,	306	Shinnabarger v. Shelton, 41 Mo	
Sheets v. Bray, 125 Ind. 33, 525, 626,	646	App. 147,	54
v. Selden, 2 Wall. 177,	102	Shipman v. State, 38 Ind. 549,	
Shelby Tp. v. Randles, 57 Ind. 390,	440,	Shircliff v. State, 96 Ind. 369,	25
	591	Shirk v. Andrews, 92 Ind. 509,	
Sheldon v. Dalton, 57 Cal. 19,	115	Shirley v. Birch, 16 Ore. 1, 132, 14	
v. Newton, 3 Ohio St. 494,	12	v. Hagar, 3 Blackf. 225,	
v. Wright, 7 Barb. 39, 147, 285,	681	v. Lunenburgh, 11 Mass. 379,	
Shellenbarger v. Biser, 5 Neb. 195,	596		
Shellito v. Sampson, 61 Ia. 40,	699		

TABLE OF CASES.

cix

[References are to Pages.]

Stacy v. Wright, Salk. 700,	286	Sim v. Hurst, 44 Ind. 579,	784
Stacy v. Irons, 28 Ind. 458,	401, 669	Simar v. Canaday, 53 N. Y. 298,	604
Stacy v. Joray, 86 Ind. 70,	287, 295, 728	Simcock v. Bank, 14 Kan. 529,	633
Stemmer v. Axtell, 78 Ind. 561,	215	Simmon v. Larkin, 82 Ind. 385,	572
St. Board, 36 Ind. 175,	90, 597	Simmons v. Beazel, 125 Ind. 362,	221
St. Smith, 74 Ind. 71, 81, 297, 399, 404		St. v. Simmons (Ind.), 28 N. E.	
St. Smith, 100 Ind. 40,	81, 494	Rep. 702,	226, 228
St. State, 12 Ohio, 43,	679	St. v. Spratt, 26 Fla. 449,	613
St. Senger v. Brinton, 52 Pa. St.		Simon v. Home Ins. Co., 58 Mich.	
	483	278,	537
St. v. Lathrop, 3 Hill, 237,	550	Simonds v. Buford, 18 Ind. 176,	598
St. v. Pennsylvania Co., 28 N.		Simons v. Simons, 107 Ind. 197,	217
Rep. 616,	693	St. v. Simons, 28 N. E. Rep. 702,	92
St. v. Kenzie, 100 Ind. 429,	623	St. v. State, 25 Ind. 331,	254
St. v. Kyler, 87 Ind. 38,	403	Simonton v. Huntington, etc., Co.,	
St. v. Taylor, 46 Ind. 345, 297, 413, 784		12 Ind. 380,	758
St. v. Kinzie, 80 Ind. 500,	773	Simpers v. Simpers, 15 Md. 160,	192
St. v. Chicago, etc., Co., 79 Ia. 73,	758	Simpkins v. Smith, 94 Ind. 470,	690
St. v. Bridwell, 15 Ind. 211,	34	Simpson v. Greeley, 20 Wall. 152,	116
St. v. Sparrow, 96 N. C. 348,	94	St. v. Kirchbaum, 43 Kan. 36,	65, 66
St. v. Stotts, 58 Ind. 29,	511	St. v. Minor, 1 Blackf. 229,	322
St. v. Stutsman, 81 Ind. 115,	198, 199,	St. v. Pearson, 31 Ind. 1,	83, 89, 208
	238	St. v. Rothschild, 43 Kan. 33,	66
Stowell v. McEhiney, 101 Mo.		St. v. Shafer, 20 Ind. 306,	483
	777,	St. v. Wilson, 6 Ind. 474,	792
St. v. McPheeters, 72 Ind. 373, 9, 90		Sims, Ex parte, 44 Ala. 248,	70
St. v. Nodelhoffer, 133 Ill. 536, 636		Sims v. Boynton, 32 Ala. 353,	569
St. v. Dulany, 1 Cranch. C. C.		St. v. City of Frankfort, 79 Ind.	
	697	446,	215, 507, 562, 565, 609
St. v. Kennedy, 84 Ind. 111, 522		St. v. Cooper, 106 Ind. 87,	34
St. v. Lawrence, 9 Ind. 322,	77	St. v. Dame, 113 Ind. 127,	636
St. v. Miles, 125 Ind. 445,	3, 165,	St. v. Gay, 109 Ind. 501,	672
196, 197, 198, 199, 202, 203, 669, 700,		St. v. Geay, 109 Ind. 501,	108
	756, 771	St. v. Hines, 121 Ind. 534,	61
Stellar v. State, 105 Ind. 289,	250, 256,	St. v. Hurst, 44 Ind. 579,	604
	539, 623, 737	Sinclair v. Jackson, 8 Cow. 543,	28
St. v. McWilliams, 104 Ind. 512,		St. v. Washington, etc., Co., 4	
	615, 619, 760	MacArthur, 13,	779
St. v. Keiser, 95 Ind. 159,	121	Singer Mnf. Co. v. Barrett, 94 N.	
St. v. Sanders, 38 N. J. Eq. 154,	495	C. 219,	326
St. v. Thompson, 15 Wall. 151,	733	St. v. Sammons, 49 Wis. 316,	580
St. v. Ex parte, 12 Pet. 488,	450	St. v. Struckman, 72 Ind. 601,	757
St. v. Smith, 46 Ark. 275,	539	Single v. Schneider, 30 Wis. 570,	483
St. v. Belknap (Ind.), 28 N. E.		Singleton v. O'Brien, 125 Ind. 151,	630
Rep. 305,	11	St. v. Pidgeon, 21 Ind. 118,	669
St. v. Davis, 69 Ind. 336, 256, 399,		Sinker, Davis & Co. v. Green, 113	
	769, 770	Ind. 264,	475, 712
St. v. Davis, 87 Ind. 342,	163, 768	Sinking Fund Cases, 99 U. S. 700,	5, 9
St. v. etc., Co. v. Warsaw School		Sioux City, etc., Co. v. Finlayson,	
District, 130 Pa. St. 76,	665	16 Neb. 578,	539
St. v. State, 95 Ind. 471,	768	Sire v. Ellithrope, etc., Co., 137 U.	
St. v. Woods, 1 Ia. 177,	675	S. 579,	756
St. v. Ransom, 6 Johns. 279,	441	St. v. Rumbold, 11 N. Y. Supp.	
St. v. Pearson, 75 Tex. 287,	690	734,	547
St. v. Foote, 20 How. 290,	323	Sisson v. State, 77 Wis. 273,	239, 254
St. v. Frost, 3 Wash. Ty. 388,	581	Sites v. Miller, 120 Ind. 19,	766
St. v. Junction R. Co., 17 Ind.		Sixth Avenue, etc., Co. v. Gilbert,	
142,	697	etc., Co., 71 N. Y. 430,	335, 462
St. v. Nerdlinger, 30 Ind. 53,	588	Sizer v. Many, 16 How. 98,	492
St. v. Parr, 115 Ind. 113,	747	Skaggs v. State, 108 Ind. 53,	293, 791

<p> Skels v. Starrett, 27 Mich. 350, 612 Skeen v. Huntington, 25 Ind. 510, 281, 283, 284 Skidmore v. Davies, 10 Paige, 316, 323 Skillen v. Jones, 44 Ind. 136, 579 Skilern v. May, 6 Cranch, 267, 498 Skinner v. Blair, 87 N. C. 168, 459 v. Bland, 87 N. C. 168, 457 Slacum v. Pomeroy, 6 Cranch. 221, 392 Slagle v. Bodmer, 58 Ind. 465, 64, 87, 282 Slaughter v. Toust, 4 Blackf. 324, 142 Slaughterhouse Cases, 10 Wall. 273, 98, 337 Slauter v. Favorite, 107 Ind. 291, 506 v. Hollowell, 90 Ind. 286, 630 Slessman v. Crozier, 80 Ind. 487, 187 Slider v. Bank of Pittsburgh, 16 How. 571, 672 Sloan v. McKinstry, 18 Pa. St. 120, 672 v. State, 8 Ind. 312, 253 v. Whitbank, 12 Ind. 444, 401 v. Whiteman, 6 Ind. 494, 116 Small v. Reeves, 14 Ind. 163, 561 Smawley v. Stark, 9 Ind. 386, 768 Smedes v. Houghtaling, 3 Cai. 48, 310 Smethurst v. Independent, etc., Church, 148 Mass. 261, 658 Smetters v. Rainey, 14 Ohio St. 287, 117 Smith v. Adams, 130 U. S. 167, 12, 499 v. Arsenal Bank, 104 Pa. St. 518, 702 v. Bean, 46 Minn. 687, 733 v. Biscailuz, 84 Cal. 344, 307 v. Baugh, 32 Ind. 163, 756 v. Burlingame, 44 Kan. 487, 639 v. Calloway, 7 Blackf. 86, 589 v. Camp, 84 Ga. 117, 667 v. Carr, 16 Conn. 450, 577 v. City of Madison, 7 Ind. 86, 30 v. Coleman, 77 Wis. 343, 126, 746 v. Commonwealth, etc., Co., 49 Wis. 322, 617 v. Cooper, 21 Ga. 359, 459 v. Countryman, 30 N. Y. 655, 406 v. Cudworth, 24 Pick. 196, 190 v. Cunningham, 2 Tenn. Ch. 565, 117 v. Davidson, 45 Ind. 396, 237, 688, 748 v. Dennison, 101 Ill. 657, 471 v. Dittman, 11 N. Y. Supp. 769, 545 v. Dodds, 35 Ind. 452, 294 v. Dragert, 61 Wis. 222, 519 v. Eaton, 50 Ia. 488, 559 v. Ellendale Mill Co., 4 Ore. 70, 90, 671 v. Flack, 95 Ind. 116, 524, 765 v. Floyd, 18 Barb. 522, 529 v. Foster, 59 Ind. 595, 461, 632 </p>	<p> Smith v. Frampton, 2 Salk. 644, n., v. Frankfield, 77 N. Y. 414, v. Freeman, 71 Ind. 85, 394, 395, v. Goodknight, 121 Ind. 312, v. Goodwin, 86 Ind. 300, 713, v. Gorham, 119 Ind. 436, 698, v. Gould, 61 Wis. 31, v. Guerant, 55 Mo. 584, v. Hannibal, etc., Co., 37 Mo. 287, v. Harris, 76 Ind. 104, v. Hays, 23 Ill. App. 244, v. Heller, 119 Ind. 212, 636, 679, v. Hess, 91 Ind. 424, 88, v. Hood, 25 Pa. St. 218, v. Hubbard, 85 Tenn. 306, v. Huntley, 48 Mich. 352, v. Hutchison, 83 Mo. 683, v. Jeffries, 25 Ind. 376, 292, 688, v. Junction, etc., Co., 29 Ind. 546, v. Kibbe, 31 Hun. 390, v. Kruger, 33 Ind. 86, v. Kyler, 74 Ind. 575, 162, 294, v. Laumier, 12 Mo. App. 546, v. Leisher, 23 Ind. 500, v. McCarthy, 33 Ill. App. 176, v. McKean, 99 Ind. 101, 562, 748 v. McMillen, 19 Ind. 391, v. Martin, 80 Ind. 260, v. Meldren, 107 Pa. St. 348, v. Mohn, 87 Cal. 489, v. Morrill, 39 Kan. 665, v. Myers, 5 Blackf. 223, v. Myers, 109 Ind. 1, 5, 13, 39; v. Nescatunga, 36 Kan. 758, v. Neubern, 70 N. C. 14, v. Newland, 9 Hun. 553, v. Niagara Fire Ins. Co., 60 Vt. 682, v. Noe, 30 Ind. 117, v. Proffitt, 82 Va. 832, v. Rowles, 85 Ind. 264, v. Ryan, 83 Ind. 152, 261 v. Schulenberg, 34 Wis. 41, v. Shaffer, 29 Neb. 656, v. Shoemaker, 17 Wall. 630, v. Smith, 3 Ind. 303, v. Smith, 77 Ind. 80, 16 v. Smith, 106 Ind. 43, 39 v. Smith, 52 N. J. L. 207, v. Smith, 51 Wis. 665, v. Speed, 50 Ala. 276, v. St. Paul, etc., Co., 32 Minn. 1, </p>
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TABLE OF CASES.

cxii

[References are to Pages.]

Smith v. St. Louis, etc., Co., 53 Mo. 338,	306	Sohn v. Marion Gravel Road Co., 73 Ind. 77,	743, 761, 765
v. State, 48 Ark. 148,	94	Solomon v. Reese, 34 Cal. 28,	327
v. State, 117 Ind. 167,	791	Somerville v. Reid, 35 Ga. 47,	482
v. Strother, 68 Cal. 194,	5, 26	Somes v. British Empire Shipping Co., 8 H. L. 338,	10
v. Summerfield, 107 N. C. 580,	455	Songer v. Walker, 1 Blackf. 251,	182
v. Summerfield, 108 N. C. 284,	634	Souders' Appeal, 57 Pa. St. 498,	32
v. Tatman, 71 Ind. 171,	294, 687, 728	Souders v. Jeffries, 98 Ind. 31,	563
v. Taylor, 11 Ia. 214,	770	Sourse v. Marshall, 23 Ind. 194,	597
v. Thomason, 26 S. C. 607,	66	South v. State, 86 Ala. 617,	739
v. Trabue, 9 Pet. 4,	73	South Bend, City of, v. Hardy, 98 Ind. 577,	537, 692
v. Uhler, 99 Ind. 140,	688	Southern, etc., Co. v. Staley (Tex.), 13 S. W. Rep. 480,	315
v. United States, 94 U. S. 97,	248	Spahr v. Nicklaus, 51 Ind. 221,	396
v. Washington, 20 How. 135,	63	Spalding v. Wathen, 7 Bush. 659,	140
v. Western Union Tel. Co., 83 Ky. 269,	332	Spanagel v. Dellinger, 38 Cal. 278,	180, 612
v. White, 5 Dana. 376,	729	Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158,	158, 159, 160
v. Whitney, 116 U. S. 167,	441	Sparkin v. Wardens, etc., 119 Ind. 535,	150
v. Williams, 22 Ill. 357,	556	Sparklin v. St. James Church, 119 Ind. 535,	274
v. Williams, 11 Kan. 104,	791	Sparks v. Heritage, 45 Ind. 66,	393
v. Williamson, 6 Hal. (N. J.) 313,	677	v. State, 59 Ala. 82,	618
v. Wright, 71 Ill. 167,	356, 358	Sparling v. Dwenger, 60 Ind. 72,	590
v. Yreka Water Co., 14 Cal. 301,	522	Spaulding v. Baldwin, 31 Ind. 376,	670
Smithson v. Dillon, 16 Ind. 169,	669	v. Thompson, 12 Ind. 477,	64, 86
Smak v. Brush, 62 Ind. 156,	597	Spear v. Place, 11 How. 522,	49
v. Harrison, 74 Ind. 348,	307, 394	Spears v. Clark, 6 Blackf. 167,	755
Snoot v. Boyd, 87 Ky. 642,	269	v. Matthews, 66 N. Y. 127,	459
v. Eslava, 23 Ala. 659,	739	Speer v. Davis, 38 Ind. 271,	87
v. Wathen, 8 Mo. 522,	604	Speight v. People, 87 Ill. 595,	9
Snurr v. State, 88 Ind. 504,	689	Spencer, Ex parte, 83 Cal. 460,	88
v. State, 105 Ind. 125,	250, 527, 647, 668, 669	95 N. C. 271,	80
Smyth, Ex parte, 3 A. & E. 319,	435	Spencer v. Chrisman, 15 Ind. 215,	635
v. Strader, 12 How. U. S. 142,	137	v. Levering, 8 Minn. 461,	411, 646
Smythe v. Boswell, 117 Ind. 365,	5, 6, 7, 81, 93, 263, 333	v. McGonagle, 107 Ind. 410,	52
Snively v. Abbott Buggy Co., 36 Kan. 106,	65, 71	v. Robbins, 106 Ind. 580,	526, 536
Snead v. Tietjen (Ariz.), 24 Pac. Rep. 324,	698	v. St. Louis, etc., Co., 79 Mo. 500,	755
Snell v. De Land (Ill.), 27 N. E. Rep. 183,	544	Spencer Water Co. v. Vallejo, 48 Cal. 70,	4
v. Hancock, 11 Ia. 117,	562	Sperry v. Dickinson, 82 Ind. 132,	782
v. Snell, 123 Ill. 403,	33	Speyers v. Torstritch, 5 Rob. (N. Y.) 606,	697
Snelson v. State, 16 Ind. 29,	670	Spicer v. Hoop, 51 Ind. 365,	590
Snodgrass v. Hunt, 15 Ind. 274,	788, 789	v. Hunter, 14 Abb. Pr. 4,	601
Snowden v. Wilas, 19 Ind. 10,	605	Spickerman v. McChesney, 111 N. Y. 686,	413
Snyder v. Braden, 58 Ind. 143,	619	Spies v. Chicago, etc., Co., 40 Fed. Rep. 34,	216
v. Fleming, 124 Ind. 335,	345	v. People, 122 Ill. 1,	528
v. Snyder, 75 Ia. 255,	508	Spitley v. Frost, 15 Fed. Rep. 299,	73
v. State, 124 Ind. 335,	105, 261, 276	Spitz v. Kerfoot, 42 Mo. App. 77,	591
v. United States, 112 U. S. 216,	581	Splahn v. Gillespie, 48 Ind. 307,	496
Sodousky v. McGee, 4 J. J. Marsh. 267,	534, 615	Spooner v. Handley, 151 Mass. 313,	743
Sohn v. Cambern, 106 Ind. 302,	19, 562		
v. Jervis, 101 Ind. 578,	537, 702		

[References are to Pages.]

Sprague v. Pritchard, 108 Ind. 491, 215, 532, 646	Stanley v. Sutherland, 54 Ind. 339,
Spraker v. Armstrong, 79 Ind. 577, 712	Stanton v. Ballard, 133 Mass. 464, v. State, 74 Ind. 503, 566, 766, v. State, 82 Ind. 463,
Spring v. South Carolina Ins. Co., 6 Wheat. 519, 461	Stanton Co. v. Canfield, 10 Neb. 389,
Springer v. Peterson, 1 Blackf. 188, 438	Stark v. Jenkins, 1 Wash. Ty. 421, v. Thompson, 3 J. J. Mar. (Ky.) 300,
Springfield, City of, v. Sleeper, 115 Mass. 587, 534	Starke v. Jenkins, 1 Wash. Ter. 421,
Sprinkle v. Toney, 73 Ind. 592, 45, 46	Starkweather v. Kittle, 17 Wend. 20,
Spurgeon v. Smitha, 114 Ind. 453, 327	Starner v. State, 61 Ind. 360, 203,
Spurrier v. Briggs, 17 Ind. 529, 789, 790	
Squier v. Gal, 1 Halst. 157, 441	
Squire v. Ford, 9 Hare, 47, 10	
St. Croix, etc., Co. v. Richie, 73 Wis. 409, 482	Starr v. Cass, 23 Ind. 458, v. Hunt, 25 Ind. 313,
St. John v. Hardwick, 17 Ind. 180, 638	Starry v. Winning, 7 Ind. 311, 195,
v. West, 4 How. Pr. 329, 750	
St. Louis, etc., Co. v. Evans, etc., Co., 15 Mo. App. 590, 124	Staser v. Hogan, 120 Ind. 207, 300, 373, 622, 669, 702, 756,
v. Godly, 45 Ark. 485, 770, 775	State v. Aarons (La.), 9 So. Rep. 114,
v. Hendricks, 48 Ark. 177, 702, 739	v. Acker, 52 N. J. L. 259,
v. Holman, 45 Ark. 102, 758	v. Adams, 20 Kan. 311,
v. Lux, 63 Ill. 523, 61	v. Adams, 84 Mo. 310,
v. McBride, 141 U. S. 127, 630	v. Adamson (Minn.), 45 N. W. Rep. 152,
v. McLain (Tex.), 15 S. W. Rep. 789, 265	v. Adamson, 33 Minn. 196,
v. Missouri, etc., Co., 12 Mo. App. 576, 160	v. Ah Lee, 8 Ore. 214,
v. Myrtle, 51 Ind. 566, 622	v. Ah Tong, 7 Nev. 148,
v. Southern Express Co., 108 U. S. 24, 72	v. Allen, 94 Ind. 441,
v. Triplett (Ark.), 1 Law. Rep. Anno. 773, 636	v. Alling, 12 Ohio, 16,
St. Louis Brokerage Co. v. Bag- nell, 76 Mo. 554, 411	v. Anderson, 42 La. Ann. 474,
St. Mark, etc., Co. v. Harris, 13 How. Pa. 95, 601	v. Anderson, 96 Mo. 241,
St. Paul, etc., Co. v. Kelly, 43 Kan. 741, 620	v. Anone, 2 Nott. & Mc. 27,
Stafford v. Nutt, 51 Ind. 535, 603	v. Armstrong, 35 Mo. App. 49
v. Union Bank of Louisiana, 16 How. 135, 316, 323, 439	v. Atkinson, 33 S. C. 100, 239
Stagg v. Compton, 81 Ind. 171, 755	v. Avery, 17 Wis. 672,
Stair v. Richardson, 108 Ind. 429, 774	v. Ayer, 23 N. H. 301,
Staley v. Barhite, 2 Caines, 221, 604	v. Bagan, 41 Minn. 285,
v. Dorset, 11 Ind. 367, 83, 208	v. Bailey, 16 Ind. 46,
v. Howard, 7 Mo. App. 377, 311, 312	v. Baker, 63 N. C. 276,
Stallings v. Barrett, 26 S. C. 474, 596	v. Baldwin, 70 Ia. 180,
Stamps v. Newton, 3 How. (Miss.) 34, 13	v. Bancroft, 22 Kan. 170,
Stanaford v. Parker (Ky.), 15 S. W. Rep. 784, 756	v. Banks, 48 Ind. 197,
Stanard v. Brownlaw, 3 Mumf. (Va.) 229, 483	v. Baoughem, 20 Ia. 497,
Standard Oil Co. v. Bretz, 98 Ind. 231, 572	v. Barker, 43 Kan. 262,
Stanford v. Cronkhite, 114 Ind. 220, 781	v. Barrett, 40 Minn. 65,
Standley v. Northwestern, etc., Ins. Co., 95 Ind. 254, 398, 399, 640	v. Bartlett, 9 Ind. 569, 230, 234 254, 744
Stanley v. Smith, 15 Ore. 505, 762	v. Baxter, 28 Ark. 129,
	v. Beck, 81 Ind. 500,
	v. Bennett, 75 Me. 590,
	v. Berdetta, 73 Ind. 185, 231
	v. Berg, 50 Ind. 496,
	v. Biddle, 36 Ind. 138, 433
	v. Billings, 23 L. Ann. 798,
	v. Bird, 107 Ind. 154,
	v. Blanch, 70 Ind. 204, 56
	v. Bloom, 17 Wis. 521,
	v. Board, 25 Ind. 210,

TABLE OF CASES.

cxiii

[References are to Pages.]

State v. Board, 45 Ind. 501,	435, 437,	State v. Cummins, 76 Ia. 133,	657
	438, 591, 592	v. Cumming, 36 Mo. 263,	513
v. Board, 63 Ind. 497,	435, 591	v. Cunningham, 101 Ind. 461,	452
v. Board, 66 Ind. 216,	188	v. Daily, 6 Ind. 9,	230
v. Board, 92 Ind. 133,	360, 361	v. Daubert, 42 Mo. 242,	657
v. Board, 39 Kan. 85,	592	v. Daugherty, 59 Mo. 104,	493
v. Bouche, 5 Blackf. 154,	237	v. Davey, 39 La. Ann. 507,	461
v. Bradley, 29 Mo. App. 366,	445	v. Davis, 4 Blackf. 345,	237
v. Brady, 107 N. C. 822,	578	v. Davis, 73 Ind. 359,	146, 281
v. Breaux, 32 La. Ann. 222,	528	v. Davis, 41 Ia. 311,	578
v. Brecht, 41 Minn. 50,	679	v. Davis, 47 Ia. 634,	240, 244
v. Breese, 15 Kan. 123,	434	v. Day, 52 Ind. 483,	236
v. Britton, 102 Ind. 214,	307	v. Delafield, 69 Wis. 264,	463
v. Brown, 44 Ind. 329,	77, 217	v. Delano, 34 Ind. 52, 105, 247,	263,
v. Brown, 71 Mo. 454,	5		276
v. Brown, 5 Ore. 119,	84	v. Demaree, 80 Ind. 519,	435
v. Brown, 33 S. C. 151,	251	v. De Moss, 98 Mo. 340,	547
v. Bruder, 35 Mo. App. 475,	120, 560	v. Denny, 118 Ind. 382,	9
v. Buchler, 103 Mo. 203,	253	v. Dickerson, 98 N. C. 708,	252
v. Burge, 7 Ia. 255,	792	v. Dickson, 6 Kan. 209,	529
v. Burnett, 119 Ind. 392	240	v. Dillon, 96 Mo. 56,	462
v. Burns, 14 Mo. App. 581,	159	v. District Judge, 41 La. Ann.	
v. Burns, 66 Mo. 227,	97	73,	436
v. Burthe, 39 La. Ann. 328,	249	v. Dogonia, 69 Mo. 485,	740
v. Byrd, 93 N. C. 624,	326	v. Dove, 10 Ired. L. 469,	736
v. Cady, 47 Conn. 44,	785	v. Downs, 7 Ind. 283,	254
v. Cape Girardeau, etc., 73 Mo.		v. Drogomond, 55 Mo. 87,	251
560,	437, 519	v. Duffel, 4 La. Ann. 958,	456
v. Cair, 37 Kan. 421,	754	v. Dufour, 63 Ind. 567,	669
v. Campbell, 67 Ind. 302,	234	v. Dunlop, 65 N. C. 288,	573
v. Carter, 98 Mo. 176,	239	v. Dumphrey, 4 Minn. 438,	680
v. Caulfield, 23 La. Ann. 148,	251	v. Dyer, 99 Ind. 426,	440
v. Chase, 41 Ind. 356,	87, 335,	v. East, 88 Ind. 602,	116, 121
v. Chastain, 104 N. C. 900,	183	v. Easton, etc., Co. (Md.), 20	
v. Circuit, 31 N. J. L. 249,	620	Atl. Rep. 242,	18
v. City of Newark, 48 N. J. L.		v. Elam, 21 Mo. App. 290,	28
101,	513	v. Ellis, 41 La. Ann. 41,	436
v. Claire, 41 La. Ann. 1067,	530	v. Ely, 11 Ind. 313,	63, 70, 232
v. Clark, 16 Ind. 97,	791, 792	v. Ely, 14 Ind. 291,	234
v. Clark, 33 La. Ann. 422,	460	v. Emmerson, 74 Mo. 607,	462
v. Clayton, 34 Mo. App. 563,	435	v. Engle, 127 Ind. 457,	439
v. Clement, 15 Ore. 237,	763	v. Ennis, 74 Ind. 17,	672
v. Coghlen, 86 Ind. 404,	190, 192	v. Ensey, 42 Ind. 480,	237
v. Coleman, 46 N. W. Rep. 664,	350	v. Ensign, 11 Neb. 529,	61
v. Collins, 33 La. Ann. 152,	251, 252	v. Evansville, etc., Co., 107 Ind.	
v. Collins, 70 N. C. 241,	534	581,	64, 233
v. Collins, 93 N. C. 564,	657	v. Ezekiel, 33 S. C. 115,	612
v. Connolly, 3 Rich. L. 337,	674	v. Farrar, 104 N. C. 702,	176, 650
v. Cooper, 103 Ind. 75,	239, 256	v. Farrell, 23 Mo. App. 176,	29
v. Coulter, 46 Kan. 87, 673,	470	v. Ferguson, 42 La. Ann. 643,	453
v. County Court, etc., 64 Mo.		v. Field, 37 Mo. App. 83,	438, 439
170,	434	v. First Nat. Bank, 89 Ind. 302,	353
v. County Judge, 5 Ia. 380,	438	v. Fitch, 113 Ind. 478,	511
v. Cowan, 7 Ired. L. 239,	765	v. Fitzhugh, 2 Ore. 227,	750
v. Crawford, 99 Mo. 74,	679	v. Flad, 26 Mo. App. 500,	439
v. Credle, 63 N. C. 506,	232	v. Fleming, 13 Ia. 443,	243
v. Cressinger, 88 Ind. 499,	439	v. Flemons, 6 Ind. 279,	764
v. Cromwell (N. Y.), 10 N. E.		v. Foster, 44 N. J. L. 378,	454
Rep. 270,	176	v. Foulkes, 94 Ind. 493,	322, 635
v. Cucuel, 31 N. J. L. 249,	579	v. Fowler, 41 La. Ann. 380,	112

[References are to Pages.]

State v. Frain, 82 Ind. 532,	239, 240	State v. Jones, 61 Mo. 232,	
v. Frazer, 28 Ind. 196,	244, 253, 679	v. Jones (N. C.), 13 S. E. Rep.	
v. French, 2 Pin. (Wis.) 181,	58	112,	
v. Funck, 17 Ia. 365,	527, 718	v. Jones, 97 N. C. 469,	
v. Gallagher, 16 La. Ann. 388,	789	v. Jones, 12 S. E. Rep. 657,	
v. Gallo, 18 Ore. 423,	254	v. Jones, 11 Ia. 11,	112,
v. Gannaway, 16 Lea. 124,	4	v. Judge, 21 La. Ann. 65,	
v. Garig (La.), 8 So. Rep. 934,	787,	v. Judge, 23 La. Ann. 29,	
	792	v. Judge, 29 La. Ann. 360,	
v. Garrand, 5 Ore. 216,	619	v. Judges, etc., 41 La. Ann. 1012,	
v. Gaslin, 25 Neb. 71,	455	v. Julian, 93 Ind. 292,	
v. Gay, 94 N. C. 841,	657	v. Justices of Moore Co., 2 Ired.	
v. Gilmore, 28 Mo. App. 561,	248	L. 430,	
v. Gleason, 88 Mo. 582,	621	v. Kamp, 111 Ind. 56,	125,
v. Goings, 100 N. C. 504,	231	v. Kansas City Court, 97 Mo.	
v. Granville, 45 Ohio St. 264,	258	331,	125,
v. Gray, 54 Ind. 91,	616	v. Kaub, 15 Mo. App. 433,	
v. Green, 16 Ia. 239,	217	v. Kern, 127 Ind. 465,	234,
v. Green, 112 Ind. 462,	9	v. Kill Buck Turnpike Co., 8	
v. Green, 42 La. Ann. 644,	578	Ind. 71,	
v. Hall, 58 Ind. 512,	234	v. King, 42 La. Ann. 77,	
v. Hallowell, 91 Ind. 376,	183, 239,	v. Kinkaid, 23 Neb. 641,	
	240	v. Kinnay, 41 Ia. 424,	
v. Hamilton, 62 Ind. 409,	232	v. Kirkpatrick, 54 Ia. 373,	
v. Hamilton, 27 La. Ann. 400,	529	v. Klaas, 42 Ind. 506,	
v. Hammill, 6 La. Ann. 257,	461	v. Kline, 54 Ia. 183,	
v. Hanna, 84 Ind. 183,	251	v. Knight, 43 Me. 11,	
v. Harland, 74 Wis. 11,	127	v. Knight, 46 Mo. 83,	
v. Harmon, 31 Ohio St. 250,	5	v. Knight, 31 S. C. 81,	
v. Harper, 38 Ind. 13,	277	v. Knowles, 34 Kan. 393,	
v. Harris, 89 Ind. 363,	354, 357	v. Koslem (Ind.), 29 N. E. Rep.	
v. Harris, 39 La. Ann. 228,	756	595,	341,
v. Harrison, 5 Jones (N.C.) 115,	195	v. Krug, 82 Ind. 58,	
v. Hattabaugh, 66 Ind. 223,	123,	v. Krug, 94 Ind. 366,	334,
	149, 154	v. Kutter, 59 Ind. 572,	
v. Hawes, 43 Ohio St. 16,	438	v. Laughlin, 75 Mo. 358,	
v. Hawkins, 81 Ind. 486,	704	v. Lawrence, 38 Mo. 535,	
v. Hay, 88 Ind. 274,	511	v. Lawrence, 81 N. C. 522,	
v. Hendrick, 62 Ia. 414,	771	v. Leach, 120 Ind. 124,	
v. Hightower, 33 S. C. 598,	99	v. Leach, 71 Ia. 54,	
v. Hinchman, 27 Pa. St. 479,	681	v. Lechman (S. D.), 49 N. W.	
v. Holcombe, 41 La. Ann. 1066,	254	Rep. 3,	
v. Hood, 7 Blackf. 127,	674	v. Lee, 29 Minn. 445,	
v. Hope, 100 Mo. 347,	254, 729	v. Leeper, 70 Ia. 748,	
v. Horner, 10 Mo. App. 307,	437	v. Lenig, 42 Ind. 541,	
v. Hosmer, 85 Mo. 553,	668	v. Leaver, 62 Wis. 387,	
v. Houston, 35 La. Ann. 236,	460	v. Leunig, 42 Ind. 541,	
v. Huffman, 16 Ore. 15,	572	v. Lewis, 22 N. J. L. 564,	
v. Hughes, 15 Ind. 104,	219	v. Lewis, 20 Nev. 333,	
v. Irish, 42 Ind. 506,	276	v. Lieben, 57 Ind. 106,	
v. Jackson, 12 La. Ann. 679,	763	v. Lindley, 98 Ind. 48,	
v. Jackson, 42 La. Ann. 1170,	578	v. Lowe, 21 W. Va. 782,	
v. Jackson, 32 S. C. 27,	556	v. Lull, 37 Me. 246,	
v. Jacobs, 28 S. C. 29,	120	v. Lusk, 68 Ind. 264,	
v. Jarvis, 20 Ore. 437,	251	v. McCabe, 74 Wis. 481,	
v. Jefferson, 66 N. C. 309,	232, 531	v. McDonald, 30 Minn. 98,	
v. Jeffries, 98 Ind. 31,	564	v. McDuffie, 107 N. C. 885,	
v. Johnson, 8 Blackf. 533,	237	v. McGinnis, 17 Ore. 332,	
v. Johnson, 102 Ind. 247,	232	v. McGuire, 40 La. Ann. 378,	
v. Johnson, 105 Ind. 463,	9	v. McKee, 109 Ind. 497,	161,

TABLE OF CASES.

CCV

[References are to Pages.]

State v. McLaughlin, 77 Ind. 335,	306	State v. Parish, 83 Ind. 223,	570
v. McNamara, 100 Mo. 100,	292	v. Parish Judge, 27 La. Ann.	68
v. Madoill, 12 Fla. 151,	528	184,	68
v. Maher, 74 Ia. 77,	517, 533	v. Paterson, 45 Vt. 308,	619
v. Mann, 83 Mo. 589,	529	v. Patterson, etc., Co., 43 N. J.	591
v. Marsh, 119 Ind. 394,	775	L. 505,	591
v. Marsteller, 84 N. C. 727,	232	v. Patton, 13 Ired. L. 421,	555
v. Mathews, 37 N. H. 450,	7	v. Peak, 85 Mo. 190,	731
v. May, 4 Dev. 328,	657	v. Phares, 24 W. Va. 657,	777
v. Mayo, 42 La. Ann. 637,	439	v. Pierce, 14 Ind. 302,	182
v. Meehan, 45 N. J. L. 189,	592	v. Polson, 29 Ia. 133,	251
v. Meeker, 19 Neb. 444,	61	v. Potts, 20 Neb. 789,	159, 239
v. Megown, 89 Mo. 156,	438	v. Powell, 40 La. Ann. 241,	536
v. Mellor, 13 R. I. 666,	529, 578	v. Prater, 26 S. C. 613,	445
v. Meloney, 79 Ia. 413,	514	v. President, etc., 44 Ind. 350,	256, 769
v. Merrill, 16 Ark. 384,	7	v. Probasco, 46 Kan. 310,	648, 743
v. Merriman (S. C.), 12 S. E.	578	v. Pugsley, 75 Ia. 742,	610
Rep. 619,	578	v. Quarrel, 2 Bay. 150,	527
v. Meyers, 99 Mo. 107,	254, 743	v. Rabburn, 14 Ind. 300,	761
v. Michaels, 8 Blackf. 436,	506	v. Ray, 53 Mo. 345,	793
v. Miller, 7 Ind. 275,	674	v. Raymond, 11 Nev. 98,	578
v. Miller, 63 Ind. 475,	65, 71	v. Reed,	239
v. Miller, 100 Mo. 606,	252	v. Republican River, etc., Co.,	591
v. Millin, 3 Nev. 409,	679	20 Kan. 404,	591
v. Mitchell, 31 Ohio St. 592,	127, 415	v. Richmond, 6 Fost. (N. H.)	13
v. Montgomery, 28 Mo. 594,	674	232,	13
v. Moore, 77 Ia. 449,	252	v. Riggs, 92 Ind. 336,	255
v. Moriarity, 20 Ia. 595,	453	v. Rightor, 36 La. Ann. 112,	438
v. Morrison, 103 Ind. 161,	504	v. Rising, 15 Nev. 164,	519
v. Munchrath, 78 Ia. 268,	528, 736	v. Robbins, 124 Ind. 308,	121
v. Murdock, 86 Ind. 124,	668, 756	v. Roberts, 40 Ind. 451,	603
v. Murphy, 8 Blackf. 498,	234	v. Rockwell (Ia.), 48 N. W.	578
v. Murphy, 41 La. Ann. 526,	439	Rep. 721,	578
v. Murrell, 33 S. C. 83,	248	v. Roderigas, 7 Nev. 328,	679
v. Musick, 71 Mo. 401,	458	v. Rook, 42 Kan. 419,	576
v. Mustard, 80 Ind. 280,	744	v. Rousch, 60 Ind. 304,	234
v. Nelson, 26 Ind. 366,	541	v. Ruhlman, 111 Ind. 17,	635
v. Nelson, 101 Mo. 477,	391	v. Ruth, 21 Kan. 583,	635
v. New Brunswick, 42 N. J. L. 51,	5	v. Saxon, 42 Ind. 484,	768
v. New Orleans, 43 La. Ann.	650	v. Scheper (S.C.), 11 S. E. Rep.	176
441,	650	623,	176
v. Newkirk, 80 Ind. 131,	237, 255	v. Severson, 78 Ia. 653,	611
v. Newlin, 69 Ind. 108,	635	v. Sevier, 117 Ind. 338,	239
v. Noble, 118 Ind. 350,	3, 9, 14, 36	v. Shaw, 5 La. Ann. 342,	679
v. Northern Central R. Co., 18	303	v. Sheldon, 2 Kan. 322,	438
Md. 193,	303	v. Shelledy, 8 Ia. 477,	674
v. Norton, 20 Kan. 506,	435	v. Shoemaker, 101 N. C. 690,	610
v. Nowland, 29 Ind. 212,	408	v. Slavin, 16 Mo. App. 541,	61
v. O'Brien, 21 La. Ann. 265,	674	v. Slick, 86 Ind. 501,	440
v. Oeder, 80 Ia. 72,	792	v. Smith, 49 Conn. 376,	572
v. Olds, 19 Ore. 397,	612	v. Smith, 8 Ind. 485,	254
v. One Bottle of Brandy, 43 Vt.	217	v. Smith, 35 Kan. 618,	792
297,	217	v. Smock, 20 Ind. 184,	665, 670
v. Overholser, 69 Ind. 144,	234, 235	v. Snodgrass, 98 Ind. 546,	591
v. Owens, 63 Tex. 261,	592	v. Soudriette, 105 Ind. 306,	313
v. Padgett, 82 N. C. 544,	232	v. Spencer, 92 Ind. 115,	64, 70, 232
v. Palmer, 40 Kan. 474,	679	v. Squaires, 2 Nev. 226,	736
v. Parker, 106 N. C. 711,	508	v. Squires, 26 Ia. 340,	61
v. Parkinson, 5 Nev. 15,	58, 479		

[References are to Pages.]

State v. St. Louis Court of Appeals, 87 Mo. 569, 46	State v. Westmoreland, 29 S. C. 1,
v. St. Paul, etc., Co., 92 Ind. 42, 688	v. Wheeler, 65 Ia. 619,
v. Stain, 82 Me. 472, 791	v. Whitewater, etc., Co., 8 Ind.
v. Staker, 3 Ind. 570, 409	320, 13,
v. Stebbins, 29 Conn. 463, 674	v. Whitman, 14 Rich. L. (S. C.)
v. Stein, 13 Neb. 529, 592	113,
v. Stewart, 32 Mo. 379, 431	v. Whitney, 7 Ore. 386, 291,
v. Stewart, 68 Wis. 234, 266	v. Whitten, 23 Mo. App. 459,
v. Straw, 33 Me. 554, 663	v. Williams, 99 Mo. 291,
v. Supervisors, 38 Wis. 554, 434	v. Wilson, 50 Ind. 487, 239,
v. Sutterfield, 54 Mo. 391, 64	v. Wilson, 52 Ind. 166,
v. Swails, 8 Ind. 524, 235	v. Wilson, 8 Ia. 407,
v. Swarts, 9 Ind. 221, 187, 203, 195,	v. Wilson, 40 La. Ann. 751,
751	v. Wilson, 104 N. C. 868,
v. Templin, 122 Ind. 235, 74, 407,	v. Winter Park, 25 Fla. 371,
488, 494, 749, 783	v. Wiseman, 68 N. C. 203,
v. Tennison, 42 Kan. 330, 623	v. Wolever, 127 Ind. 306, 12, 299
v. Terre Haute, etc., Co., 64	v. Wood (Ind.), 30 N. E. Rep.
Ind. 297, 177, 265, 268, 275, 469	309,
v. Thomas, 111 Ind. 515, 536, 538	v. Woodward, 89 Ind. 110,
v. Thomas, 99 Mo. 235, 657	v. Worden, 46 Conn. 349,
v. Thompson, 81 Mo. 163, 325, 450	v. Wyatt, 76 Ia. 328,
v. Thorn, 28 Ind. 306, 109, 467	v. Wyse, 32 S. C. 45,
v. Tickel, 13 Nev. 33, 618	v. Yount, 4 Ind. 653,
v. Tompkins, 71 Mo. 613, 619	v. Younts, 89 Ind. 313,
v. Tool, 4 Ohio St. 553, 441	v. Zanesville, etc., Co., 16 Ohio
v. Town of Tipton, 109 Ind. 73, 592	St. 308,
v. Tp. of Union, 37 N. J. L. 268, 514	State Bank v. Abbott, 20 Wis. 599,
v. Trout, 75 Ind. 563, 320	v. Dutton, 11 Wis. 371,
v. Turner, 18 S. C. 103, 745	v. State, 1 Blackf. 267,
v. Trustee, etc., 5 Ind. 77, 592	State Ins. Co. v. Schreck, 27 Neb.
v. Trustees, etc., 114 Ind. 389, 591	527,
v. Tumey, 81 Ind. 559, 233, 237, 239	State Reservation, Matter of, 102
v. Turner, 6 La. Ann. 309, 528	N. Y. 734,
v. United States, 8 Blackf. 252, 323	Stayner v. Joyce, 120 Ind. 99, 575
v. Vail, 53 Mo. 97, 431	Steamboat Lake of the Woods v
v. Van Valkenburg, 60 Ind. 302, 234	Shaw, 2 Gr. (Ia.) 91,
v. Vanderbilt, 116 Ind. 11, 236	Steamer Virginia v. West, 19 How
v. Voorhies, 41 La. Ann. 567, 647	182,
v. Wagner, 78 Mo. 644, 250	Steamship Co. v. Tugman, 106 U
v. Wakefield, 15 Atl. Rep. 181, 12	S. 118,
v. Walker, 26 Ind. 346, 239	Stearly's Appeal, 3 Grant, 370,
v. Wallace, 41 Ind. 445, 231, 439	Stearns v. Warner, 2 Alk. (Vt.) 26
v. Walters, 64 Ind. 226, 124, 154,	v. Wright, 51 N. H. 600,
243, 244, 348, 360, 443	Steel v. Grigsby, 79 Ind. 184,
v. Wamire, 16 Ind. 357, 250	v. Thompson, 38 Mo. App. 31,
v. Wapucca Bank, 20 Wis. 640, 498	Steele v. White, 2 Paige, 478,
v. Ward, 75 Ia. 637, 239	Steeple v. Downing, 60 Ind. 478,
v. Warner, 55 Wis. 271, 436	Steer v. Little, 44 N. H. 613,
v. Wasson, 99 Ind. 261, 480	Stefani v. State, 124 Ind. 3,
v. Watson, 81 Ia. 380, 729	Steffen v. Jefferis (Mont.), 22 Pa
v. Watts, 8 La. (O. S.) 76, 435	Rep. 152,
v. Weaver, 123 Ind. 512, 290, 745	Steffy v. People, 130 Ill. 98,
v. Weaver, 104 N. C. 758, 252	Stegman v. Berryhill, 72 Mo. 307
v. Webber, 22 Mo. 231, 763	Stehman v. Crull, 26 Ind. 436, 21
v. Weil, 89 Ind. 286, 240	Steinau v. Cincinnati, etc., C
v. Weiskittle, 61 Md. 48, 755	(Ohio), 27 N. E. Rep. 545,
v. Weld, 39 Minn. 426, 101	Steinkamper v. McManus, 26 M
v. Wenzel, 77 Ind. 428, 588	App. 51,

TABLE OF CASES.

cxvii

[References are to Pages.]

<i>See v. Lovejoy</i> , 125 Ill. 352, 312	<i>Stockton v. Lockwood</i> , 82 Ind. 158, 373
<i>Slater v. La Rose</i> , 79 Ind. 435, 296	<i>v. Stockton</i> , 40 Ind. 225, 399, 570, 603, 785
<i>Stanzel v. Sims</i> , 25 Ill. App. 538, 453	<i>Stockwell v. State</i> , 101 Ind. 1, 290, 397, 405, 488, 550, 567, 595
<i>Stearns v. First Nat. Bank</i> , 79 Ind. 560, 398	<i>v. Thomas</i> , 76 Ind. 506, 785
<i>v. Vert</i> , 111 Ind. 408, 108 Ind. 126	<i>Stoddard v. Chambers</i> , 2 How. 284, 398
<i>Stenberg v. Bernheimer (N.Y.)</i> , 24 N. E. Rep. 311, 291	<i>v. Emery</i> , 128 Pa. St. 436, 56
<i>Stevens v. Bradley</i> , 23 Fla. 393, 176	<i>v. Johnson</i> , 75 Ind. 20, 419
<i>v. Bradley</i> , 24 Fla. 201, 681	<i>v. Roland</i> , 31 S. C. 342, 455
<i>v. Koonce</i> , 106 N. C. 255, 454, 456	<i>v. Aetna, etc., Ins. Co.</i> , 10 W. Va. 546, 644
<i>v. Railroad</i> , 96 Mo. 207, 657	<i>Stone v. Brown</i> , 116 Ind. 78, 712, 771
<i>v. Regenstein</i> , 89 Ala. 561, 571	<i>v. Spellman</i> , 16 Tex. 432, 457
<i>v. Stephens</i> , 51 Ind. 542, 379, 446	<i>v. State</i> , 42 Ind. 418, 249, 254, 789
<i>Stephenson v. Ballard</i> , 82 Ind. 87, 294	<i>v. State</i> , 75 Ind. 235, 320, 562
<i>v. Doe</i> , 8 Blackf. 508, 61	<i>Stoops v. Greensburgh, etc., Co.</i> , 10 Ind. 47, 592
<i>v. State</i> , 110 Ind. 358, 517, 530, 531, 578, 678, 689	<i>Stoots v. State</i> , 108 Ind. 415, 530
<i>v. Stiles</i> , 3 N. J. L. 543, 736	<i>Stoppenbach v. Zohrlaut</i> , 21 Wis. 285, 76
<i>Stevens v. Campbell</i> , 21 Ind. 471, 596	<i>Storm v. United States</i> , 94 U. S. 76, 536
<i>v. Higginbotham (Utah)</i> , 23 Pac. Rep. 757, 445	<i>Story, Ex parte</i> , 12 Pet. 339, 438, 450
<i>v. Nevitt</i> , 15 Ind. 224, 782	<i>Story v. O'Dea</i> , 23 Ind. 326, 736
<i>v. Phoenix Ins. Co.</i> , 41 N. Y. 142, 72	<i>Stott v. Smith</i> , 70 Ind. 298, 678, 767, 768
<i>v. Stevens</i> , 127 Ind. 560, 531, 771	<i>Stoughton v. State</i> , 2 Ohio St. 562, 674
<i>v. Webb</i> , 7 C. & P. 60, 617	<i>v. State</i> , 5 Wis. 291, 27
<i>v. Wolf</i> , 77 Tex. 215, 560	<i>Stout v. Calver</i> , 6 Mo. 254, 788
<i>Stevenson v. Felton</i> , 99 N. C. 58, 291	<i>v. Curry</i> , 110 Ind. 514, 294, 295
<i>v. Miller</i> , 2 Litt. 306, 306	<i>v. Gully</i> , 13 Col. 604, 495
<i>v. Sherwood</i> , 22 Ill. 238, 666	<i>v. Indianapolis, etc., Co.</i> , 41 Ind. 149, 143
<i>v. State</i> , 71 Ind. 52, 308	<i>v. McPheeters</i> , 84 Ind. 585, 215, 525
<i>v. Steinberg</i> , 32 Cal. 373, 639	<i>v. State</i> , 90 Ind. 1, 254, 255, 530
<i>Stewart v. Babbs</i> , 120 Ind. 568, 274	<i>v. State</i> , 78 Ind. 492, 255
<i>v. Codd</i> , 58 Md. 86, 114	<i>v. Turner</i> , 102 Ind. 418, 395, 396, 774
<i>v. Huntington Bank</i> , 11 S. & R. 743	<i>v. Woods</i> , 79 Ind. 108, 146, 284, 82
<i>v. Rankin</i> , 39 Ind. 161, 770, 771	<i>Stovall v. Banks</i> , 10 Wall. 583, 82
<i>v. Salamon</i> , 97 U. S. 364, 450	<i>Stowe v. Querner</i> , L. R. 5 Exch. 155, 701
<i>v. Smith</i> , 111 Ind. 526, 535	<i>Strader v. Manville</i> , 33 Ind. 111, 281, 282, 284
<i>v. State</i> , 24 Ind. 142, 759	<i>Strang v. Beach</i> , 11 Ohio St. 283, 217
<i>v. State</i> , 111 Ind. 554, 168, 682	<i>Strange v. Lowe</i> , 8 Blackf. 243, 604
<i>v. State</i> , 113 Ind. 505, 408, 636, 760	<i>v. Tyler</i> , 95 Ind. 395, 178
<i>v. Stewart</i> , 31 Ala. 207, 31	<i>Stratton v. Commonwealth</i> , 84 Ky. 190, 244
<i>v. Stringer</i> , 41 Mo. 400, 456	<i>v. Graham</i> , 68 Cal. 168, 208
<i>v. Taylor</i> , 68 Cal. 5, 459	<i>v. Kennard</i> , 74 Ind. 302, 769, 771
<i>Strakney, Ex parte</i> , 40 Ala. 160, 438	<i>v. Lockwood</i> , 1 Ind. App. 380, 733
<i>Straton v. O'Neal</i> , 32 La. Ann. 947, 126	<i>v. Paul</i> , 10 Ia. 139, 689
<i>v. Ross</i> , 51 Me. 556, 495	<i>Strauss v. Cooch</i> , 47 Ohio St. 115, 646
<i>Stupp v. Claman</i> , 123 Ind. 532, 536	<i>Stribling v. Brougher</i> , 79 Ind. 328, 637
<i>v. Spring Mill, etc., Co.</i> , 54 Ind. 16, 578	<i>v. Splint Coal Co.</i> , 31 W. Va. 82, 557
<i>Stutz v. Fullinwieder</i> , 40 Kan. 73, 615	<i>v. Tripp</i> , 86 Ind. 166, 765
<i>v. State</i> , 91 Ala. 10, 747	<i>Strickland v. Draughan</i> , 91 N. C. 103, 467
<i>v. Sadler</i> , 109 Ind. 254, 215, 532, 371, 713	<i>Striker v. Kelly</i> , 2 Denio, 323, 9
<i>Stakman v. Riverside, etc., Co.</i> , 64 Cal. 57, 497	<i>Stringer v. Davis</i> , 30 Cal. 318, 513
<i>Stakton v. Coleman</i> , 42 Ind. 281, 497	

[References are to Pages.]

Stringer v. Frost, 116 Ind. 477,	738	Summerson v. Hicks, 134 Pa. St.	566,
v. Northwestern, etc., Co., 82	480	Sumner v. Coleman, 20 Ind. 486,	
Ind. 100,	21	v. Cook, 12 Kan. 162,	
Street v. Francis, 3 Ohio, 277,	789	v. Golings, 74 Ind. 293, 170, 182	
v. Lemon, etc., Co., 9 Nev. 257,	103	Sunbolt v. Alford, 3 Mess. & Wels.	248,
v. United States, 133 U. S. 299,	396	Sunier v. Miller, 105 Ind. 393,	
Stroch v. Com., 90 Pa. St. 272,	515	Supervisors v. Amight, 54 Mass. 67	
Strong, Ex parte, 20 Pick. 484, 433,	599	Supreme Lodge, etc., v. Johnson, 78	Ind. 110,
Strong v. Downing, 34 Ind. 300	547	Supreme Lodge of Knights of the	
v. Manf. Co., 6 Hun. 528,	108	Golden Rule v. Rose, 62 Tex. 321,	
v. Makeever, 102 Ind. 578,	253	Sutherland v. Hankins, 56 Ind. 343,	773,
v. State, 105 Ind. 1,	589	v. Putman (Ariz.), 24 Pac. Rep.	164,
v. Strong, 102 N. Y. 69,	566	v. Venard, 34 Ind. 390,	
v. Taylor School Tp., 79 Ind.	646	Sutherlin v. State, 108 Ind. 389,	255,
208,	714, 715	Sutton v. McConnell, 46 Wis. 269,	
v. Willey, 104 U. S. 512,	100	Suydam v. Hoyt, 1 Dutch. (N. Y.)	230,
Stropes v. Board, 72 Ind. 42,	418	v. Williamson, 20 How. 427,	
Strosser v. City of Ft. Wayne, 100	640, 641,	Swaggard v. Hancock, 25 Mo. App.	596,
Ind. 443,	645	Swafford v. Whipple, 3 G. Greene,	261,
Strough v. Gear, 48 Ind. 100,	447	Swales v. Grubbs, 126 Ind. 106, 575,	
Struber v. Rohlfis, 36 Kan. 202,	112	Swan v. Clark, 80 Ind. 57,	
Stuart v. Gay, 127 U. S. 518,	539	Swank v. Nichols, 24 Ind. 199,	
v. Haven, 17 Neb. 211,	58, 479	Swann v. Wright, 110 U. S. 590,	
v. Laird, 1 Cranch. 209,	121, 148	Swasey v. Adair, 83 Cal. 136, 324,	
v. Palmer, 74 N. Y. 183,	597	Swearengen v. Gulick, 67 Ill. 208,	
Stuckey v. Fritsche, 77 Wis. 327,	68	v. Leach, 7 B. Monr. 285,	
Studdart, In re, 30 Minn. 553,	621	Sweeney, Ex parte, 126 Ind. 583, 24,	31, 45, 46, 48, 50, 51, 53, 57,
Studley v. Hall, 22 Me. 198,	588	Sweeney v. Kelley, 42 Cal. 402,	
Studwell v. Shapter, 54 N. Y. 249,	733	Sweet v. Merkl, 27 Ill. App. 245,	
Stull v. Howard, 26 Ind. 456,	328	Sweetzer v. McCrea, 97 Ind. 404,	
Stults v. Zahn, 117 Ind. 297,	761, 777	Swem v. Green, 9 Col. 358,	
Stump v. Fraley, 7 Ind. 679,	712	Swift v. Allen, 55 Ill. 303,	
Stumph v. Bauer, 76 Ind. 157,	44	v. Edson, 5 Conn. 163,	
Stunz v. Stunz, 131 Ill. 309,	88	v. Mulkey, 14 Ore. 59,	
Sturgeon v. Gray, 96 Ind. 166,	207, 209,	v. Mulkey, 17 Ore. 532,	
Sturgis v. Rogers, 26 Ind. 1,	213, 308, 309, 312, 314	v. Ratliff, 74 Ind. 426,	
Sturm v. State, 74 Ind. 278,	231, 247	v. Tousey, 5 Ind. 196,	101,
Stutsman v. Barringer, 16 Ind. 363, 579	547, 655	Swigart v. State, 67 Ind. 287,	
Sturtevant v. Wineland, 22 Neb. 702, 447	634	Swinburn v. Swift, 15 W. Va. 483,	
Suarez v. Manhattan Ry. Co., 60	303	Swinney v. Nave, 22 Ind. 178,	
Hun. 584,	544	Sword v. Keith, 31 Mich. 247,	
Sullivan v. Frazell, 4 Rob. (N. Y.)	676	Sylvis v. Sylvis, 11 Col. 319,	
616,	788	Szorn v. Lamar, 71 Ga. 85,	
v. Haug, 82 Mich. 548,	690		
v. McMillan (Fla.), 8 So. Rep.	534		
450,	604		
v. Missouri Pacific R. Co., 97	792		
Mo. 113,			
v. O'Conner, 77 Ind. 149,			
v. State, 52 Ind. 309,			
v. State, 46 N. J. L. 446,			
Sullivan, Town of, v. Phillips, 110			
Ind. 320,			
Suman v. Cornelius, 78 Ind. 506,			
Summers v. Greathouse, 87 Ind.			
205,			
v. State, 51 Ind. 201,			
v. Tarney, 123 Ind. 560,			

T

Taber v. Grafmiller, 109 Ind. 206,
v. Huston, 5 Ind. 322,
Tabor v. Judd, 62 N. H. 288, 619,

TABLE OF CASES.

cxix

[References are to Pages.]

Tabor v. Stanuels, 2 Cal. 40,	701	Taylor v. Steam Navigation Co.,	
Tachau v. Fiedeldey, 81 Ind. 54,	287,	105 N. C. 484,	345
	295, 728	v. Williams, 120 Ind. 414,	510
Taggart v. Tevanny, 1 Ind. App.		v. Wing, 83 N. Y. 527,	389
	532, 646	v. Wootan, 1 Ind. App. 188,	659
Talbird v. Whippee, 31 S. C. 600,	447	Teal v. Spangler, 72 Ind. 380,	251, 294,
Talburt v. Berkshire Life Ins. Co.,			725, 728, 752
No Ind. 434,	122, 361, 712	Tedrowe v. Esher, 56 Ind. 443,	699
Talcott v. Johnson, 41 Ind. 201,	682	Tegeler v. Shipman, 33 Ia. 194,	523
Talington v. Parrish, 89 Ind. 202,	640	Teikert v. Wilson, 38 Minn. 341,	155
Tapiey v. McGee, 6 Ind. 56,	276	Telford v. Garrels, 132 Ill. 550,	79, 560
Tarbell v. Bowman, 103 Mass. 341,	634	v. Wilson, 71 Ind. 555,	786
Tarbox v. Sughrue, 36 Kan. 225,	592	Temple v. Lasher, 39 Ind. 203,	278
Tardy v. Howard, 12 Ind. 404,	712	v. Superior Court, 70 Cal. 211,	437
Tarkington v. Link, 27 Neb. 826,	601	Templeman v. Steptoe, 1 Munf. 339,	75
v. Purvis, 128 Ind. 182, 712, 713,	719	Templeton v. Hunter, 10 Ind. 380,	378
Tate v. Booe, 9 Ind. 13,	561	v. Voshloe, 72 Ind. 134,	643
v. Ohio, etc., Co., 10 Ind. 174,	604	Tennessee, etc., Co. v. East Ala-	
Tatem v. Potts, 5 Blackf. 534,	523	bama, etc., Co., 81 Ala. 94,	164
Tatibv v. State, 38 Ind. 437,	256	Ten Eyck, Estate of, 36 Hun. 575,	73
Taylor v. Riggs, 1 Pet. 591,	701	Terre Haute, etc., Co. v. Barr, 31	
Taylor, Ex parte, 14 How. 3,	440	Ill. App. 57,	626
Taylor v. Adair, 22 Ia. 279,	646	v. Bissell, 108 Ind. 113,	760
v. Adams, 58 Mich. 187,	638	v. Brunker, 128 Ind. 542,	540, 708
v. Baltimore, etc., Co., 33 W.		v. Clark, 73 Ind. 168,	163, 693
Va. 39,	468	v. Jackson, 81 Ind. 19,	618
v. Betsford, 13 Johns. 487,	619	v. Soice, 128 Ind. 505,	590
v. Board, 120 Ind. 121, 64, 203,	444	v. Teel, 20 Ind. 131,	614
v. Burk, 91 Ind. 252, 219, 222, 225,	692	v. Wilson, 16 Ind. 102,	758
v. Carpenter, 2 Sandf. Ch. 603,	673	Terre Haute v. Terre Haute, etc.,	
v. Claypool, 5 Blackf. 557,	603	Co., 94 Ind. 305,	62
v. Cole, 3 T. R. 292,	588	Terre Haute, City of, v. Hudnut,	
v. Collins, 51 Wis. 123,	626	112 Ind. 542,	702, 703, 739
v. Davis (Tex.), 13 S. W. Rep.		Terrill v. Jennings, 1 Met. (Ky.),	
642,	774	450,	112
v. Deverell, 43 Kan. 469,	732	Terry, Ex parte, 128 U. S. 289,	7
v. Elliott, 52 Ind. 588,	115	Terry v. Abraham, 93 U. S. 38,	129
v. Elliott, 53 Ind. 441,	140	v. Hatch, 93 U. S. 44,	79
v. Fletcher, 15 Ind. 80,	767, 769	v. Shively, 93 Ind. 413, 294, 580,	690
v. Flint, 35 Ga. 124,	765	Terwilliger v. Murphy, 104 Ind. 32,	603
v. Greely, 3 Me. 204,	527	Tesh v. Commonwealth, 4 Dana	
v. Johnson, 113 Ind. 164,	243, 394,	(Ky.), 522,	23
	395, 396	Test v. Larsh, 76 Ind. 452, 126, 350, 491,	
v. King, 32 Mich. 42,	599		791
v. Lohman, 74 Ind. 418,	480	Testard v. State, 26 Tex. App. 260,	536
v. Nichols, 86 Tenn. 32,	402	Territory v. Bryson, 9 Mont. 32,	291
v. Penquite, 35 Mo. App. 389,	547	v. Burgess, 8 Mont. 57,	546
v. Savage, 1 How. U. S. 282,	136	v. Ely, 6 Dak. 128,	786
v. Savage, 2 How. U. S. 375,	136	v. Haxhurst, 3 Dak. 205,	592
v. Savage, 2 How. U. S. 394,	136	v. Jinks, 8 Mont. 135, 19 Pac.	
v. Shelkett, 66 Ind. 297,	777	Rep. 386,	236
v. Shew, 39 Cal. 536,	463	v. Langford, 3 Wash. Ty. 279,	266
v. Short, 40 Ind. 506,	637	v. Laun, 8 Mont. 322,	231
v. Skrine, 2 Const. (S. C.) 696,	250	v. Milroy, 7 Mont. 559,	324
v. Smith, 4 Ga. 133,	494	v. Pratt, 6 Dak. 483,	530
v. State, 82 Ga. 578,	454	v. Reberg, 6 Mont. 467,	345
v. State (Ind.), 29 N. E. Rep.		v. Scott, 7 Mont. 407,	252
415,	550	v. Shearer, 2 Dak. 332,	438
v. State, 16 Tex. App. 514,	320	Teters v. Hinders, 19 Ind. 93,	274, 732
		Thacher v. Jones, 31 Me. 528,	556

[References are to Pages.]

Thames Loan, etc., Co. v. Beville, 100 Ind. 309, 159, 273, 292, 581, 704, 718, 764, 775	Thompson v. Lynch, 43 Cal. 482, 78
Tharp v. Jarrell, 66 Ind. 52, 628	v. Lyon, 14 Cal. 39, 56
Thatcher v. Humble, 67 Ind. 444, 590	v. McKim, 6 Har. & J. 302, 2
v. Ireland, 77 Ind. 486, 187	v. Oskamp, 19 Ind. 399, 63
Thayer v. Society, etc., 20 Pa. St. 60, 709	v. Pershing, 86 Ind. 303, 53
v. Burger, 100 Ind. 262, 293, 581	v. Sanders, 118 N. Y. 252, 39
Theirman v. Vahle, 32 Ind. 400, 71	v. Shannon, 9 Tex. 536, 66
Thickstun v. Baltimore, etc., Co., 119 Ind. 26, 790	v. State, 29 Tex. App. 208, 76
Thiebaud v. Dufour, 57 Ind. 598, 64, 219, 229	v. Thompson, 9 Ind. 323, 572, 70
Thigpen v. Mundine, 24 Tex. 282, 671	v. Thompson, 34 Ind. 94, 55
Third Great Western Turnpike Co. v. Loomis, 32 N. Y. 127, 517	v. Thompson, 24 Wis. 515, 32
Thom v. Savage, 1 Blackf. 51, 313	v. Thornton, 41 Cal. 626, 51
v. Wilson, 24 Ind. 323, 176	v. Toohey, 71 Ind. 206, 39
Thoma v. State, 86 Ind. 182, 105, 247, 261, 276	v. Tracy, 60 N. Y. 31, 44
Thomas v. Anderson, 55 Cal. 43, 96	v. United States, 103 U. S. 480, 43
v. Dale, 86 Ind. 435, 724	v. Weeks, 32 Ill. App. 642, 59
v. De Gaffenraid, 27 Ala. 651, 555	v. White, 18 Ind. 373, 76
v. Farley Mfg. Co., 76 Ia. 735, 734	v. Wilson, 34 Ind. 94, 510, 61
v. Georgia, etc., Co., 38 Ga. 222, 324	Thornton, Ex parte, 46 Ala. 384, 43
v. Griffin, 1 Ind. App. 457, 648, 743, 765, 766	Thornton v. Baker, 15 R. I. 553, 12
v. Hamilton, 71 Ind. 277, 608	Thorp v. Reily, 57 N. Y. Sup. Ct. 589, 29
v. His Creditors, 1 Harr. (N. J.) 272, 435	v. Hanes, 107 Ind. 324, 5
v. Kelley, 27 Ill. App. 491, 454	Thorwegan v. King, 111 U. S. 549, 57
v. Merry, 113 Ind. 83, 285, 791	Thotwenin v. Rodriguez, 24 Tex. 468, 14
v. Musical, etc., Union, 121 N. Y. 45, 217, 591	Thrasher v. Postel, 79 Wis. 503, 64
v. Ruddell, 66 Ind. 326, 640	Threishel v. McGill, 28 Ill. App. 78, 68
v. Schee, 80 Ia. 237, 624	Thurston v. Boardman, 48 Ind. 258, 26
v. Service, 90 Ind. 128, 105, 266, 276	v. Kennett, 22 N. H. 151, 61
v. Simmons, 103 Ind. 538, 357, 494	Tibbetts v. O'Connell, 66 Ind. 171, 29
v. Wyatt, 9 S. & M. 308, 272	v. Penley, 83 Me. 118, 62
Thomason v. Odum, 31 Ala. 108, 701	Tice v. Hannibal, etc., Co., 35 Mo. 416, 53
v. Wood, 42 Cal. 416, 475	Tichenor v. Tichenor, 45 N. J. Eq. 664, 60
Thomlinson v. Briles, 101 Ind. 538, 536, 571, 704	Tierney v. Union Lumber Co., 47 Wis. 248, 51
Thompson, In re, 11 Paige, 453, 142	Tiffany v. Gilbert, 4 Barb. 320, 30
Thompson v. Adams, 2 Ind. 151, 87	Tilghman v. Little, 13 Ill. 239, 1
v. Adams, 82 Va. 672, 78	Tillinghast v. Nourse, 14 Ga. 641, 60
v. Butler, 95 U. S. 694, 50, 51	Tilton v. Beecher, 59 N. Y. 176, 51
v. Campbell, 52 Ala. 583, 133	v. Vail, 117 N. Y. 520, 7
v. Davis, 29 Ind. 264, 295	Tillman v. Averett, 82 Cal. 576, 10
v. Deprez, 96 Ind. 67, 174	Tilman v. Harter, 38 Ind. 1, 70
v. Doty, 72 Ind. 336, 504	Timmons v. McOnnoughhay, 8 Ind. 483, 75
v. Egleton, 33 Ind. 300, 758	Tindal v. Drake, 60 Ala. 177, 41
v. Ellsworth, 1 Barb. Ch. 624, 152	Tinder v. Association, 47 Ind. 351, 41
v. Erie, etc., Co., 45 N. Y. 468, 601	Tipper v. Commonwealth, 1 Met. (Ky.) 6, 70
v. Erie, etc., Co., 9 Abb. Pr. (N. Y.) 212, 697	Tipping v. Robbins, 71 Wis. 507, 40
v. Hawley, 16 Ore. 251, 491	Titus v. Relyea, 8 Abb. Pr. Rep. 177, 1
v. Lassiter, 85 Ala. 223, 581	Titusville Iron Works v. Keystone Oil Co., 130 Pa. St. 211, 41
v. Lea, 28 Ala. 453, 323	Tobin v. Young, 124 Ind. 507, 34, 70
v. Lowe, 111 Ind. 272, 507, 609	Todd v. Daniel, 16 Pet. 521, 117, 10
	v. Fenton, 66 Ind. 25, 694, 60
	v. Jackson, 75 Ind. 272, 296, 20
	v. Wilson, 80 Ind. 429, 27

TABLE OF CASES.

CXXI

[References are to Pages.]

Toledo, etc., Co. v. Daniels, 21 Ind. 256	689	Travelers, etc., Co. v. Harvey, 82 Va. 949	791
v. Goddard, 25 Ind. 185	579, 608	Travis v. Travis, 48 Hun. 343	320
v. Levy, 127 Ind. 168	416, 587	Travvick v. Martin Brown & Co., 74 Tex. 522	159
v. Milligan, 52 Ind. 505	396, 735	Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556	38, 596
v. Rathmann, 78 Ia. 288	624	Treadway v. Cobb, 18 Ind. 36	599
v. Rogers, 48 Ind. 427, 754, 756	757	Treadwell v. Whittier, 80 Cal. 575	556
v. Shuckman, 50 Ind. 42	661	Treat v. Hiles, 75 Wis. 265	67
v. Tilton, 27 Ind. 71	393	v. Hiles, 77 Wis. 475	125
Toledo, etc., Works v. Work, 70 Ind. 253	399, 635	v. Jamison, 20 Wall. 652	266
Toler v. Keiher, 81 Ind. 383	575, 663, 694, 695	Trebby v. Simmons, 38 Minn. 508	636
Tollen v. Read, 32 N. Y. Supr. 46	612	Trega v. Pierce, 119 Pa. St. 139	168
Turner v. Densmore, 8 Neb. 384	786	Trenholm v. Morgan, 28 S. C. 268	646
Turkin v. Harris, 90 Cal. 201	435	Trentman v. Edridge, 98 Ind. 525	301, 403, 687
Tomlinson v. Briles, 101 Ind. 538	536, 571, 704	v. Neff, 124 Ind. 503	587
v. Hamilton, 27 Ind. 139	393, 394	v. Wiley, 85 Ind. 33	579, 689
v. Wallace, 16 Wis. 224	662	Trenton Mutual Life Ins. Co. v. Johnson, 24 N. J. L. 576	549
Toney v. Toney, 73 Ind. 34	791	Trew v. Gaskill, 10 Ind. 265	154
Tucker v. Arnoux, 76 N. Y. 397	521	Tribble v. Poore, 28 S. C. 565	455
Turner's Estate of, 54 Cal. 509	612	Trickey v. Schlader, 52 Ill. 78	127
Topeka, etc., Co. v. Martin, 39 Kan. 750	266	Trigg v. Taylor, 27 Mo. 245	411
Torr v. Torr, 20 Ind. 118, 281, 524	567	Triggs v. Jones, 46 Minn. 277	733
Torry v. Robertson, 24 Miss. 192	141	Trimble v. Pollock, 77 Ind. 576	640
Totten's Appeal, 40 Pa. St. 385	546	Tripp v. Elliott, 5 Blackf. 168	45, 50
Touchar d v. Crow, 20 Cal. 150	761	v. Cook, 26 Wend. 143	513, 516
Towell v. Hollweg, 81 Ind. 154	101, 274, 413, 467	v. Duane, 74 Cal. 85	269
Towles, Ex parte, 48 Tex. 413	217	Tripp, etc., Co. v. Martin (Kan.), 26 Pac. Rep. 424	788
Towne v. Boasier, 19 La. Ann. 162	677	Trippe, Ex parte, 66 Ind. 531	69
v. Wiley, 23 Vt. 354	589	Trisler v. Trisler, 54 Ind. 172	638
Towns v. Smith, 115 Ind. 480	626	Trittipio v. Morgan, 99 Ind. 269	716
v. Stoddard, 30 N. H. 23	648	Troost v. Davis, 31 Ind. 34	215
Townsend v. Townsend, 21 Ill. 149	671	Trotter v. Neal, 50 Ark. 340	13
Townsend v. Chapin, 8 Blackf. 328	689	Trout v. Small, 10 Ind. 380	769
v. Davis, 1 Ga. 495	272	v. State, 107 Ind. 580	408
v. Townsend, 60 Mo. 246	458	v. West, 29 Ind. 51	292, 718
Tracewell v. Farnsley, 104 Ind. 497	508, 562	Troutman v. Neff, 124 Ind. 503	216
Tracey v. Altmyer, 46 N. Y. 598	664	Troyer v. State, 115 Ind. 331	620, 786
v. First Nat. Bank, 37 N. Y. 523	269	Trueblood v. Knox, 73 Ind. 310	306, 307
Tracy v. Holcomb, 24 How. 426	499	v. Nicholson, 52 Ind. 420	447
Traders Ins. Co. v. Carpenter, 85 Ind. 350	126, 287, 295, 451, 456	Truelock v. Friendship Lodge, 75 Ia. 384	445
v. Newman, 120 Ind. 554	604	Truitt v. Baird, 12 Kan. 420	635
Train v. Gridley, 36 Ind. 241, 403	637, 727	v. Truitt, 37 Ind. 514	692
Trammel v. Chipman, 74 Ind. 474	267, 394, 562	v. Truitt, 38 Ind. 16	160, 533
v. Simmons, 8 Ala. 271	111	Trullenger v. Todd, 5 Ore. 36	90
Traphagen v. Levy, 45 N. J. Eq. 448	601	Trullinger v. Webb, 3 Ind. 108	530
Travelers Ins. Co. v. Leeds, 38 Ind. 44	756	Truman v. McCollum, 20 Wis. 360	413
v. Noland, 97 Ind. 217	562	v. Scott, 72 Ind. 258	123, 154, 361, 443, 734
		Truscott v. King, 6 N. Y. 147	414, 593
		Trustees v. Brooklyn Fire Ins., 23 How. Pr. 448	699
		v. Greenough, 105 U. S. 527	116
		v. Hihler, 85 Ill. 409	349
		v. Love, 29 Ill. App. 615	466

[References are to Pages.]

Trustees, etc., v. Odlin, 8 Ohio St. 293,	634	Ulman v. Baltimore, etc., Co., 72 Md. 587,	11
Trustees of East Hampton v. Kirk, 68 N. Y. 459,	550	Ulrich v. Drischell, 88 Ind. 354, 488,	59
Tryon v. Baker, 7 Lans. 511,	587	v. Hervey, 26 Ind. 107,	16
Tucker v. Call, 45 Ind. 31,	785	Umlauf v. Umlauf, 103 Ill. 651,	7
v. Constable, 16 Ore. 239,	373	Underhill v. Dennis, 9 Paige, 202,	14
v. Conrad, 103 Ind. 349,	274, 785	Underwood v. McDuffie, 15 Mich. 361,	
v. Gordon, 7 How. (Miss.) 306,	96	v. Pack, 23 W. Va. 704,	49
v. Henniker, 41 N. H. 317,	622	v. Riley, 19 Wis. 412,	48
v. Jones, 8 Mont. 225,	738, 761	v. Sample, 70 Ind. 446,	47
v. Leland, 75 N. Y. 186,	514	Unfried v. Baltimore, etc., Co., 34 W. Va. 260,	64
v. Sandridge, 82 Va. 532,	70	Union, etc., Co. v. Buchanan, 100 Ind. 63,	70
v. Smith, 68 Tex. 473,	762	v. Fray, 35 Kan. 700,	61
v. South Kingstown, 5 R. I. 558,	621	v. Moore, 80 Ind. 458,	536, 69
v. White, 19 Ind. 253,	101	Union Bank v. Forrest, 3 Cranch. C. C. 218,	10
Tull v. David, 27 Ind. 377,	614	v. Mott, 39 Barb. 180,	58
Tull v. Pope, 69 N. C. 183,	791	v. Mott, 27 N. Y. 633,	58
Tupper v. Wise, 110 U. S. 398,	80	Union Nat. Bank v. Kupper, 63 N. Y. 617,	19
Turnbull v. Ellis, 35 Ind. 422,	769	Union-Pacific Ry. Co. v. Botsford, 11 Sup. Ct. Rep. 1000,	54
Turner v. Althaus, 6 Neb. 57,	40	Union School Tp. v. First Nat. Bank, 102 Ind. 464,	470, 491, 49
v. Armstrong, 9 Bradw. 24,	306	Union Tel. Co. v. Dickinson, 40 Ind. 444,	7
v. Booker, 2 Dana, 334,	141	United Lines Tel. Co. v. Stevens, 67 Md. 156,	9
v. Campbell, 59 Ind. 279,	566	United States, Ex parte, 16 Wall. 699,	41
v. Cool, 23 Ind. 56,	615	United States v. Adams, 9 Wall. 661,	18
v. Fendall, 1 Cranch. 117,	509	v. Addison, 6 Wall. 291,	31
v. First Nat. Bank, 26 Ia. 562,	635	v. Armijo, 5 Wall. 444,	11
v. First Nat. Bank, 30 Ia. 191,	458	v. Arnold, 1 Gall. 348,	31
v. Hahn, 1 Col. 23,	527	v. Arredondo, 6 Pet. 691,	1
v. Hine, 37 Ia. 500,	447	v. Barnard, 1 Ariz. 319,	61
v. Morrison, 11 Cal. 21,	788	v. Bassett, 21 How. 412,	38
v. Norton, 31 Ill. App. 423,	591	v. Boyd, 5 How. 29,	61
v. People, 33 Mich. 363,	745	v. Boyer, 7 Fed. Rep. 193,	51
v. Quinn, 92 N. C. 501,	449	v. Boutwell, 17 Wall. 604,	41
v. State, 40 Ala. 21,	119	v. Breitling, 20 How. 252,	71
v. White, 77 Cal. 392,	610	v. Bromley, 4 Utah, 498,	61
v. Yates, 16 How. 14,	200, 533, 743, 761	v. Burroughs, 3 McLean, 405,	61
Tuskaloosa Co. v. Logan, 50 Ala. 503,	770	v. Carey, 110 U. S. 51,	743, 71
Tweed's Case, 16 Wall. 504,	573	v. Colt, Peters, C. C. 145,	
Tweed v. Davis, 4 T. & C. (N.Y.) 1,	438	v. Curry, 6 How. 106, 91, 104,	11
Twogood v. Franklin, 27 Ia. 239,	495	v. Davis, 6 Blatch. 464,	21
Tyerman v. Smith, 6 E. & B. 719,	424	v. Drapier, 18 Wash. L. J. 532,	31
Tyin v. Halstead, 74 N. Y. 604,	514	v. Duff, 6 Fed. Rep. 45,	61
Tyler v. Bowlus, 54 Ind. 333,	785	v. Edwards, etc., Comrs., 5 Wall. 563,	41
v. Healey, 51 Cal. 191,	519	v. Einholt, 105 U. S. 414,	71
v. Waddingham, 58 Conn. 375,	713	v. Ferreira, 13 How. 40, n,	
v. Willis, 33 Barb. 327,	398	v. Gibert, 2 Sumn. 19,	61
Tyrell v. Baldwin, 78 Cal. 470,	445	v. Gomez, 1 Wall. 690, 97, 98,	11
Tyson, In re, 13 Col. 482,	402	v. Gomez, 3 Wall. 752,	41
v. Milwaukee, etc., Co., 50 Wis. 78,	483		
v. Rickard, 3 Harr. & J. 109,	643		
v. Tyson, 100 N. C. 360,	683		

U

Uhl v. Bingaman, 78 Ind. 365,	661
Uland v. Carter, 34 Ind. 344,	178

TABLE OF CASES.

cxxxiii

[References are to Pages.]

United States v. Groesbeck, 4 Utah, 487, 252, 679	Van Leuven v. Lyke, 1 N. Y. 515, 588
v. Guthrie, 17 How. 284, 435	Van Martes v. Hotchkiss, 4 Abb. Dec. 484, 681
v. Hawkins, 10 Pet. 125, 714	Van Meter v. Barnett, 119 Ind. 35, 581
v. Hoskins, 5 Mackey, 478, 217	Van NESTE v. Conover, 5 How. Pr. (O. S.) 148, 54
v. Hudson, 7 Cranch. 34, 7	Van Nest v. Latson, 19 Barb. 604, 601
v. Jarvis, 3 Wood & M. 225, 750	Van Orman v. Merrill, 27 Ia. 476, 646
v. Kirby, 7 Wall. 482, 105	Van Reinsdyk v. Kane, 1 Galh. 271, 601
v. Knight, 1 Black, 484, 451	Van Sickle v. Erdelmeyer, 36 Ind. 262, 736
v. Knox County, 39 Fed. Rep. 757, 462	Van Slyke v. Schneck, 10 Paige, 301, 225
v. McMasters, 4 Wall. 680, 731	v. Trempealeau, etc., Co., 39 Wis. 390, 532
v. Mingo, 2 Curtis C. C. 1, 534	Van Steenwyck v. Miller, 18 Wis. 320, 94
v. Morillo, 1 Wall. 706, 444	Vance v. Cowing, 13 Ind. 460, 648
v. Neverson, 1 Mackey, 152, 531	v. Schayer, 76 Ind. 194, 81
v. Norton, 91 U. S. 566, 232	v. Vance, 74 Ind. 370, 480
v. Parrott, McAll (U. S.), 447, 163	Vandall v. Vandall, 13 Ia. 247, 639
v. Phillips, 6 Pet. 776, 125, 444	Vandercook v. Williams, 106 Ind. 345, 9, 531
v. Rickett, 2 Cranch. C. C. 553, 311	Vanderkarr v. State, 51 Ind. 91, 159, 161, 164, 172, 679
v. Sacramento, 2 Mont. 239, 415	Vanderpool v. Valkenburgh, 6 N. Y. 190, 601
v. Salentine, 8 Biss. 404, 579	Vanderveer v. Holcomb, 17 N. J. Eq. 547, 22, 134
v. Schooner Peggy, 1 Cranch. 103, 73	Vandervoort v. Gould, 36 N. Y. 639, 656
v. Tenney (Ariz.), 8 Crim. Law. Mag. 486, 577	Vandivens v. Dollins, 49 Ind. 216, 613
v. Winchester, 2 McLean, 135, 697	Vandoren v. Kimes, 29 Ind. 582, 758
v. Wonson, 1 Gall. (U. S.) 5, 15	Vanliew v. State, 10 Ind. 384, 169
v. Yates, 6 How. 605, 444, 633	Vann v. Rouse, 94 N. Y. 401, 402
United States Bank v. Smith, 11 Wheat. 171, 392, 644	v. State, 83 Ga. 44, 530, 576
United States, etc., Co. v. Martin, 43 Kan. 526, 155	Vanness v. Bradley, 29 Ind. 388, 758
v. Rawson, 106 Ind. 215, 395	Vannoy v. Duprez, 72 Ind. 26, 715
University v. Bank, 92 N. C. 651, 74	v. Klein, 122 Ind. 416, 660, 732
Untereiner v. Miller, 29 La. Ann. 435, 91	Vansittart v. Taylor, 4 E. & B. 910, 424
Unruh v. State, 105 Ind. 117, 252	Vantilburgh v. Shann, 4 Zab. 740, 639
Urbanski v. Manns, 87 Ind. 585, 179	Vanvabry, In re, v. Staton, 88 Tenn. 334, 438, 440
Urton v. Luckey, 17 Ind. 213, 768	Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433, 167, 291, 574
Urochlan Tp. Road, 30 Pa. St. 157, 61	Varn v. Williams, 30 S. C. 608, 453
	Varnum v. Hart, 47 Hun. 18, 612
	Vass v. Commonwealth, 3 Leigh. 786, 763
V	Vasse v. Smith, 6 Cranch. 225, 588
Vail v. Dining, 44 Mo. 210, 431	Vater v. Lewis, 36 Ind. 288, 648
v. Halton, 14 Ind. 344, 108	Vawter v. Gilliland, 55 Ind. 278, 298, 785
v. Jones, 31 Ind. 467, 420	Vaughan v. Ferrall, 50 Ind. 221, 266
v. Lindsay, 67 Ind. 528, 112, 142	v. Godman, 103 Ind. 499, 480
v. McKernan, 21 Ind. 421, 533	Vaughn v. Harp, 49 Ark. 160, 9, 37
v. Owen, 19 Barb. 22, 286	Veach v. Pearce, 6 Ind. 48, 349
v. Rinehart, 105 Ind. 6, 635	Veatch v. State, 60 Ind. 291, 231, 783
Valle v. Harrison, 93 U. S. 233, 96	Venable v. Bank, 2 Pet. 107, 601
Valencia v. Couch, 32 Cal. 339, 523	Veneman v. McCurtain (Neb.), 50 N. W. Rep. 955, 769
Vallette v. Whitewater, etc., Co., 4 McLean, 192, 601	Verbeck v. Verbeck, 6 Wis. 157, 13
Van Allen v. Spadone, 16 Ind. 319, 520	
Van Brunt v. Greaves, 32 Minn. 68, 677	
Van Cleve v. Boler, 34 Ind. 538, 276	
Van Dusen v. Kandleburger, 44 Ind. 282, 268	
Van Hook v. Whitlock, 26 Wend. 43, 414	

[References are to Pages.]

Verger v. Roush, 1 Neb. 113,	92	Wabash Ry. Co. v. Williamson,	
Vermillion v. Nelson, 87 Ind. 194,	775	104 Ind. 154,	480, 643
Vermilya v. Davis, 7 Blackf. 158,	630	Wachendorf v. Lancaster, 61 Ia.	
Vermilye v. Vermilye, 32 Minn. 499,	73	509,	470
Veronce v. Bell (S. C.), 12 S. E.		Wachstetans v. State, 42 Ind. 166,	318
Rep. 664,	446	Wachstetter v. State, 97 Ind. 378,	517
Very v. Watkins, 23 How. 464,	509		531
Vick v. Maulding, 1 How. (Miss.),		Waddle v. Harbeck, 33 Ind. 231,	597
217,	349	- v. Magee, 81 Ind. 247,	518
Vickers v. Leigh, 104 N. C. 248,	556	Waddingham v. Waddingham, 27	
Vickery v. McCormick, 117 Ind. 594,	703	Mo. App. 596,	12
Viele v. Germania Ins. Co., 26 Ia.		Wade v. First Nat. Bank, 11 Bush.	
9,	615, 616	697,	347
Viera v. Dobyns (Cal.), 24 Pac.		v. Bryant (Ky.), 7 S. W. Rep.	
Rep. 181,	447	397,	751
Villabolas v. United States, 6 How.		Wadkins v. Hill, 106 Ind. 543,	398
81,	92	Wafer v. Hamill, 44 Kan. 447,	78
Vincennes, etc., Co. v. White, 124		Wagar v. Peak, 22 Mich. 368,	777
Ind. 376,	760	Wagner v. Kastner, 79 Ind. 162, 45,	51
Vincent v. Evans, 1 Met. (Ky.) 247,	681	v. State, 116 Ind. 181,	610
Vinton v. Baldwin, 95 Ind. 433,	708	v. Wagner, 73 Ind. 135,	397
Virginia Comm'rs, Ex parte, 112		v. Winton, 122 Ind. 57,	411
U. S. 177,	438	v. Winter, 122 Ind. 57,	216, 52
Vitoreno v. Corea (Cal.), 25 Pac.		Waggoner v. Liston, 37 Ind. 357,	78
Rep. 420,	447	Wagoner v. Wilson, 108 Ind. 210,	77
Vitrified, etc., Co. v. Edwards, 135		Wainright v. Burroughs, 1 Ind.	
Mass. 591,	525	App. 393,	709, 711
Vizzard v. Taylor, 97 Ind. 90,	154	Wainwright v. Silvers, 13 Ind. 497,	29
Vogel v. Harris, 112 Ind. 494,	537, 750	Wait v. Van Allen, 22 N. Y. 319, 61,	9
v. State, 107 Ind. 374,	101	Wakeman v. Jones, 5 Ind. 454,	72
Voiles v. Voiles, 51 Ind. 385,	349	Walburn v. Babbitt, 16 Wall. 577,	571
Volger v. Sidener, 86 Ind. 545,	759		57
Volkering v. De Graaf, 81 N. Y.		Walden v. Bodley, 14 Pet. 156,	57
268,	521	Waldo v. Richter, 17 Ind. 634,	30
Voltz v. Newbert, 17 Ind. 187,	521, 628	Waldhier v. Hannibal, etc., Co., 71	
Vonderweit v. Centerville, 15 Ind.		Mo. 514,	58
447,	46	Wales v. Miner, 89 Ind. 118,	74
Von Glahan v. Von Glahan, 40 Ill.		Walker v. Davis, 1 Gray, 506,	58
73,	184	v. Dunspaugh, 20 N. Y. 170,	53
Voorhees v. Bank, 10 Pet. 449,	12	v. Granite Bank, 19 Abb. Pr.	
v. Earl, 2 Hill. 288,	589	III,	69
v. Jackson, 10 Pet. 449,	670	v. Heller, 73 Ind. 46, 299, 335,	604
Vose v. Cockcroft, 44 N. Y. 415,	414		78
v. Muller, 23 Neb. 171,	620	v. Hill, 111 Ind. 223, 108, 124, 15,	
v. Phillbrook, 3 Story, 335,	601	171, 274, 361, 44	
Voss v. Eller, 109 Ind. 260,	781	v. Houlton, 5 Blackf. 348,	67
Vreton v. Beltzore, 17 Neb. 399,	751	v. Johnson, 96 U. S. 424,	57
		v. Larkin, 127 Ind. 100,	56
		v. Owen, 79 Mo. 563,	41
		v. Popper, 2 Utah, 96,	73
		v. Scott, 102 N. C. 487,	
		v. Scott, 106 N. C. 56,	40
		v. Spencer, 86 N. Y. 168,	6
		v. State, 91 Ala. 32,	663, 74
		v. State, 23 Ind. 61,	23
		v. State, 26 Ind. 346,	54
		v. State, 102 Ind. 502, 181, 182,	53
			67
		v. State, 9 Tex. App. 200,	76

W

Waarich v. Winter, 33 Ill. App. 36,	554
Wabash, etc., Co. v. Goodwine, 18	
Bradw. 65,	356
v. Nice, 99 Ind. 152,	395, 785
v. People, 106 Ill. 652,	765
v. Rookes, 90 Ind. 581,	418
v. Tretts, 96 Ind. 450,	692
Wabash Ry. Co. v. Savage, 110 Ind.	
156,	667

TABLE OF CASES.

CXXV

[References are to Pages.]

Walker v. Steele, 121 Ind. 436, 13, 219, 221, 288, 766	Wanser v. Atkinson 43 N. J. L. 571, 525
v. Turner, 27 Neb. 103, 631	Warbritton v. Cameron, 10 Ind. 302, 524
v. United States, 4 Wall. 182, 50	Warburton v. Cranch, 108 Ind. 83, 52, 781
v. Walker, 11 Ga. 203, 621	Ward v. Angevine, 46 Ind. 415, 69, 767
v. Walker, 14 Ga. 242, 535	v. Bateman, 34 Ind. 110, 775, 785
Wall v. Bagby, 126 Ind. 372, 274, 345	v. Buell, 18 Ind. 104, 308, 309, 314
v. Dodge, 3 Utah, 168, 490	v. Busack, 46 Wis. 407, 580, 708
v. Galvin, 80 Ind. 447, 597	v. Clay, 82 Cal. 502, 713
v. State, 80 Ind. 146, 791	v. Jewett, 4 Robt. 714, 617
Wallace v. Carter, 32 S. C. 314, 94, 453	v. Kalfleish, 21 How. Pr. 283, 557
v. Cox, 71 Ill. 548, 421	v. Maryland, 12 Wall. 163, 388
v. Cravens, 34 Ind. 534, 506, 570	v. Montgomery, 57 Ind. 276, 535
v. Douglas, 105 N. C. 42, 66	v. People, 13 Ill. 635, 303
v. Exchange Bank, 126 Ind. 265, 746, 782	v. Ringo, 2 Tex. 420, 560
v. Harris, 32 Mich. 380, 412	v. Southfield, Town of, 102 N. Y. 287, 455
v. Kirtley, 98 Ind. 485, 687	v. State, 48 Ind. 289, 679
v. McVey, 6 Ind. 300, 85	v. Thompson, 48 Ia. 588, 718
v. Morse, 5 Hill, 391, 587, 588	v. Voris, 117 Ind. 368, 791
v. Stutsman, 6 Dak. 1, 499	v. Washington Ins. Co., 6 Bosw. 229, 549
v. Taunton St. Ry. Co., 119 Mass. 91, 537	v. Wilms (Col.), 27 Pac. Rep. 247, 738
v. Tumlin, 42 Ga. 462, 693	v. Woodburne, 27 Barb. 346, 54
v. Wilder, 13 Fed. Rep. 707, 311	Ware v. Henderson, 25 S. C. 385, 392
v. Williams, 59 Hun. 628, 746	v. Morris, 42 La. Ann. 760, 123
Waller v. Wood, 101 Ind. 138, 62	v. Ware, 8 Me. 42, 529
Walling v. Beers, 120 Mass. 548, 631	Waring v. Gilbert, 25 Ala. 295, 483
v. Burgess, 122 Ind. 299, 508, 562	v. U. S. Tel. Co., 4 Daly, 233, 657
Wallis v. Anderson, etc., Co., 60 Ind. 56, 159, 296, 764	Warner v. Cammack, 37 Ia. 642, 589
v. Randall, 81 N. Y. 164, 702, 739	v. Campbell, 39 Ind. 409, 177, 469
v. Thomas, 7 Vesey, 262, 180	v. People, 2 Denio, 272, 3
Walls, Ex parte, 73 Ind. 95, 714, 748	v. State, 114 Ind. 137, 622
Walls v. Baird, 91 Ind. 429, 274	v. Warner, 11 Kan. 121, 635
v. Johnson, 16 Ind. 374, 54	v. Whittaker, 6 Mich. 133, 557
v. Palmer, 64 Ind. 493, 335, 434, 462	Warrall v. Parmelee, 1 Comst. 519, 657
Walpole, In re, 84 Cal. 584, 88	Warren v. Crane, 50 Mich. 300, 631
Walpole v. Carlisle, 32 Ind. 415, 790	v. Henly, 31 Ia. 31, 30
v. Smith, 4 Blackf. 304, 115, 141, 598	v. Sohn, 112 Ind. 213, 748
Walsh v. Kelly, 40 N. Y. 556, 746	Warrick, etc., Co. v. Hougland, 90 Ind. 115, 188
v. People, 88 N. Y. 458, 617	Warsaw, City of, v. Dunlap, 112 Ind. 576, 301, 397
v. Sayre, 52 How. Pr. 334, 539	Warson v. McElroy, 33 Mo. App. 553, 569
v. United States, 23 Ct. of Cl. 1, 92	Wartena v. State, 105 Ind. 445, 248, 533
Walter v. Walter, 117 Ind. 247, 291, 745, 752	Washburn v. Board, 104 Ind. 321, 645
Walters v. Jordan, 13 Ired. L. 361, 570	v. Kline, 47 Ind. 128, 118
v. Tefft, 57 Mich. 390, 665	v. Milwaukee, etc., Co., 58 Wis. 516, 539
Walton v. United States, 9 Wheat. 651, 761	v. Milwaukee, etc., Co., 59 Wis. 379, 120
Waltz v. Barroway, 25 Ind. 380, 672	v. Roberts, 72 Ind. 213, 398, 511, 638
v. Waltz, 84 Ind. 403, 567	Washburn, etc., Co. v. Chicago, etc., Co., 119 Ill. 30, 489
Wannack v. Mayor, etc., 53 Ga. 162, 572	Washer v. Allensville, etc., Co., 81 Ind. 78, 683
Wampler v. State, 28 Tex. App. 352, 254, 754	Washington v. Eaton, 4 Cranch. C. C. 352, 35
Wanata, The, 5 Otto, 600, 311	
Wangerien v. Aspell, 47 Ohio St. 250, 123	
Wann v. McGoon, 2 Scam. 74, 638	

[References are to Pages.]

Washington v. Louisville, etc., 34	Weatherhead v. Bray, 7 Ind. 706,	30
Ill. App. 658,	Weaver v. Kintzley, 58 Ia. 191,	64
Washington Bridge Co. v. Stew-	v. State, 83 Ind. 542,	53
art, 3 How. 413,	v. State, 24 Ohio St. 584,	53
Washington Ice Co. v. Lay, 103	v. Templin, 113 Ind. 298,	9, 58, 6
Ind. 48,		479, 51
Washington, etc., Co. v. Colton, 26	v. Trustees, etc., 28 Ind. 112,	59
Conn. 42,	v. Van Akin, 77 Mich. 588,	59
Washington County v. Durant, 7	Webb v. Carr, 78 Ind. 455,	41
Wall. 694,	v. Portland, etc., Co., 3 Sumn.	
Wasson v. Hodsire, 108 Ind. 26,	C. C. 189,	50
v. First Nat. Bank, 107 Ind. 206,	v. Simpson, 105 Ind. 327,	222, 22
Wassum v. Feeney, 121 Mass. 93,		22
Waterman v. State, 116 Ind. 51,	v. State, 29 Ohio St. 351,	53
	Webber v. Bueger (Col.), 27 Pac.	
Watertown Bank v. Mix, 51 N. Y.	Rep. 871,	20
558,	v. Wilcox, 45 Cal. 301,	8
Watertown Nat. Bank v. Holabird	Weber v. Tschetter (Dak.), 46 N.	
(S. Dak.), 49 N. W. Rep. 98,	W. Rep. 201,	49
Watkins v. Holman, 16 Pet. 25,	Webster v. Bebinger, 70 Ind. 9, 608,	69
v. Mason, 11 Ore. 72,	v. Buffalo Ins. Co., 110 U. S.	
v. State, 68 Ind. 427,	386,	13
Watson, Ex parte, 3 Pet. 193,	v. Calden, 55 Me. 165,	76
Watson v. Avery, 3 Bush. 635,	v. Spindler, 36 Mo. App. 355,	9
v. Camper, 119 Ind. 60,	v. Tibbits, 19 Wis. 439,	73
v. Commonwealth, 85 Va. 867,	Webster, etc., Co. v. St. Croix Co.,	
v. Crowsore, 93 Ind. 220,	63 Wis. 647,	6
v. Mercer, 8 Pet. 88,	Weed v. Weed, 25 Conn. 337,	18
v. Piel, 58 Ind. 566,	Weed, etc., Co. v. Philbrick, 70 Mo.	
v. Smith, 28 Tex. App. 34,	646,	52
v. St. Paul, etc., Co., 42 Minn.	Weeden v. Richmond, 9 R. I. 128,	39
46,	Weichselbaum v. Curlett, 20 Kan.	
v. State, 63 Ind. 548,	709,	3
v. Sutherland, 5 Wall. 74,	Weik v. Pugh, 92 Ind. 382, 510, 537,	61
v. Trustees, 2 Jones, 211,	Weil v. Cavins, 74 Ind. 265,	21
v. Van Meter, 43 Ia. 76,	Weir v. Burlington, etc., Co., 19	
v. Walker, 23 N. H. 471,	Neb. 212,	16
v. Watson, 53 Ark. 415,	v. St. Paul, etc., Co., 18 Minn.	
v. Whitney, 23 Cal. 375,	155,	20
v. Williard, 9 Pa. St. 89,	v. State, 96 Ind. 311, 507, 562, 606	60
Watson, etc., Co. v. Casteel, 73 Ind.		
296,	Weir Plow Co. v. Walmsley, 110	
Watt v. Alvord, 25 Ind. 533,	Ind. 242,	678, 77
v. Alvord, 27 Ind. 495,	Weis v. City of Madison, 75 Ind.	
v. De Haven, 55 Ind. 128,	241,	480, 74
Watts v. Pitman, 125 Ind. 168, 288,	Weiser v. Day, 77 Iowa, 25,	14
v. Green, 30 Ind. 98,	Weiss v. Guerinian, 109 Ind. 438,	50
v. Julian, 122 Ind. 124,	Welborn v. Sheppard, 5 Ala. 674,	67
v. State, 33 Ind. 237,	Welch v. Bowen, 103 Ind. 252,	51
Waugh v. Waugh, 47 Ind. 580,	v. Bowman, 103 Ind. 252,	6
Waxel v. Hamman, 35 Ill. App. 571,	v. Taverner, 78 Ia. 207,	62
Way v. Fravel, 61 Ind. 162,	v. Wetzell Co., 29 W. Va. 63,	51
v. Lewis, 115 Mass. 26,	Wellington, In re, 16 Pick. 97,	2
Wayman v. Southard, 10 Wheat. 1,	Wells v. Burlington, etc., Co., 56	
Waymire v. Lank, 121 Ind. 1, 624, 702,	Ia. 520,	77
	Well's Case, 2 Greenl. (Me.) 322,	23
Wayne County Turnpike Co. v.	Wells v. Dickey, 15 Ind. 361,	40
Berry, 5 Ind. 286,	Wells, Estate of, v. Wells, 71 Ind.	
Wearen v. Smith, 80 Ky. 216,	509,	77
Weatherby v. Higgins, 6 Ind. 73,		

TABLE OF CASES.

cxxvii

[References are to Pages.]

Wells v. Kavanaugh, 74 Ia. 372,	700	Weymouth v. Gregg (Mich.), 41 N.	
v. Lea, 20 Mo. App. 352,	159	W. Rep. 243,	282
v. McGeoch, 71 Wis. 196,	684	Whalen v. Chicago, etc., Co., 75 Ia.	
v. Waterhouse, 22 Me. 131,	670	421,	580
Welch v. Childs, 17 Ohio St. 319,	672	Whaley v. Charleston, 8 S. C. 344,	459
v. State, 126 Ind. 71, 253, 665,	681,	v. Gleason, 40 Ind. 405,	769, 782
	689	Wheeler v. American Central Ins.	
v. State, 25 N. E. Rep. 883,	27	Co., 6 Mo. App. 235,	411
Werborn v. Pinney, 76 Ala. 291,	493	v. Edinger, 11 Ia. 409,	284
Werner v. O'Brien, 40 Mo. App.		v. Goffe, 24 Tex. 660,	180
453,	571	v. Harris, 13 Wall. 51,	98
Wesley v. Milford, 41 Ind. 413, 268,	269	v. Me-shing-go-me-sia, 30 Ind.	
Wessels v. Beeman, 66 Mich. 343,	755-	402,	507
	756	v. Reitz, 92 Ind. 379,	289
West v. Camden, 135 U. S. 507,	570	v. Schroeder, 4 R. I. 383,	643
v. Cavins, 74 Ind. 265, 213, 222,		v. State, 8 Ind. 113,	744
244, 300, 345, 443,	786	Wheeler, etc., Co. v. Burcklingham,	
v. Miller, 125 Ind. 70,	596	137 Mass. 581,	208
v. Shryer, 29 Ind. 624,	596	Wheelock v. Henshaw, 19 Pick. 341,	192
v. State, 2 Zab. 212,	674	Whelchell v. State, 23 Ind. 89,	579
v. Williamson, 1 Swan. 277,	672	Whidden v. Seelye, 40 Me. 247,	570
West Coast, etc., Co. v. Newkirk,		Whiple v. Flower, 6 Cal. 630,	666
50 Cal. 275,	567	v. Mills, 9 Cal. 641,	153, 448
Westbrooke v. Wicks, 36 Ia. 382,	434	Whipperman v. Dunn, 124 Ind.	
Westcott v. Huff, 18 Ind. 245,	556	349,	407, 488, 736
Westfall v. Stark, 24 Ind. 377, 394,	396	Whipple v. Shewalter, 91 Ind. 114,	768
Westerfield v. Spencer, 61 Ind. 339,	299,	Whisler v. Lawrence, 112 Ind. 229,	168,
	786		682
Western Union Tel. Co. v. Brown,		Whistler v. Teague, 66 Ind. 565,	531
105 Ind. 538,	19, 475, 709,	Whitaker v. Gee, 61 Tex. 217,	74
v. Buskirk, 107 Ind. 549,	534	Whitcomb v. Smith, 123 Ind. 329,	713
v. Fenton, 52 Ind. 1,	405	White v. Allen, 9 Ind. 561,	354, 359
v. Frank, 85 Ind. 480,	187, 300	v. Bailey, 14 Conn. 271,	714
v. Hamilton, 50 Ind. 181,	469	v. Behan, 80 Ind. 239,	690
v. Kilpatrick, 97 Ind. 42, 279, 373,	518	v. Burkett, 119 Ind. 431,	438, 592
	697	v. Butcher, 97 N. C. 7,	491
v. Locke, 107 Ind. 9, 63, 64, 65, 84,		v. Carlton, 52 Ind. 371,	614
	697	v. Chicago, etc., Co., 122 Ind.	
v. Rogers, 93 U. S. 565,	50	317,	506
v. Scircle, 103 Ind. 227,	35, 217	v. Clawson, 79 Ind. 188,	108
v. Trissall, 98 Ind. 566,	687, 725,	v. Gilbert, 10 Neb. 539,	91
	745, 749	v. Gregory, 126 Ind. 95,	683, 685,
Western, etc., Co. v. Central, etc.,			758
Co., 116 Ind. 229,	592	v. Harvey, 23 Ind. 55,	70
v. State, 69 Ga. 524,	459	v. Miller, 47 Ind. 385,	398
v. Studebaker, etc., Co., 124		v. Milwaukee, etc., Co., 61 Wis.	
Ind. 176,	791	536,	539
Westminster, City of. v. Shipley,		v. Morris, 107 N. C. 92,	630
65 Md. 610,	757	v. People, 90 Ill. 117,	534
Westmoreland Co. v. Conemaugh		v. Perkins, 16 Ind. 358,	781
Tp., 34 Pa. St. 231,	91	v. Poorman, 24 Ia. 108,	483
v. Overseers, 34 Pa. St. 232,	61	v. State, 69 Ind. 273,	592
Weston v. Charlestown, 2 Pet. 449,	73	v. Stellwagon, 54 Ind. 186,	567
v. City Council, 2 Pet. 449,	16	v. Van Houten, 51 Mo. 577,	54
v. Johnson, 48 Ind. 1,	687, 789	v. United States, 1 Wall. 660,	439
Wetherbee v. Dunn, 32 Cal. 106,	109	White Water Valley, etc., Co. v.	
Wetherill v. Langston, 1 Exch. 644,	602	Comegys, 2 Ind. 469,	590
Wetmore v. Plant, 5 Conn. 541,	271	White Water, etc., Co. v. McClure,	
Wetzel v. Duffy, 75 Wis. 170,	544	29 Ind. 536,	614

[References are to Pages.]

White Water R. R. Co. v. Budgett, 94 Ind. 216,	571	Wilcox v. Wilcox (Vt.), 21 Atl. Rep. 423,	
Whitefield v. Greer, 3 Baxt. 78,	434	Wilds v. Bogan, 55 Ind. 331,	
Whiteford Tp. v. Probate Judge, 53 Mich. 130,	148	Wiles v. Manley, 51 Ind. 169,	
Whitehead v. Boorum, 7 Bush. 399,	340	Wiley, Ex parte, 39 Ind. 546,	
v. Mathoway, 85 Ind. 85,	698	v. Barclay, 58 Ind. 577,	
v. Scott, 1 Mood. & R. 2,	697	v. Coovert, 127 Ind. 559,	271,
v. Thorp, 22 Ia. 425,	312	v. Givens, 6 Gratt. 277,	
Whitehurst v. Pettipher, 105 N. C. 39,	446, 454, 750	v. Johnson, 74 Ind. 233,	
Whitelaw v. Whitelaw, 83 Va. 40,	618	v. Lovely, 46 Mich. 83,	
Whitewell v. Emory, 3 Mich. 84,	178	v. Neal, 24 Neb. 141, 37 N. W. Rep. 926,	
Whiting v. Bank, 13 Pet. 6,	73, 451	Wilhite v. Wilhite, 124 Ind. 226,	
v. Edmunds, 94 N. Y. 309,	34	Wilhoit v. Cunningham, 87 Cal. 453,	
v. Mississippi, etc., Co., 76 Wis. 592,	537	Willkerson v. Rust, 57 Ind. 172, 732,	
Whiteside v. Adams, 26 Ind. 250,	281,	Wilkins v. Mitchell, 3 Salk. 229,	
Whitesides v. Russell, 8 W. & S. 44,	192, 718	v. State, 113 Ind. 514,	7, 9,
v. Hunt, 97 Ind. 191,	614	Wilkinson v. Bayley, 71 Wis. 131,	
Whitlock v. Consumers Gas, etc., Co., 127 Ind. 62,	700	v. St. Louis, etc., Co., 102 Mo. 130,	
Whiteman v. Harriman, 85 Ind. 49,	562	v. Whitney, 15 Ind. 194,	
Whitman v. Weller, 39 Ind. 515,	159,	Willcuts v. Northwestern, etc., Co., 81 Ind. 300,	
410, 417, 696,	697	Willett v. Porter, 42 Ind. 250,	
Whitmore v. Supreme Lodge, etc., 100 Mo. 36,	547	Willets v. Ridgway, 9 Ind. 367,	
Whitney v. Ferris, 10 Johns. 66,	732	Willey v. Morrow, 1 Wash. Ty. 474,	
v. Lehmer, 26 Ind. 503,	277	v. State, 46 Ind. 363,	
Whiton v. Chicago, etc., Co., 25 Wis. 424,	72	v. State, 52 Ind. 421,	254,
Whitsitt v. Union, etc., Co., 122 U. S. 363,	447	v. Strickland, 8 Ind. 453,	
Whittem v. State, 36 Ind. 196,	231, 434	Williams v. Allen, 40 Ind. 295, 535,	
Whittemore v. Fisher (Ill.), 24 N. E. Rep. 636,	412	v. Banhead, 19 Wall. 563,	
Whitworth v. Ballard, 56 Ind. 279,	506,	v. Bank of U. S., 11 Wheat. 414,	116,
v. Sour, 57 Ind. 107,	758	v. Birch, 6 Bosw. 674,	
Wickham v. Hess, 38 Ind. 183,	121,	v. Board, 121 Ind. 239,	
276, 448		v. Boyd, 75 Ind. 286,	398,
Wichita, etc., Co. v. Fechheimer, 36 Kan. 45,	624	v. Bruffy, 102 U. S. 248,	332,
Wickliffe v. Owings, 17 How. 47,	476	v. Citizens' Ry. Co. (Ind.), 29 N. E. Rep. 408,	
Widner v. State, 28 Ind. 394,	689	v. Coleman, 49 Mo. 325,	
Wieting v. Millston, 77 Wis. 523,	792	v. Com., 82 Ky. 640,	
Wigand v. Sichel, 3 Keyes, 120,	587	v. Conger, 131 U. S. 390,	
Wiggins v. City of Chicago, 68 Ill. 372,	718	v. Ewart, 29 W. Va. 659,	
v. McCoy, 87 N. C. 499,	65	v. Grand Rapids, 53 Mich. 271,	
Wight v. Walbaum, 39 Ill. 555,	9	v. Guile, 117 N. Y. 343,	
Wightman v. City of Providence, 1 Cliff. 524,	623	v. Henderson, 90 Ind. 577,	
Wiggs v. Koontz, 43 Ind. 430,	261	v. Hitzie, 83 Ind. 303,	
Wilcox v. Majors, 88 Ind. 203,	181	v. Hutchinson (Fla.), 7 So. Rep. 852,	
v. Moudy, 82 Ind. 219,	670	v. Jacksonville, etc., Co., 25 Fla. 359,	
v. Saunders, 4 Neb. 569,	61	v. Kessler, 82 Ind. 184,	
v. Smith, 26 Barb. 316,	142	v. Jones, 14 Ind. 363,	
		v. La Penotiere, 25 Fla. 473,	
		v. Morgan, 111 U. S. 684,	79
		v. Nesbit, 65 Ind. 171,	
		v. Norris, 12 Wheat. 117,	
		v. Nottawa, 104 U. S. 209,	

TABLE OF CASES.

CXXIX

[References are to Pages.]

Williams v. Pendleton, etc., Co., 76		Wilson v. Hefflin, 81 Ind. 35,	361
Ind. 87,	755	v. Hobday, 4 M. & S. 121,	306
v. Port, 9 Ind. 551,	497	v. Holloway, 70 Ind. 407,	368
v. Potter, 72 Ind. 354,	162, 768	v. Holt, 85 Ala. 95,	436
v. Quin, 7 Cow. 539,	184	v. Hoss, 24 U. S. Sup. Ct. Ry.	
v. Riley, 88 Ind. 290, 261, 274,	279	(Lawyers' ed.) 270,	509
v. Rochester, 2 Lans. 169,	190	v. Hulz, 61 Mo. 445,	63
v. Santa Clara Mining Associa-		v. Kelly, 58 Ind. 586,	393
tion, 66 Cal. 193,	122	v. Life and Fire Ins. Co., 12	
v. Shepherd, 1 Gr. 76,	267	Pet. 140,	137, 139
v. Sims, 16 S. W. Rep. 786,	340	v. McNamee, 102 U. S. 572,	391
v. State, 5 Ind. 235,	103	v. McVey, 83 Ind. 108,	327
v. State, 87 Ind. 527,	736	v. People, 94 Ill. 299,	578, 736
v. State, 127 Ind. 471,	703	v. Piper, 77 Ind. 437,	756, 766
v. State, 69 Tex. 368,	592	v. Rocke, 58 N. Y. 642,	402
v. State, 28 Tex. App. 301,	578	v. Roots, 119 Ill. 379,	639
v. State, 61 Wis. 281,	250	v. Scott, 3 Lans. 308,	601
v. Stevenson, 103 Ind. 243,	290	v. Shepherd, 15 Neb. 15,	71
v. Thomas, 3 N. M. 324,	628	v. State, 6 Blackf. 212,	603
v. Thomas, 78 N. C. 47,	619	v. State, 16 Ind. 392,	252
v. Thomas, etc., Co., 105 Ind.		v. Stewart, 63 Ind. 294,	120
420,	781	v. Town of Monticello, 85 Ind.	
v. West, 2 Ohio St. 82,	54, 638	10,	562, 565, 566, 608, 609
v. Wheeler, 17 How. Pr. 93,	392	v. Trafalgar, etc., Co., 93 Ind.	
v. Willis, 7 Abb. Pr. 90,	709	287,	574
Williamson v. Carlton, 51 Mo. 449,	28	v. Vance, 55 Ind. 394,	268
v. Field, 2 Barb. Ch. 281,	73	v. Walfer, 8 Ind. 308,	745
v. Yingling, 80 Ind. 379,	536, 570,	v. Wheeling, 19 W. Va. 323,	65
	624, 626	v. Ziegler, 44 Tex. 657,	149
Willis v. Bayles, 105 Ind. 363,	88	Willstach v. Heyd, 122 Ind. 574,	276
v. Browning, 96 Ind. 149,	282, 404	Wimberg v. Schwegeman, 47 Ind.	
v. Chambers, 8 Tex. 150	554	528,	561
v. Farley, 24 Cal. 490,	4	Wimer v. Albaugh, 78 Ia. 79,	692
v. McNutt, 75 Tex. 69,	623	Winbrenner v. Brunswick, etc., Co.	
v. Rivers, 80 Ga. 556,	307	(Ia.), 47 N. W. Rep. 1089,	265
v. State, 27 Neb. 98,	252	Winchell v. Hicks, 18 N. Y. 558,	550
v. State, 73 Ala. 362,	250	Winchester v. King, 46 Mich. 102,	662
Wilson v. Binford, 54 Ind. 569,	331	Windham, etc., Bank v. Kendall, 7	
v. Binford, 74 Ind. 424,	220, 221	R. I. 77,	791
v. Glenn, 77 Ind. 585,	312	Windman v. Vincennes, 58 Ind. 480,	62
v. Watkins, 3 Pet. 43,	34	Windsor v. McVeigh, 93 U. S. 274,	148
Wilnot v. Richardson, 2 Keyes,		Winfield Town Co. v. Moris, 11	
519,	587	Kan. 128,	736
Wilson, In re, 75 Cal. 580,	436	Wing v. De La Rionda, 125 N. Y.	
v. Allen, 3 How. Pr. R. 369,	146	678,	416, 655
v. Atlanta, etc., Co., 82 Ga.		v. Warner, 2 Doug. (Mich.) 288,	83
366,	120, 678, 691	Wingate v. Wilson, 53 Ind. 78,	511
v. Board, 63 Mo. 137,	640	Wingo v. State, 99 Ind. 343,	77, 232
v. Broder, 24 Cal. 190,	469	Winkley v. Foye, 33 N. H. 171, 28	
v. Brookshire, 126 Ind. 497, 589, 781		N. H. 513,	568, 612
v. Buell, 117 Ind. 315,	73, 603	Winona, etc., Co. v. Denman, 10	
v. Campbell, 119 Ind. 286,	713	Minn. 267,	556
v. Castro, 31 Cal. 420,	604	v. First Nat. Bank, 33 Ill. App.	
v. Coles, 2 Blackf. 402,	632, 675	630,	319
v. Daniel, 3 Dall. 400,	49	Winsett v. State, 54 Ind. 437,	241, 243,
v. Dean, 10 Ark. 308,	330		529, 792
v. Everett,	571	Winship v. Block, 96 Ind. 446,	45
v. Giddings, 28 Ohio St. 554,	761	Winslow v. Anderson, 3 Dev. &	
v. Hamilton, 75 Ind. 71, 715, 716, 719		Bat. (L.) 9,	284
v. Harrison, 44 Ind. 468,	268	v. Winslow, 52 Ind. 8,	592

[References are to Pages.]

Winsor v. Queen, 6 B. & S. 143,	541	Womack v. McAhren, 9 Ind. 6,	10
Winston v. Miller, 20 Miss. 550,	286		103, 46
Winterfield v. Bradnum, 3 Q. B. Div. 324,	398	Wood v. Brewer, 9 Ind. 86,	81, 8
Winter v. Fulstone (Nev.), 21 Pac. Rep. 687,	472	v. Franklin, 97 Ind. 117,	66
v. Hughes, 3 Utah, 438,	343	v. Fulton, 2 Harr. & G. 71,	33
Winters v. Ethell, 132 U. S. 207,	97	v. Jackson, 8 Wend. 9,	49
v. Hughes, 3 Utah, 438,	315	v. Lake, 13 Wis. 84,	40
v. Kansas City, etc., 99 Mo. 509,	391	v. Ostram, 29 Ind. 177, 17, 356,	57
v. Null, 7 S. E. Rep. 443,	348		624, 68
Winterson v. Eighth Ave. R. Co., 2 Hilt. 389,	407	v. Rawlings, 76 Ill. 206,	12
Winton v. Conner, 24 Ind. 107,	494	v. Squires, 60 N. Y. 191,	19
Wiscart v. D'Auchy, 3 Dall. 321,	15	v. State, 92 Ind. 269,	25
Wise v. Columbian Turnpike Co., 7 Cranch. 276,	49	v. State, 27 Tex. App. 538,	48
v. Ringer, 42 Ala. 488,	673	v. Thomas, 5 Blackf. 553,	31
v. Williams, 88 Cal. 30,	479	v. Wall, 5 La. Ann. 179,	32
Wiseman v. Lynn, 39 Ind. 250,	306	v. Wayne, etc., 48 Mich. 641,	31
v. Mitchell Co., 104 N. C. 330,	452	v. Wheeler, 106 N. C. 512,	60
v. Risinger, 14 Ind. 461,	630	v. Wilkinson, 13 Ind. 352,	7
v. Wiseman, 73 Ind. 112,	555	v. Wood, 51 Ind. 141,	64, 22
Wisconsin, etc., Co. v. Plumer, 49 Wis. 668,	450	Woodard v. Davis, 127 Ind. 172, 292,	58
Wishmier v. Behymer, 30 Ind. 102,	658	Woodburn v. Fleming, 1 Blackf. 4,	32
v. State, 110 Ind. 523,	159, 273		32
Wiscart v. D'Auchy, 3 Dall. 321,	134	Wood Paper Co. v. Heft, 8 Wall. 333,	12
Witbeck v. Chittenden, 50 Mich. 426,	83	Woodfield v. Barber, 18 Ind. 320,	29
Withers v. Buckley, 20 How. 84,	27	Woodfill v. Patton, 7 Ind. 575,	70
Withers v. Jacks, 79 Cal. 297,	413	Woodhouse v. Fillabater, 77 Va. 317,	67
v. Patterson, 27 Tex. 491,	392	Woodrum v. Kirkpatrick, 2 Swan. 217,	45
Witing v. City of Kansas, 39 Mo. App. 259,	678	Woodruff v. Garner, 27 Ind. 4,	39
Witkowski v. Hern, 82 Cal. 604,	66	v. Jabine (Ark.), 15 S. W. Rep. 830,	63
Witt v. King, 56 Ind. 72,	628	v. Rose, 43 Ala. 382,	7
Witten v. Caspary, 15 S. W. Rep. 47,	340	Woods v. Brezzinski, 57 Conn. 471,	10
Witter v. Arnett, 8 Ark. 57,	590	v. Brown, 93 Ind. 164,	165, 28
v. Latham, 12 Conn. 392,	701	v. Dickinson, 7 Mackey, 301	6
Witters v. Sowles, 38 Fed. Rep. 700,	126	v. Hamilton, 39 Kan. 69,	65
Wittkowsky v. Wasson, 71 N. C. 451,	702	v. Winan, 122 N. Y. 445,	64
Witz v. Dale (Ind.), 27 N. E. Rep. 498,	187, 188, 198	Woodward v. Baker, 116 Ind. 152,	15
Wixson v. Devine, 80 Cal. 385,	492	v. Beegue, 53 Ind. 176,	57
Wolcot v. Wigton, 7 Ind. 44,	670	v. Corson, 86 Pa. St. 176,	46
Wolcott v. Standley, 62 Ind. 198,	597	v. Horst, 10 Ia. 120,	554, 78
Wolever v. State, 127 Ind. 306,	671	v. Howard, 13 Wis. 557,	42
Wolf v. Schofield, 38 Ind. 175,	562,	v. Leavenworth, 14 Ind. 311,	21
	605, 674	v. Murdock (Ind.), 13 Crim. L. Mag. 71,	2
v. State, 11 Ind. 231,	420	Woodworth v. Wilcox, 27 Ind. 207,	5
Wolfe v. Davis, 74 N. C. 597,	504	v. Zimmerman, 92 Ind. 349, 488,	5
v. Kable, 107 Ind. 565,	781	Woody v. Dean, 24 S. C. 499,	61
v. Pugh, 101 Ind. 293,	572, 702	Woollen v. Whitacre, 91 Ind. 502,	61
Wolff v. Mathews (Neb.), 11 S. W. Rep. 563,	78		694, 6
Wolfley v. Lebanon Mining Co., 3 Col. 296,	177	v. Wire, 110 Ind. 251, 531, 535,	57
Wolford v. Oakley, 1 Sheldon (N. Y.), 261,	628		6
Wolly, In re, 11 Bush. (Ky.) 95,	7	v. Wishmier, 70 Ind. 108,	771, 7
		Woolery v. Grayson, 110 Ind. 149,	6
		v. Louisville, etc., Co., 107 Ind. 381,	571, 7
		Woolfolk v. State, 81 Ga. 551,	6
		Woolley v. State, 8 Ind. 377,	64, 2

cxxxix

Woolley v. State, 2 Ind. 502,	253	Yerkes v. Sabin, 97 Ind. 141,	19, 712
Wooster v. Glover, 37 Conn. 315,	180	Yeakle v. Winters, 60 Ind. 554,	308
Worley v. Moore, 97 Ind. 15, 570, 571,	622	Yearley v. Sharp, 96 Ind. 469, 221,	225, 226
Wortham v. Harrison, 8 Tex. 141,	483	Yeaton v. Lenox, 3 Pet. 123,	128
Worthington v. Olden, 31 La. 419,	666	Yeoman v. Davis, 86 Ind. 189,	636
Wray v. Hill, 85 Ind. 546,	719	York v. Ingham Circuit Judge, 57 Mich. 421,	439
Wreidt v. State, 48 Ind. 579,	256	v. Pease, 2 Gray, 282,	535
Wright, In re, 49 Cal. 550,	142	York Co. v. Central, etc., Co., 3 Wall. 107,	733
Wright v. Abbott, 85 Ind. 154, 373,	616	York, etc., Co. v. Myers, 18 How. 243,	754
v. Anderson, 117 Ind. 349,	73	Yost v. Conroy, 92 Ind. 464,	766
v. Boynton, 40 N. H. 353,	780	Young, In re, 22 Wis. 205,	450
v. Cabot, 89 N. Y. 570,	733	Young v. Dickey, 63 Ind. 31, 632,	671
v. Carpenter, 49 Cal. 607,	539	v. Gundy, 6 Cranch. 51,	73
v. Defrees, 8 Ind. 398,	5	v. Harry, 4 Blackf. 167,	404
v. Field, 7 Ind. 376,	596, 603	v. Highland, 9 Gratt. 16,	616
v. Forrestall, 65 Wis. 341,	514	v. Hudson, 99 Mo. 102,	109, 611
v. Gillespie, 43 Mo. App. 244,	657	v. Ledrick, 14 Kan. 92,	532
v. Hooker, 10 N. Y. 51,	407	v. McFadden, 125 Ind. 254, 108,	577
v. Jordan, 71 Ind. 1,	413	v. McLane, 8 Ind. 357,	750
v. Judge of Superior Court, 41 Mich. 726,	757	v. Martin, 8 Wall. 354, 164, 729,	753
v. Julian, 97 Ind. 109,	640	v. Mason, 8 Ill. 55,	323
v. Kleyla, 104 Ind. 223,	108	v. Matthiesen, etc., Co., 105 Ill. 26,	68
v. McHaffey, 76 Ia. 96,	122	v. Omohundro, 69 Md. 424,	639
v. McLarinan, 92 Ind. 103, 368,	375	v. Pickens, 45 Miss. 553,	140
v. Manna, 111 Ind. 422,	99, 101, 105, 221	v. Sellers, 106 Ind. 101,	670
v. Marsh, 2 Gr. (Ia.) 94,	285	v. Stearns, 91 Ill. 222,	58
v. Mulvaney, 78 Wis. 89,	391	v. Youngman (Kan.), 25 Pac. Rep. 209,	746
v. Norris, 40 Ind. 247,	282	Youngman v. Elmira, etc., 65 Pa. St. 278,	286
v. Rogers, 26 Ind. 218,	71, 100	Yturvide v. United States, 22 How. 290,	94
v. Sanderson, 20 Mo. App. 534,	414		
v. State, 78 Ga. 102,	556		
v. Wilson, 98 Ind. 112,	494		
v. Wright, 97 Ind. 444,	108		
v. Wright, 74 Wis. 439,	88		
Wrandotte, City of, v. Gibson, 25 Kan. 236,	624		
Wrat v. Noble, 8 Blackf. 507,	527		
Wynn v. Central, etc., Co., 14 N.Y. Supp. 172,	546, 655		
v. Simons, 33 Ala. 272,	666		
v. Troy, 109 Ind. 250,	748		
Wynne v. Newman, 75 Va. 811,	793		
Wyser v. Johnson, 30 N. E. Rep. 144,	759		
v. Johnson, 1 Ind. App. 419,	51		
Wyvell v. Jones, 37 Minn. 68,	675		

Y

Yancey v. Teter, 39 Ind. 305,	284	Yerkes v. Sabin, 97 Ind. 141,	19, 712
Yaple v. Titus, 41 Pa. St. 195,	140	Yeakle v. Winters, 60 Ind. 554,	308
Yates v. Lansing, 9 Johns. 415,	474	Yearley v. Sharp, 96 Ind. 469, 221,	225, 226
v. Lansing, 5 Johns. 282,	424, 671	Yeaton v. Lenox, 3 Pet. 123,	128
Yater v. Mullen, 24 Ind. 277,	470	Yeoman v. Davis, 86 Ind. 189,	636
v. Mullen, 23 Ind. 562,	786	York v. Ingham Circuit Judge, 57 Mich. 421,	439
v. State, 58 Ind. 299,	604	v. Pease, 2 Gray, 282,	535
Yeager v. Wright, 112 Ind. 230,	398, 550	York Co. v. Central, etc., Co., 3 Wall. 107,	733

Z

Zable v. Harris, 82 Ky. 473,	79	Yerkes v. Sabin, 97 Ind. 141,	19, 712
Zackary v. Pace, 9 Ark. 212,	570	Yeakle v. Winters, 60 Ind. 554,	308
Zeckendorf v. Zeckendorf, 1 Ariz. 401,	91	Yearley v. Sharp, 96 Ind. 469, 221,	225, 226
v. Johnson, 123 U. S. 617,	50	Yeaton v. Lenox, 3 Pet. 123,	128
Zehnor v. Beard, 8 Ind. 96,	195, 401, 648, 750	Yeoman v. Davis, 86 Ind. 189,	636
v. Crull, 10 Ind. 547,	446	York v. Ingham Circuit Judge, 57 Mich. 421,	439
Zeigelmueller v. Seamer, 63 Ind. 488,	404	v. Pease, 2 Gray, 282,	535
Zehner v. Kepler, 16 Ind. 290, 615, 616,	658	York Co. v. Central, etc., Co., 3 Wall. 107,	733
v. Griffiths, 89 Ind. 80,	793	York, etc., Co. v. Myers, 18 How. 243,	754
Ziegler v. Handrick, 106 Pa. St. 87,	168	Yost v. Conroy, 92 Ind. 464,	766
Zigler v. Manges, 121 Ind. 99,	713	Young, In re	

PART I.

APPELLATE TRIBUNALS, JURISDICTION AND PRACTICE

CHAPTER I.

APPELLATE TRIBUNALS.

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|---|--|
| 1. Judicial Power—Definition. | § 6. Inherent powers of constitutional courts. |
| 2. Rule where Constitution defines the jurisdiction. | 7. Power to frame rules. |
| 3. Only judicial duties can be imposed on courts. | 8. Where judicial power resides. |
| 4. Courts not required to give opinions to the legislature. | 9. Amplifying jurisdiction. |
| 5. Where the ultimate superior jurisdiction is vested. | 10. Influence of the Common Law. |
| | 11. Supplying statutory omissions. |

§ 1. **Judicial Power—Definition**—Judicial power is inherent in the people, and is vested in courts by the constitution. The legislature determines, subject to the provisions of the constitution, what tribunals shall exercise judicial power, but the power itself is neither created nor vested by legislative enactments. The constitution authorizes the creation of tribunals, and when they are created by the legislature pursuant to the authority conferred by the organic law, they are endowed by that law, and not by legislative enactments, with judicial functions.¹ It is one thing to organize tribunals and quite another to invest them with that branch of the governmental power known as the judicial.

¹ *The State v. Noble*, 118 Ind. 350; *Am. Com.* 429; *Warner v. People*, 2 *Stugart v. Miles*, 125 Ind. 445, 447; *Denio*, 272; *King v. Hunter*, 65 N. C. 603, S. C. 6 *Am. Rep.* 754. In speaking of a constitutional provision conferring authority upon designated judicial tribunals the Supreme Court of Illinois said: "This section exhausted the judicial power of the people of the State. It is there fully disposed of, leaving no residuum." *Missouri River Telegraph Co. v. The First National Bank*, 74 Ill. 217.

§ 2. Rule where the Constitution defines the Jurisdiction—Where the constitution defines the jurisdiction of a court the legislature can not take it away, nor, indeed, change it in any material respect.¹ As a corollary of this principle it must follow that where a Supreme Court is created by the constitution with ultimate appellate jurisdiction, the legislature, although it may have power to establish courts, can not take away the superior appellate jurisdiction.² The Constitution of Indiana creates a Supreme Court and makes it the highest judicial tribunal of the State, so that while inferior tribunals may be created, a higher one can not be established by the legislature.³ While the legislature can not rightfully, or constitutionally, take away the supreme appellate jurisdiction of the Supreme Court, it may regulate the procedure, designate the amount that shall authorize an appeal, and, within limits, designate the class of cases that may be appealed; but it can not, under the guise of regulating the procedure or the right of appeal, take away the essential jurisdiction of that court as the highest court of error or appeals.

§ 3. Only Judicial Duties can be Imposed—The fundamental

¹ *Harris v. Vanderveer*, 21 N. J. Eq. 424; *In re Cleaveland* (N. J.), 17 Atl. 772; *Hutkoff v. Demorest*, 103 N. Y. 377; *State v. Gannaway*, 16 Lea. 124; *Landers v. Staten Island Railroad Co.*, 53 N. Y. 450; *In Matter of the Application of the Senate*, 10 Minn. 78. Courts must exercise the jurisdiction vested in them by the constitution. *Alexander v. Bennet*, 60 N. Y. 204. Where the constitution lodges jurisdiction there it abides beyond legislative reach. *Spencer Creek Water Company v. Vallejo*, 48 Cal. 70.

² *In the Matter of the Senate*, 9 Col. 623; *Adams v. Town*, 3 Cal. 247; *Hicks v. Bell*, 3 Cal. 219, 224; *Fitzgerald v. Urton*, 4 Cal. 235; *Haight v. Gay*, 8 Cal. 297; *Adams v. Woods*, 8 Cal. 306, 314; *Willis v. Farley*, 24 Cal. 490, 499.

³ Const., Article 7, §§ 1 to 7. Prior

to the amendments adopted in 1881, it was held that courts inferior to the circuit courts might be established. *Combs v. The State*, 26 Ind. 98; *Anderson v. State*, 28 Ind. 22; *Clem v. State*, 33 Ind. 418; *Eitel v. State*, 33 Ind. 201; *Ex parte Wiley*, 39 Ind. 546. Since the adoption of those amendments there can be no question as to the power of the legislature to establish courts superior in jurisdiction to the circuit courts. Courts created solely by the legislature are subject to legislative control, except that while they exist as courts they possess the inherent powers of courts. *Mullen v. State*, 34 Ind. 540. The inherent power of a court can not be destroyed since that would destroy the independence of the judiciary. *Little v. State*, 90 Ind. 338; *Hawkin v. State*, 25 N. E. 818.

principle of free government requiring the separation of the departments of government¹ precludes the legislature from imposing any other than judicial duties upon the courts.² The courts can not be required to interfere with legislative matters, nor can they be given jurisdiction over matters made legislative by the constitution.³

§ 4. Court not Required to give Opinions to Legislature—The Supreme Court can not be required to give opinions to the legislature except in those States where the constitution expressly imposes the duty upon that tribunal. The duty does not rest upon the courts except where there is a constitutional provision imposing it upon them. As there is no such requirement in the Constitution of Indiana, that duty can not be imposed upon the Supreme Court of this State.⁴

§ 5. Where the ultimate Superior Jurisdiction is Vested—It is no doubt true that under the constitutional amendments of 1881,⁵ the legislature may create intermediate appellate courts, but as it can not take from the Supreme Court the ultimate appellate

¹ *Sinking Fund Cases*, 99 U. S. 700; *Clough v. Curtis*, 10 Sup. Ct. R. 573; *Wright v. Defrees*, 8 Ind. 298; *Lafayette, etc., Co. v. Geiger*, 34 Ind. 185, 197; *Kuntz v. Sumption*, 117 Ind. 1; *Smythe v. Boswell*, 117 Ind. 365; *Smith v. Myers*, 109 Ind. 1.

² *Ex parte Griffiths*, 118 Ind. 83; *Hayburn's Case*, 2 Dall. 409, *n*; *United States v. Ferreira*, 13 How. 40, *n*; *Rees v. City*, 19 Wall. 107; *Auditor v. Atchison, etc., Co.*, 6 Kan. 500; *Smith v. Strother*, 15 Cal. 194; *Burgoyne v. Supervisors*, 5 Cal. 9; *People v. Nevada*, 6 Cal. 143; *McLean Co. v. Deposit Bank*, 81 Ky. 254.

³ *Clough v. Curtis*, 10 Sup. Ct. R. 573; *Smith v. Myers*, 109 Ind. 1; *Robertson v. State*, 109 Ind. 79; *State v. Harmon*, 31 Ohio St. 250; *State v. Baxter*, 28 Ark. 129.

⁴ *Opinion of Justices*, 21 N. E. R.

439; *Opinion of Justices*, 23 Fla. 297, S. C. 6 So. R. 925; *Opinion of Justices*, 49 Mo. 216; *In re Irrigation Resolution*, 9 Col. 620; *In re Senate Resolution*, 21 Pac. R. 470; *Opinion of Judges*, 79 Ky. 621.

⁵ Const., Article 2, § 14; Article 7, § 1. The general authority to establish courts leaves much to the legislative discretion. *Commonwealth v. Hipple*, 69 Pa. St. 9; *State v. New Brunswick*, 42 N. J. 51; *State v. Brown*, 71 Mo. 454; *Burke v. St. Paul, etc., Co.*, 35 Minn. 172. But the jurisdiction vested by the constitution can not be changed or impaired by legislation. *Greenough v. Greenough*, 11 Pa. St. 489; *Gough v. Dorsey*, 27 Wis. 119; *Risser v. Hoyt*, 53 Mich. 185; *Schoultz v. McPheeters*, 79 Ind. 373; *In re Cleveland*, 17 Atl. R. 772 (N. J.).

jurisdiction it would seem to follow that no statute can be valid which assumes to vest in any other tribunal than the Supreme Court jurisdiction of questions which require the highest expression of judicial judgment. Whether the legislature can give any other tribunal than the Supreme Court jurisdiction over all cases involving simply a controversy as to the right to money is doubtful, for it seems that even where money alone is in dispute there must be some limit to the jurisdiction of an intermediate tribunal, otherwise it would not be inferior. But, however this may be, it is clear that as to all controversies which are in their nature inferior, as probate matters, controversies concerning comparatively small sums of money, misdemeanors, and the like, appellate jurisdiction may be given to an intermediate appellate tribunal.¹ For many years this principle has been recognized, for during the existence of the common pleas court there were some cases where the court to which appeals were allowed was the circuit court, and that court is now, and long has been, the court of last resort in some cases originating before justices of the peace.

§ 6. Inherent Powers of Constitutional Courts—All constitutional courts are invested with inherent powers by the constitution. This must necessarily be true, otherwise there could be no independent judiciary. The legislature can not take from a court the power to decide upon the validity of statutes, since to concede this power to the legislature would make the legislature the judge of its powers and thus break down the partition between the legislative and the judicial departments of the government, nor can the legislature deprive the courts of power over their own records; this power is, it is clear, absolutely essential to the independence of the judiciary. The principle involved in the instances we have given justifies the conclusion that the legislature can not deprive the courts of the power to prevent fraud upon their jurisdiction or process.² Upon the

¹ *Ross v. Murphy*, 55 Mo. 372; *Smith v. State*, 85 Ind. 318; *Smythe v. Boswell*, 117 Ind. 365; *Boswell v. Boswell*, 117 Ind. 599. Upon the general doctrine of the existence in all constitutional courts of inherent judicial power, the

² *Nealis v. Dicks*, 72 Ind. 374; *Cavanaugh v. Smith*, 84 Ind. 380; *Sanders*

same principle it must be held that every constitutional court has inherent power to preserve its dignity and independence by punishing persons guilty of contempt.¹ It is true, no doubt, that the legislature may regulate the procedure, but it can not in any manner destroy or impair the substantive power, for that is above legislative reach. The fundamental principle to which we have referred requires that it should be held that the conduct of business, the course of argument and the like, are matters for the determination of the courts and not for legislative decision.² The legislature may, of course, prescribe rules of pleading and practice and require the courts to conform to those rules, but it can not so far control the conduct of business as to invade the domain of the judiciary.³ It is very questionable whether the legislature can direct how briefs shall be prepared or arguments conducted, since the attempt to exercise such power would seem to be an unauthorized encroachment upon the province of the courts.

§ 7. Power to Frame Rules—It is an ancient principle that

Following cases will be found interesting and instructive: *United States v. Hudson*, 7 Cranch. 34; *Houston v. Williams*, 13 Cal. 24; *Underwood v. McDuffie*, 15 Mich. 361; *Chandler v. Nash*, 5 Mich. 409; *Greenough v. Greenough*, 11 Pa. St. 489. See, also, *Schoultz v. McPheeters*, 79 Ind. 373; *Gregory v. State*, 94 Ind. 384; *Kuntz v. Sumption*, 117 Ind. 1; *Wilkins v. State*, 113 Ind. 314.

¹ *Ex parte Robinson*, 19 Wall. 505; *Ex parte Terry*, 128 U. S. 289; *Anderson v. Dunn*, 6 Wheat. 204; *Little v. State*, 90 Ind. 338; *Holman v. State*, 105 Ind. 513; *Hawkins v. State*, 125 Ind. 570; *State v. Morrill*, 16 Ark. 384; *People v. Wilson*, 64 Ill. 195; *Clark v. People*, 138 Ill. 340; *Ex parte Biggs*, 64 N. C. 202; *Com. v. Dandridge*, 2 Va. Case, 408; *State v. Matthews*, 37 N. H. 450; *In re Wolly*, 11 Bush. (Ky.) 95; 111; *Arnold v. Commonwealth*, 80 Ky. 300, S. C. 44 Am. R. 480.

Courts have the inherent power to protect themselves and their officers. *In re Neagle*, 14 Sawyer U. S. C. C. 232, S. C. 5 Lawyers' Rep. Ann. R. 78. The courts may protect themselves from annoyance by travel on the highways. *Belvin v. Richmond*, 85 Va. 574.

² A very able and instructive paper upon this general subject was read before the American Bar Association, at a meeting held in August, 1889, by Judge Henry B. Brown. Reports of American Bar Association, Vol. 12, p. 263. The author demonstrates the fact that many statutes do trench upon the judicial domain.

³ *Smythe v. Boswell*, 117 Ind. 365. The legislature may regulate procedure but it can not destroy the power of constitutional courts. *Supervisors v. Amight*, 54 Mass. 672.

courts may prescribe rules for the conduct of business and this power is an inherent one, so far, at least, as concerns the mode of conducting the affairs of the court,¹ although, as has been said, the power to prescribe general rules of procedure and pleading binding upon the parties and the court, is a legislative one; but this legislative power is not broad enough to warrant the conclusion that the legislature can control the action of the court in matters of a purely judicial nature. It is not, and can not be, within the legislative power to so fetter or control the action of the courts in the conduct of business as to preclude the exercise of judicial discretion or judgment. Such matters must be left to the courts, otherwise judicial independence will be annihilated and judges become mere passive instruments of legislative will. It is difficult to define with exactness the line which separates the legislative from the judicial power respecting the general subject under consideration, but it is quite safe to affirm that a constitutional court has power to prescribe rules for its own direct government independent of express legislative enactments.² In so far as regards the personal conduct of

¹ Attorney General *v.* Lun, 2 Wis. 507; *In re Road McCandless Tp.*, 110 Pa. St. 605, 1 Atl. R. 594. Rules framed by a court in the exercise of the power vested in it as the repository of that element of governmental sovereignty known as the judicial, have the force and effect of rules of law. Rout *v.* Ninde, 111 Ind. 597, and authorities cited; Moulder *v.* Kempff, 115 Ind. 459. As the rules of court have the force and effect of law, parties and counsel must obey them. In speaking of this duty it was said by the Supreme Court of North Carolina in the case of Walker *v.* Scott, 102 N. C. 487, 490, that, "The impression seems to prevail, to some extent, that the rules of practice prescribed by this court are merely directory—that they may be ignored, disregarded and suspended almost, as of course. This is a mistake. The court has ample authority to make them." The cases of Rencher *v.* Anderson, 93 N.

C. 105; Barnes *v.* Easton, 98 N. C. 116, were cited. It follows, as a legitimate deduction from the proposition that the rules of court have the effect of law, that it is not only the right, but the duty of the court, to enforce its rules as they are written. Parties have a right to expect the court to enforce its rules, and there is no reason for departing from them in cases where they justly apply. It may happen, as it does in all cases where general rules prevail, that peculiar circumstances may justly take a particular case outside of the rules. Of this the court must judge, but the operation of its rules can not be rightfully suspended without cause properly shown.

² The statute in defining the powers and jurisdiction of the Supreme Court grants power to frame rules, but it is quite clear upon principle as well as upon authority, that it needed no express legislative grant to invest the court with that power.

judges of constitutional courts in the exercise of the duties of the judicial office it is the law that legislative power is ineffective to control them, for it is evident that without freedom of judicial action government must degenerate into a system of sovereign and supreme legislative power, and this can not be allowed to take place under a republican form of government.¹

§ 8. **Where Judicial Power Resides**—Judicial power can only reside in courts, although powers in their nature judicial may be conferred upon ministerial officers.² The power to decide controversies between litigants is strictly judicial,³ but judicial power is not confined to the sole act of deciding or of giving judgment, for judicial power extends beyond the simple act of deciding or adjudging, and embraces many incidents connected with the administration of justice.⁴ Constitutions, as has often been decided, are framed by organized communities and with reference to existing things,⁵ so that when a term having a

¹ *Nudd v. Burrows*, 91 U. S. 426, S. C. 23 U. S. (Law. Co. Ed.) 286; *Indianapolis, etc., Co. v. Horst*, 93 U. S. 291; *Houston v. Williams*, 13 Cal. 24; *Vaughn v. Harp*, 49 Ark. 160; *In re Editor*, 35 Wis. 410; *Commissioners v. Hall*, 7 Watts (Pa.), 290; 1 Bryce's Am. Com. 31; *Lieber's Civil Liberty*, 154; *Wilson's Congressional Government*, 70; 3 *Burke's Works* (Bohn's ed.), 110; *Montesquieu's Spirit of Laws*, 33.

² *Flournoy v. Jeffersonville*, 17 Ind. 70; S. C. 79 Am. Dec. 468; *Wilkins v. State*, 113 Ind. 514, 519; *Pennington v. Speight*, 54 Ind. 376; *State v. Johnson*, 105 Ind. 463, 467; *Weaver v. Templin*, 113 Ind. 398; *Betts v. Dimon*, 3 Conn. 307; *Crane v. Camp*, 12 Conn. 463; *Eastman v. State*, 109 Ind. 278; *Orr v. Meek*, 111 Ind. 40; *State v. Green*, 112 Ind. 462.

³ *Rhode Island v. Massachusetts*, 12 Peters, 657, 718; *In re Cooper*, 22 N. Y. 67, 82, 84; *Sinking Fund Cases*, 99 U. S. 700, 761; *Maby v. Baxter*, 11 Ill. 652, 699; *Tindal v. Drake*, 60 Ala. 177; *In re Saline County*, 45

Mo. 52. Judicial power proper can not be conferred upon any other officers except those invested with power under the direct or indirect provision of the constitution which vests the judicial power of the State. *Shoults v. McPheeters*, 79 Ind. 373; *Greenough v. Greenough*, 11 Pa. St. 489; *Gregory v. State*, 94 Ind. 384; *Chandler v. Nash*, 5 Mich. 409; *Columbus, etc., Co. v. Board*, 65 Ind. 427; *Hawkins v. Governor*, 1 Ark. 570; *Speight v. People*, 87 Ill. 595; *Ex parte Randolph*, 2 Brock, 447; *Campbell v. Board*, 118 Ind. 119, 222; *Vandercook v. Williams*, 106 Ind. 345, and cases cited; *Wight v. Wallbaum*, 39 Ill. 555.

⁴ In the matter of *Cooper*, 22 N. Y. 67; *Striker v. Kelly*, 2 Denio, 323; *State v. Noble*, 118 Ind. 350, 360.

⁵ *Johnston v. State*, 128 Ind. 16, 18; *Durham v. State*, 117 Ind. 477; *State v. Denny*, 118 Ind. 382; *State v. Denny*, 118 Ind. 449; *Davis v. State*, 119 Ind. 555, 556; *Cooley's Const. Lim.* (5th ed.), 73.

known meaning is used, the inference is that it was used to signify what is embraced within the term. Thus, where the term "judicial power" is employed it is deemed to embrace all things, which, by the consideration of courts and jurists, have been embraced within the general powers and duties of courts. It is not to be expected that a constitution, or even a statute, will define the terms employed, or state in detail what things are within the sweep of such terms. In the work of construction reference must, therefore, be made to the existing condition of things as well as to the history of the past. Unsatisfactory and clumsy work would indeed be done by one who did not look beneath words to things.

§ 9. Amplifying Jurisdiction—It is an ancient doctrine of the common law that, "It is the duty of a judge, when requisite, to amplify the limits of his jurisdiction."¹ This long existing doctrine is not without force even under systems such as ours, where jurisdiction is limited and regulated by written laws, although it can not, of course, be given effect in contravention of effective statutory provisions. While its effect is circumscribed by written laws, it is, nevertheless, not without force. Courts often tacitly act upon it, and so they must do in many cases or else fail in doing what they are organized for the purpose of doing, that is, of administering complete justice. In construing remedial statutes this principle is often impliedly invoked, and sometimes seemingly acted upon without a consciousness of its existence. As the principle is part of the common law, and, consequently, part of the very foundation of our whole system of jurisprudence, it is logical and just to assume that statutes are enacted with reference to it, and, indeed, to assume that constitutions are framed with reference to it.

§ 10. Influence of the Common Law—As the common law is the foundation of our jurisprudence it can not be disregarded in considering the formation of our courts, nor in determining

¹ *Squire v. Ford*, 9 Hare, 47, 57; 8 H. L. Cases, 338; *Dart v. Dart*, 32 Moses v. Macferlane, 2 Burr, 1005, L. J. P. M. & A. 125; *Ashmole*, 1012; *Aiken v. Short*, 1 H. & N. 210, Wainwright, 2 Q. B. 837, S. C. 2 G. & 214; *Litt v. Martindale*, 18 C. B. 314; D. 217; 6 Jur. 729. *Somes v. British Empire Shipping Co.*,

questions of procedure. The progress of one who should attempt to measure the powers of a court, ascertain its jurisdiction, or apply rules of procedure without reference to the common law would be very unsatisfactory. The influence of the common law is, and must ever be, very great, both as to the nature of a court, its essential powers, and its mode of procedure. The principles of the common law are so closely interwoven with all matters of a judicial nature that an acquaintance with them is indispensable.

§ 11. **Supplying Statutory Omissions**—Omissions in statutory provisions are often supplied by the common law, and from that source fundamental principles are frequently obtained. Short-sighted men, deceived by the statement that all our courts are created by written laws, sometimes act upon the false theory that a rule or principle not found in the constitution or in the statute-book has no existence. It is, in truth, impossible to justly conceive the powers and duties of courts without reference to the fundamental principles of the unwritten law, for that all-pervading power encircles all written laws much as the air does the earth. Statutes are not often intelligible without reference to the unwritten law, and, upon the principle heretofore stated, constitutions must be construed with reference to the fundamental principles recognized as existing by their framers. There is, in fact, one great system of law in which written enactments and unwritten principles have their places and in which they unite to form one harmonious body of law.¹

¹ We do not, of course, mean to be understood as affirming that a *casus omis-* in a statute can be supplied by the courts. The rule is, we know, well settled that the courts can not supply such an omission. *In re Election of Executive Officers* (Neb.), 10 Law Rep. Ann. 803. What we mean is this: Where the legislature has not undertaken to make provision for all cases for which the common law prescribed remedies, the courts will act upon the presumption, where there is nothing countervailing it, that the legislature meant

that the common law remedies and rules of procedure should remain in force. *Fitch v. Creighton*, 24 How. U. S. 159; *Broderick's Will*, 21 Wall. 503, 519; *Clark v. Smith*, 13 Pet. 195. See, also, *Holland v. Challen*, 110 U. S. 15; *Borland v. Haven*, 37 Fed. R. 394; *Van Sickle v. Belknap* (Ind.), 28 N. E. R. 305. Our own court has enforced this doctrine with reference to a motion for a *venire de novo* as well as in reference to other matters of procedure. *Shaw v. Merchant's National Bank*, 60 Ind. 83.

CHAPTER II.

APPELLATE JURISDICTION.

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| <p>§ 12. Jurisdiction—Definition.</p> <p>13. Consent can not confer jurisdiction of the subject.</p> <p>14. Fictitious cases.</p> <p>15. Appeal defined.</p> <p>16. Appellate jurisdiction defined.</p> <p>17. Appellate jurisdiction one of review.</p> <p>18. Jurisdiction for one purpose retained for all.</p> | <p>§ 19. Statutory mode of review exclusive.</p> <p>20. Incidents of appellate jurisdiction.</p> <p>21. Power of appellate tribunals to frame judgments.</p> <p>22. Grant of appellate jurisdiction.</p> <p>23. Determination of the question of the right of appeal.</p> <p>24. Blending of legal and equitable jurisdiction.</p> |
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§ 12. **Jurisdiction—Definition**—Jurisdiction is the authority to hear and determine a legal controversy. Any movement of a court in a matter in which it has authority to act is jurisdiction.¹ If it appears upon the face of the record that there is authority to move in the case, then, as a general rule, there is jurisdiction to hear and determine the controversy,² and in order that this may appear it is only necessary that the record should show that the particular case is one of a class within the jurisdiction of the court.³ The general rule is, as is well known, that where the court is one of general jurisdiction the presumption is that

¹ *Smith v. Adams*, 130 U. S. 167; *Rhode Island v. Massachusetts*, 12 Peters, 657, 718; *United States v. Arredondo*, 6 Peters, 691, 709; *Grignon v. Astor*, 2 How. 319, 338; *Riggs v. Johnson Co.*, 6 Wall. 166, 187; *Jackson v. Smith*, 120 Ind. 520; *Board of Com. v. Markle*, 46 Ind. 96; *Dequindre v. Williams*, 31 Ind. 444; *State v. Wakefield*, 15 Atl. R. 181.

² *United States v. Arredondo*, 12 Peters, 6 Peters, 691, 709; *Ex parte Watson*, 3 Peters, 193, 207.

³ *Voorhees v. Bank*, 10 Peters, 449.

473; *Jackson v. Smith*, 120 Ind. 520; *State v. Wolever*, 127 Ind. 306; *Sheldon v. Newton*, 3 Ohio St. 494; *Le Roy v. Clayton*, 2 Sawyer, 493, 499; *Babb v. Bruere*, 23 Mo. App. 604; *Kendall v. United States*, 12 Peters, 524, 623; *Smith v. Adams*, 130 U. S. 167; *Cornett v. Williams*, 20 Wall. 226; *In re White*, 17 Fed. R. 723; *In re Bogart*, 2 Sawyer, 396; *Lantz v. Maffett*, 102 Ind. 23; *Schroeder v. Merchants Ins. Co.*, 104 Ill. 71; *Bush v. Hanson*, 70 Ill. 480.

jurisdiction exists, and it is not necessary that the record should affirmatively show the jurisdictional facts.¹ Jurisdiction of the subject can not be given to any court by the parties since such jurisdiction can be conferred only by law.² It is to be observed that, as appeals are tried by the record, the rule first stated can have little practical value in appellate procedure since the question of jurisdiction must ordinarily be determined by the recitals and statements of the record.³ Where the record discloses the fact that the appellate tribunal has no jurisdiction, that tribunal will, of its own motion, dismiss the appeal,⁴ unless there is a statute requiring that the case be remanded to another court. Where there is such a statute the case should be transferred to the proper court.

§ 13. **Consent can not confer Jurisdiction of Subject**—It is a necessary sequence from the two cardinal principles stated that parties can not by consent confer upon the appellate tribunal authority to decide questions which are not in the record, except in cases where it has original jurisdiction. Where the question is one of a purely appellate nature it can only be exhibited and determined by the record, so that when the appellate power is invoked the court must confine its investigation and its decision to the record. It is, therefore, correctly held that where the questions are not exhibited by the record the parties can not

¹ *Shewalter v. Bergman*, 123 Ind. 155; *Bass Foundry, etc., v. Board*, 115 Ind. 234; *Board, etc., v. Leggett*, 115 Ind. 544; *Chapell v. Shuee*, 117 Ind. 481. See Questions that may be first made on appeal, Chapter XX.

² *Smith v. Myers*, 109 Ind. 1; *Robertson v. State*, 109 Ind. 79; *Doctor v. Hartman*, 74 Ind. 221; *Trotter v. Neal*, 50 Ark. 340, S. C. 7 S. W. Rep. 384; *State v. The Whitewater Canal Co.*, 8 Ind. 320; *State v. Richmond*, 6 Foster (N. H.), 232; *Baker v. Chisholm*, 3 Tex. 157; *Chapman v. Morgan*, 2 Greene (Ia.), 374; *Titus v. Relyea*, 8 Abbott's Pr. R. 177; *Burns v. Nash*, 23 Ill. App. 552; *In re Rade*, 9 N. Y. Supp. 812.

³ *McArthur v. Schultz*, 78 Ia. 364, S. C. 43 N. W. Rep. 223; *Walker v. Steele*, 121 Ind. 436, S. C. 22 N. E. Rep. 142.

⁴ *Stamps v. Newton*, 3 How. (Miss.) 34; *Stearly's Appeal*, 3 Grant, 270; *Dykeman v. Budd*, 3 Wis. 640, 643; *Verbeck v. Verbeck*, 6 Wis. 157, 161; *Cerro Gordo Co. v. Wright Co.*, 59 Iowa, 485; *Musselman's Appeal*, 101 Pa. St. 165, 169; *Mathie v. McIntosh*, 40 Wis. 120; *Richards v. Lake Shore, etc., Co.*, 25 Ill. App. 344; S. C. 124 Ill. 516, 16 N. E. R. 909; *Green v. Creighton*, 10 Smedes & M. 159, S. C. 48 Am. Dec. 742; *In re Larson*, 96 N. Y. 381.

confer authority upon the appellate tribunal to decide them.¹ A distinction exists, as indicated by what has been said, between cases where the exercise of purely appellate authority is invoked and cases where the jurisdiction is original, or is in the nature of original jurisdiction. As an instance of a case of the last named class may be taken that of an application for a mandate; of the first class may be taken the case of a plea in bar to the assignment of errors. It can not, indeed, be said with strict accuracy that an application for a writ of mandate is a matter of original jurisdiction save in rare instances, for such applications are ordinarily in aid of the appellate jurisdiction but there are, nevertheless, cases where there is purely original jurisdiction.²

§ 14. **Fictitious Cases**—Growing out of the general principles stated and closely resembling the doctrine discussed in the preceding paragraph, is the rule that appellate tribunals entertain jurisdiction only of real questions arising in actual cases. They will not determine questions where there is no actual controversy, nor will they determine mere abstract or hypothetical questions.³ It is seldom, however, that the question whether there is an actual controversy arises, for where a case proceeds in the ordinary mode it will be assumed, in the absence of counter showing, that there is an actual controversy between the parties.

§ 15. **Appeal Defined**—In order to secure an adequate and intelligent conception of what is meant by the term “appellate jurisdiction” it is necessary to look with some care to the force and meaning of the term “appeal” when used in law proced

¹ Board of Com. v. Newman, 35 Ind. 10. In this case the true rule was admirably stated by Worden, J., who said: “The parties, however, by the agreement stated, have attempted to present for our determination, certain questions not presented by the record. This is an appellate court, and the agreement of the parties will not be effectual to convert it into a *nisi prius* tribunal.” See,

generally, Crane v. Farmer (Col.), 2 Pac. 455; Planters Ins. Co. v. Cramer, 47 Miss. 200; Marbury v. Madison, Cranch. 137.

² State v. Noble, 118 Ind. 350; *E parte* Griffiths, 118 Ind. 83.

³ Little v. Bowers, 134 U. S. 547; Chicago, etc., Co. v. Dey (Iowa), 41 N. W. R. 17; Pierse v. West, 29 Ind. 266.

ure. The word "appeal" is very often inaccurately employed even by judges and text writers, but for our present purpose it is essential to give it a somewhat definite and restricted meaning. The word, when accurately used in law matters, means the removal of a suit in equity, or of an action at law, from an inferior court to a superior court.¹ The word is sometimes applied to the removal of a matter from the decision of an inferior officer to a superior officer, but this is not, in law affairs, an accurate use of the term,² since the word, when properly used, means the removal of a case from one court to another. The matter of appeals is essentially, and throughout, judicial, and there can, in legal contemplation, be no appeal where there is no decision by a judicial tribunal. Two things are essential, the decision of a judicial tribunal of original jurisdiction, and a superior court invested with authority to review the decision of the inferior tribunal.³

§ 16. **Appellate Jurisdiction Defined**—Appellate jurisdiction is the authority of a superior tribunal to review, reverse, correct, or affirm the decisions of an inferior judicial tribunal in cases where such decisions are brought before the superior court pursuant to law. Appellate jurisdiction exists only in courts, and is, strictly speaking, the authority to review what has been previously the subject of investigation and determination by a court.⁴ Judicial power resides in courts, and hence it is es-

¹ *Leach v. Blakely*, 34 Vt. 134, 136; *United States v. Wonson*, 1 Gallison (U. S. C. C.), 5, 13. Under our system, an appeal removes a cause from an inferior court to one of superior jurisdiction. We do not deem it necessary to speak of the limited effect given to the word "appeal" in jurisdictions where a writ of error is one of the modes of removing a case from an inferior to a superior court. Inasmuch as under our law we have only the one mode, that of appeal. It may be said that our simple system is far preferable to the cumbersome system which has been adopted in many of the States. For a statement of the

difference between a writ of error and an appeal, see *Wiscart v. D'Auchy*, 3 Dallas, 321, 327.

² *Hestres v. Brennan*, 50 Cal. 210, 217.

³ This consideration becomes of importance in considering the question of the right of the legislature to authorize an appeal from the decisions of administrative or ministerial officers upon questions not judicial in their nature.

⁴ Judge Story says: "The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate juris-

sential that the original, as well as the appellate decision, should be made by a court. It is clear enough that only a court can revise judicial decisions, so that there is seldom difficulty in determining the general right to assert appellate authority; but it is sometimes difficult to determine from what decisions and from what officers or bodies an appeal will lie.

§ 17. **Appellate Jurisdiction one of Review**—It seems clear that the exercise of what is strictly appellate jurisdiction can not be invoked where there has been no decision by a court composed of judges, and that an appeal will not lie directly to a superior court of exclusive appellate jurisdiction from the decision of bodies or officers possessing *quasi* judicial power, as, for instance, the common council of a municipal corporation, or the trustees of a township. There must be a decision by a court, not simply the decision of a body with *quasi* judicial authority, in order to entitle a party to ask a review by an appellate tribunal. This must be true for the reason that where a court is invested with appellate jurisdiction by the constitution it can not be required to exercise purely original jurisdiction.¹ It is, of course, true that where the constitution provides that original jurisdiction may be imposed upon an appellate court, it may be conferred by statute,² but where no original jurisdiction is conferred, either by the constitution or by a statute enacted under constitutional authority, none exists in a court essentially of appellate jurisdiction.³ It is evident from the nature of the two kinds of jurisdiction that it would be inconsistent to invest one court with both. Except to a very limited extent, both original

diction, therefore, necessarily implies that the subject-matter has already been instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and, indeed, in any form which the legislature may choose to prescribe, but still the substance must exist before the form can be applied to it." 2 Story Const., § 1761.

¹ *Marbury v. Madison*, 1 Cranch. 137, 175; *Weston v. City Council*, 2 Peters. 449. The appellate tribunal decides upon its own jurisdiction; the trial court can not settle that question for it. *Hungerford v. Cushing*, 8 Wis. 324; *Benson v. Christian (Ind.)*, Nov. 17, 1891.

² *Osborne v. Bank*, 9 Wheat. 738, 820; *Ex parte Henderson*, 6 Fla. 279; *Hawes v. People*, 124 Ill. 560.

³ *Hubbell v. McCourt*, 44 Wis. 584.

and appellate jurisdiction can not exist in the same tribunal without trenching upon true principle. When, therefore, a tribunal is created for appellate purposes and is essentially a court for the trial of appeals, original jurisdiction can not be attributed to it where there are no constitutional or statutory provisions conferring such jurisdiction.

§ 18. **Jurisdiction for One Purpose Retained for All**—It has been held that where an appellate tribunal obtains jurisdiction of a case for one purpose it will retain it for all, and that it will give judgment upon all questions properly presented for its decision.¹ This ruling is in harmony with the rule which has long prevailed, that where a court of equity obtains jurisdiction for one purpose it will retain it for all purposes.² This must necessarily be the rule, since any other would involve the legal absurdity of disjointing a single case and turning over one fragment to one court and another parcel to another court.³ This conclusion does not conflict with that established by the decisions of the Supreme Court of the United States, wherein it is declared that in appeals from the State courts only Federal questions will be decided by that tribunal.⁴ These decisions do not control the question for the obvious reason that the Federal court is a tribunal of a different and distinct government from that of the State, and has exclusive ultimate jurisdiction of Federal questions.

¹ *Pitnam v. Wakefield* (Ky.), 13 S. W. Rep. 525; *Feder v. Field*, 117 Ind. 157.

² *Wood v. Ostram*, 29 Ind. 177; *Field v. Holzman*, 93 Ind. 205; *Kimble v. Seal*, 92 Ind. 276, 282; *Carmichael v. Adams*, 91 Ind. 526; *Faught v. Faught*, 90 Ind. 470, 472; *Feder v. Field*, 117 Ind. 157, 386, 389; *Albrecht v. The C. C. Foster Lumber Co. (Ind.)*, 26 N. E. R. 157.

³ "A party will not be allowed to appeal piecemeal; that is, he can not appeal from part of a decree by one petition and afterwards appeal from another part by another petition. The

rule is that if a party appeals from a part of a decree, he admits the remainder to be correct." 2 *Daniels' Ch. Pr.* (15th ed.), 1467; *Clowes v. Dickenson*, 8 Cow. 328; *Kelsey v. Western*, 2 N. Y. 500, 505; *Norbury v. Meade*, 3 Bligh, 261; *Parker v. Morrell*, 2 Phil. 453, 461.

⁴ *In re Kemmler*, 136 U. S. 436, 34 Law. Co. Ed. 439; *Giles v. Little*, 134 U. S. 645, 36 Law. Co. Ed. 623; *City of San Francisco v. Itsell*, 133 U. S. 65, 33 Law. Co. Ed. 241; *Beatty v. Benton*, 135 U. S. 244, 34 Law. Co. Ed. 124; *Hale v. Akers*, 132 U. S. 554, 33 Law. Co. Ed. 442.

§ 19. **Statutory Mode of Review Exclusive**—A question as to the mode of reviewing judgments may be here touched upon, for although not directly connected with the subject of our discussion, it is yet so nearly allied to it as to render its discussion convenient and not altogether illogical. It may be said with accuracy that the general rule is that where a valid statute provides the mode of reviewing a judgment, that mode must be pursued.¹ This question connects itself with the general subject of appellate jurisdiction, inasmuch as a court can not have authority over a case where parties assume to bring it within the authority of the court in a mode wholly unauthorized by law. The rule we have stated can not, of course, control where there is a law under which jurisdiction may exist over the general subject and errors or irregularities occur in attempting to comply with the law. Nor is the rule so important under a system like ours, where there is one method of securing a review of a judgment by an appellate tribunal, as it is in States where there are both appeals and writs of errors. But, as will appear in subsequent pages, the rule is not without importance in this State.

§ 20. **Incidents of Appellate Jurisdiction**—Appellate jurisdiction is naturally the essential attribute of a court created by constitutional warrant for reviewing the decisions of inferior courts. The jurisdiction of an appellate tribunal is not exercised over ministerial or administrative officers directly, for when it exercises such authority it proceeds as a court of original jurisdiction.² But it is not to be understood that an express statutory provision is required to confer upon an appellate tribunal authority to exercise auxiliary authority in aid of its appellate power, although such auxiliary authority may be in

¹ *Anderson v. People*, 28 Ill. App. 317; *Lang Syne Gold Mining Co. v. Ross*, 20 Nev. 127, S. C. 18 Pac. R. 358; *State v. Easton, etc., Co.* (Md.), 20 Atl. R. 242; *Idaho, etc., Co. v. Bradbury*, 132 U. S. 509, 33 Law. Co. Ed. 433, 10 Sup. Ct. R. 177.

² *Auditor of State v. The Atchison, etc., Co.*, 6 Kan. 500. In that case the

court said, "The term, then, 'appellate jurisdiction' as used in the constitution has some other meaning than that there should be merely an appeal from some decision or act of an officer of the State and it is this meaning of the term that is sought for." See, also, *Crane v. Giles*, 3 Kan. 54; *Ex parte Logan Branch Bank*, 1 Ohio St. 433.

its nature original, for all courts of the rank of appellate courts proper have such general powers as are necessary to enable them to effectually exercise the jurisdiction conferred upon them.

§ 21. **Power of Appellate Tribunals to frame Judgments**—The general authority to review and revise necessarily includes the right to enforce the law and administer justice. In the exercise of this authority an appellate tribunal may so mold its judgments as to secure the proper relief to the parties entitled to it.¹ The fact that a question may be presented in a particular mode does not always restrict an appellate court to a particular course; for it may, upon an inspection of the whole record, pronounce such a judgment as will secure justice to the parties. It is inconceivable that a high court of justice, such as an appellate tribunal, may not, upon an investigation of the record, so frame its judgment as to prevent the defeat of justice by technical and arbitrary rules.² The denial of this right involves the affirmation that the highest courts can not award justice, and this conclusion can not be vindicated, since the underlying and sovereign principle is that the right of appeal insures to litigants who have obeyed the substantive rules of law and conformed to the rules of procedure a judgment awarding them justice under the laws of the land. It must be true, therefore, that a high appellate tribunal may deliver and enforce a judgment

¹ In *Piqua Bank v. Knoup*, 6 Ohio, 342, it was said by one of the judges that, "Appellate jurisdiction is the cognizance which a superior court takes of a case removed to it by appeal or writ of error from the decision of an inferior tribunal. The power of the appellate court necessarily includes the power not only to reverse the judgment, but also to control and direct the subsequent action of the subordinate court. Appellate jurisdiction, therefore, always implies the existence of subordinate courts in the same judicial organization over which the court in which it is

vested exercises a supervising or correcting control."

² This general doctrine is fully recognized in *Buchanan v. Milligan*, 108 Ind. 433, 435; *Shannon v. Hay*, 106 Ind. 589; *Sohn v. Cambern*, 106 Ind. 302; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Cottrell v. Nixon*, 109 Ind. 378; *Roberts v. Lindley*, 121 Ind. 56, 59; *Louisville, etc., Co. v. Etzler*, 119 Ind. 39; *Murdock v. Cox*, 118 Ind. 266, 269; *Brown v. Jones*, 113 Ind. 46, 50; *Bartholomew v. Pierson*, 112 Ind. 430; *Parker v. Hubble*, 75 Ind. 580; *Yerkes v. Sabin*, 97 Ind. 141.

that will prevent wrong and award justice to the parties entitled to it.

§ 22. **Grant of Appellate Jurisdiction**—The grant of appellate jurisdiction, whether made by the constitution or by a statute, necessarily vests in the tribunal designated all powers of an incidental nature that are required to make the granted jurisdiction effective. Upon this principle it is held that in every appellate tribunal resides the power to coerce obedience to its orders, writs and mandates.¹ This incidental power may, indeed, be safely placed on higher ground, for it may be securely rested on the ground that all appellate tribunals, as of the very essence of their existence, possess inherent judicial powers. It seems impossible to conceive of the existence of a high judicial tribunal so hedged in by legislative restrictions as to be incapable of effectively and freely exercising the branch of sovereign power which is placed, and must of necessity be placed, in the judiciary in all free governments. If the legislature can shackle the judicial power so that its judgments can not be made effective, or its functions exercised as the judges deem it right and just to exercise them, then, courts are nothing more than the mere passive organs of legislative will, pronouncing legislative decisions and not judicial judgments. It is, perhaps, not now possible to draw the exact line between the two departments, but there is a line, and that line has been again and again recognized as existing, although it has never been traced with distinctness.

§ 23. **Determination of the Question of Right of Appeal**—An essential incident of superior appellate jurisdiction is that the appellate tribunal must determine when an appeal will lie and whether it is well taken; the decision of these questions is for the higher tribunal, and its freedom of action can not be fettered

¹ *Mitcheson v. Foster*, 3 Metc. (Ky.) 324. This incidental power is inherent in every appellate tribunal. In order to maintain its existence and enforce its orders the courts may assume jurisdiction essentially original in its nature. Issues of fact may be formed on appeal and there determined. *Brown v. Carraway*, 47 Miss. 668; *Planters Ins. Co. v. Cramer*, 47 Miss. 200, 206; *Belew v. Jones*, 56 Miss. 592.

by the rulings of the lower court.¹ It is not, of course, within the power of any tribunal to create an independent system of appellate procedure,² for all courts, high or low, must yield to the law of the land. But it is for the superior appellate tribunal to determine the nature and extent of its jurisdiction, guided and limited, however, by the statutory and common law, and it is also for that tribunal to pronounce the ultimate decision upon the question whether an appeal has been properly taken.

§ 24. **Blending of Legal and Equitable Jurisdiction**—The appellate jurisdiction under statutes combining in one system legal and equitable rights and providing for one remedial system is necessarily different in detail from appellate jurisdiction in the States where the distinction between law and equity is rigidly maintained, but the same great principles prevail whether the old system remains in force in all its vigor or whether it is modified by the code system.³ The reformed system is simpler, more efficacious and less technical than the old with its cumbersome petitions for leave to take out a writ of error and its intricate machinery. Appeal under the code system is much more than an appeal under the old system, and, yet, in some respects an appeal under the code system may be less comprehensive in its scope than an appeal under the old system.⁴ An

¹ *Keighler v. Savage, etc., Co.*, 12 Md. 333; *Lester v. Howard*, 24 Md. 233; *Thompson v. McKim*, 6 Har. & J. 302; *Armstrong v. Athens Co.*, 16 Peters, 381; *United States v. Emholt*, 105 U. S. 414.

² In the case of the Attorney General *v. Sillem*, 10 H. L. Cases, 704, Lord Chancellor Westbury said: "The creation of a new right of appeal is plainly an act which requires legislative authority. The court from which the appeal is given, and the court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right." *The Schooner Constitution v. Woodworth*, 1 Scam. (Ill.) 511; *Ed-*

wards v. Vandemack, 13 Ill. 633; *Street v. Francis*, 3 Ohio, 277; *Grover v. Coon*, 1 N. Y. 536; *McNulty v. Batty*, 10 How. (U. S.) 71.

³ The truth is that the great and fundamental principles of remedial justice must be the same no matter by what name they may be called or what forms they may assume. Legislatures may modify forms and change names, but the essential attributes of the great principles of remedial justice can not be changed by legislative declarations.

⁴ "A writ of error," says Judge Curtis, "carries up nothing but questions of law, and these questions of law are to be determined according to the facts which are found in the record—an appeal carries up everything—it substi-

appeal under the code system combines all that could be accomplished by a writ of error and all of value that could be accomplished by an appeal under the rules of the chancery system. It unites in one system the merits of the two former systems and excludes the vices of arbitrariness and technicality which deformed the common law mode of procedure. In the appellate jurisdiction of States with statutes similar to ours the chancery element is the predominant one but the common law element remains, nevertheless, an important factor.

tutes the higher court in place of the lower court, and all questions, whether of law or of fact, depending upon evidence or law are re-examinable by the appellate court just as they were originally examined by the court having original jurisdiction." Jurisdiction of the Courts of the United States, 61. It is evident that an appeal under the code system does not necessarily bring up the entire case; it is indeed doubtful whether it necessarily had that effect in every instance under the former system. *Vanderveer v. Holcomb*, 17 N. J. Eq. 547. Nor does an appeal under the code system require the appellate tribunal to re-examine questions of law and fact as they were examined in the trial court. So far as concerns questions of law examinable on appeal the rule which prevailed in the common law procedure is still the dominant one.

CHAPTER III.

THE SUPREME COURT.

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| 23. The rank of the Supreme Court. | § 36. Incidents of a class go with it. |
| 26. The repository of appellate jurisdiction. | 37. Equity cases. |
| 27. Can not be transformed into a <i>visi prius</i> court. | 38. What are considered equity cases. |
| 28. Mode of procedure. | 39. Foreclosure of liens on property. |
| 29. Trial of questions of fact. | 40. Title to land—Cases involving. |
| 30. No right to trial by jury on appeal. | 41. Prosecutions for felony. |
| 31. Territorial jurisdiction. | 42. Actions to recover statutory penalties. |
| 32. Constitutional questions. | 43. Municipal ordinances. |
| 33. How constitutional questions must appear. | 44. Where the principal appellate jurisdiction is vested. |
| 34. Statutory jurisdiction. | 45. Inherent powers. |
| 35. Classes of cases taken from the jurisdiction of the Supreme Court. | 46. Opinions—Constitutional requirements. |

§ 25. **The Rank of the Supreme Court**—The Supreme Court is the highest judicial tribunal of the State. This conclusion is required by the words of the constitution.¹ But there is an additional reason for the conclusion stated. In the very necessity created by a system of government of delegated and distributed powers there must be lodged somewhere supreme and paramount judicial power. It is inconceivable that one element of sovereign power can be so dissected and distributed that it may be parceled out among several tribunals.² Supreme judicial power is no more capable of partition than is the executive or the legislative power. If it were, there could be no court of

¹ Const., Article 7, §§ 1 to 4; Tesh Commonwealth, 4 Dana (Ky.), 522; Frame v. Trebble, 1 J. J. Marshall (Ky.), 205; Stark v. Thompson, 3 J. J. Marshall (Ky.), 300.

² We do not enter into the field of strife so much fought over by those who

maintain that sovereign power is indivisible and those who oppose. We content ourselves with saying that a unit of power, such as the judicial, can not be so cut into parts so as to place one supreme part in one court and another supreme part in another court.

final resort, and if no such court, then, no question could ever be finally and authoritatively decided. If there were no tribunal possessing power to put a question at rest, confusion leading to anarchy would necessarily be the ultimate result. It is true, therefore, that there is, and must be, in every organized free government, a supreme judicial tribunal.

§ 26. **Repository of Appellate Jurisdiction**—The Supreme Court, as the highest judicial tribunal of the commonwealth, necessarily possesses all the appellate jurisdiction distributed by the constitution or the laws not elsewhere lodged by valid enactments. What part of the appellate jurisdiction less than that which is in its nature paramount and supreme may be taken from it and conferred upon inferior tribunals, it would be very difficult to determine, but this much is certain: All of the appellate jurisdiction not expressly or impliedly taken from the Supreme Court remains in that tribunal. All jurisdiction of an appellate character conferred upon other tribunals is carved out of that which originally dwelt in the Supreme Court. The great jurisdictional field is that of the Supreme Court, and all that is given to other tribunals is taken from that great field, leaving all parts and parcels of the field not taken in the tribunal originally the possessor of it.¹ A statute is required to subtract from its jurisdiction, and it loses only what is validly subtracted.

§ 27. **Can not be Transformed into a Nisi Prius Court**—The Supreme Court is essentially and primarily an appellate tribunal. The constitution ordains that this shall be its character. It is true that it is provided, that "it shall also have such original jurisdiction as the general assembly may confer,"² but this isolated and fragmentary provision can not, in view of other constitutional provisions and of the purpose for which the court was created, be construed as empowering the legislature to transform the highest judicial tribunal of the State into a mere *nisi prius* court.³ Constitutions are to be construed by the light of

¹ *Ex parte* Sweeney, 126 Ind. 583.

² Const., Article 7, § 4.

³ This is true for the further reasons

outlined in the preceding paragraph, that the highest constitutional tribunal of the State must, because of the parti-

attendant facts and with reference to existing systems. These considerations, when taken in connection with other provisions of the constitution and in connection with the fact that the article in which the provision is found distributes the whole judicial power of the State, forbid the conclusion that the highest court of the State may be made a mere trial court and compelled to hear and determine controversies as a court of original jurisdiction. Doubtless some original jurisdiction may be conferred upon the Supreme Court, but a complete and radical transformation can not be effected by legislative enactments.

§ 28. **Mode of Procedure**—As the Supreme Court is essentially an appellate tribunal its powers are necessarily such as are inherent in such a tribunal or are conferred upon it by constitutional statutes, and its modes of procedure are those of a tribunal of its rank and character. It does not proceed as a trial court but as a court of errors or appeals. Questions of fact may, in rare instances, require decision as original questions, but even in hearing and deciding such questions it does not proceed as a trial court of original jurisdiction. All questions of fact are, of necessity, connected with the appellate power of the court, and, therefore, are not, except possibly in rare cases where the court is invested with original jurisdiction, to be disposed of as independent issues originating in a trial court. It seems clear that, whether trying questions of fact or of law, the Supreme Court acts as an appellate tribunal unless the case is one where a valid statute expressly or impliedly requires it to act as a court of original jurisdiction. If it does act as an appellate tribunal it is not bound to call a jury, although the question for decision may be one of fact.

§ 29. **Trial of Questions of Fact**—It is very doubtful whether an appellate tribunal acting as such can call a jury to decide a question of fact for it,¹ as there is no law providing for such a

tion of the governmental departments, preme Court has authority to call a be one of final resort, where litigation jury. Buskirk's Practice, 117. This may be ended by a decision from which we think is an erroneous conclusion as there is no further appeal. will appear from the text. The House

¹ Judge Buskirk declares that the Su- of Lords of England or the Supreme

proceeding. It would require judicial legislation to make provision for summoning and impaneling a jury, and, certainly, the court has no legislative power. It is true that the legislature has assumed to confer upon the court authority to make rules for the trial of questions of fact.¹ But this assumption of power is foundationless, for these reasons: First. Legislative power can not be delegated.² Second. Only judicial duties can be devolved upon a court.³ Another consideration exerts an important influence upon the question, and that is this: Trial by jury is not an incident of appellate jurisdiction. It is, therefore, quite doubtful whether the legislature has power to enact a statute compelling the Supreme Court to summon a jury to decide any question. It seems clear, at all events, that the constitution imposes upon the court the duty of deciding all questions brought before it as an appellate tribunal, and, that, if this be true, the duty can not be evaded or delegated.

§ 30. **No Right to Trial by Jury on Appeal**—It is quite clear that the Supreme Court is not, under existing statutes, obliged to call a jury to decide any question.⁴ Our constitution does not create the right of trial by jury; it simply provides that the “trial by jury shall remain inviolate.”⁵ This provision refers to the great right of trial by jury as created and preserved by the common law.⁶ As the right to trial by jury in appellate

Court of the United States have certainly not called juries, nor, so far as we can ascertain, has any other court of last resort, and we can conceive no source from which a right to call a jury can be derived. Certainly not from the common law. It seems to us that the duty of deciding is devolved upon the court and can not be delegated, in whole or in part, to a jury.

¹ R. S. 1881, § 656.

² *Smith v. Strother*, 68 Cal. 194; *In re School Manual*, 63 N. H. 574; *Gould v. Raymond*, 59 N. H. 260; *In re Pacific R. R. Co.*, 32 Fed. R. 241; *Doe v. Conidine*, 6 Wall. 458.

³ *Ex parte Griffiths*, 118 Ind. 83, Cooley's Principles of Const. Law, 53;

Cooley's Constitutional Lim., 139, 148.

⁴ *The Board of Commissioners of Huntington Co. v. Brown*, 14 Ind. 191.

⁵ Const., Article 1, § 20.

⁶ *Anderson v. Caldwell*, 91 Ind. 451, 455; *Indianapolis, etc., Co. v. Christian*, 93 Ind. 360; *Ross v. Davis*, 97 Ind. 79; *Lipes v. Hand*, 104 Ind. 503; *Lavery v. State*, 109 Ind. 217; *Pennsylvania R. R. Co. v. First German Lutheran Congregation*, 53 Pa. St. 445; *In re Lower Chatham*, 35 N. J. L. 497; *McKinney v. Mononghela Co.*, 2 Harris (Pa.), 65; *Kendall v. Post*, 8 Oregon, 141; *Livingston v. Mayor*, 8 Wend. 85; *Heyneman v. Blake*, 19 Cal. 579; *Ames v. Lake Superior, etc., Co.*, 21 Minn. 241.

courts did not exist at common law, and as our constitution does not create the right, it follows that no court of exclusively appellate jurisdiction is bound to try questions of fact by a jury. It has never been done, and, as said by a learned author, "is never likely to be done."¹

§ 31. **Territorial Jurisdiction**—The territorial jurisdiction of the Supreme Court is co-extensive with the State.² The constitution defines the boundaries of the state, and under the construction given it, the exclusive jurisdiction³ of the State extends at least to low water mark on the Ohio river.⁴ The county bordering on the river is, of course, the seat of original jurisdiction, and the appellate tribunal acquires jurisdiction by appeal from the local courts. It is probably true that the jurisdiction of our courts over the Ohio river is to some extent concurrent and not exclusive. If this be true, then it would seem to follow that, where the cause of action grows out of an act done on a river where the jurisdiction is concurrent, jurisdiction remains with the court which first acquires it.

§ 32. **Constitutional Questions**—Constitutional questions are for the Supreme Court in every case where there is a right of appeal, no matter what may be the nature of the case in which they arise or the class to which the case in which they arise belongs. The act creating the Appellate Court so provides, but without any such provision it is evident that jurisdiction is in the Supreme Court.⁵ It is, of course, easy to declare that all constitutional questions are for the Supreme Court, but it is

¹ 2 Works Pr., § 1087.

² Const., Article 7, § 4.

³ Const., Article 14.

⁴ *Carlisle v. State*, 32 Ind. 55; *Sherlock v. Alling*, 44 Ind. 184; *Dougan v. State* (Ind.), 25 N. E. R. 171; *Dorsey v. State* (Ind.), 25 N. E. R. 350; *Welsh v. State* (Ind.), 25 N. E. R. 883; *McFall v. Commonwealth*, 2 Metcf. (Ky.) 394. See, generally, *People v. Tibbitts*, 19 N. Y. 523; *Parker v. Cutler Milldam Co.*, 20 Me. 353; *Stoughton v. State*, 5

Wis. 291; *Withers v. Buckley*, 20 How. 84; *Handly v. Anthony*, 5 Wheat. 374. But, see *Indiana v. Kentucky*, 136 U. S. 479.

⁵ Questions of such grave importance, affecting the organic law itself and arising upon the enactments of the law making power, demand the highest exercise of judicial power. It seems clear, therefore, that their ultimate decision must be by the highest court of the commonwealth.

by no means easy to say when such questions are so presented as to require a decision. As is well known, courts will only decide constitutional questions when they are in the record and are manifestly necessary to a final determination of the case.¹ It is also well settled that a party not affected by a statute can not present a question as to its validity and compel a decision.²

§ 33. **How Constitutional Questions must Appear**—It must fairly appear that a constitutional question is in the record, and that the party who assumes to make the question has a right to do so, but these things need not conclusively or even decisively appear, for if it appears, from an inspection of the record, that there is reason for inferring or adjudging that the record does present a constitutional question, jurisdiction is in the Supreme Court. If it were held otherwise, it might deprive a party of the right to a decision by the Supreme Court, since it would leave the question whether the validity of a statute is involved to the Appellate Court, and its decision would shut off the right of a party to invoke the judgment of the tribunal to which jurisdiction over such questions is committed. Mere assertion that a constitutional question is presented will not be sufficient, but if it appears that the question whether a statute is or is not valid is involved, is a fairly debatable one, the case belongs to the Supreme Court.³ Reasonable ground for asserting that a constitutional question is involved should be deemed sufficient to establish the jurisdiction of the tribunal invested with authority over such questions, for it can not be justly asserted that the

¹ *Hoover v. Wood*, 9 Ind. 286; *Ireland v. Palestine, etc., Turnpike Co.*, 19 Ohio St. 369; *Smith v. Speed*, 50 Ala. 276; *Allor v. Auditor*, 43 Mich. 76; *Ex parte Randolph*, 2 Brock, 447; *Mobile, etc., Co. v. State*, 29 Ala. 573.

² *Wagner v. Town of Garrett*, 118 Ind. 114; *Commonwealth v. Wright*, 79 Ky. 22, S. C. 42 Am. R. 203; *Marshall v. Donovan*, 10 Bush. (Ky.) 681; *Smith v. McCarthy*, 56 Pa. St. 359;

People v. Rensselaer, etc., Co., 15 Wend. 113, S. C. 30 Am. Dec. 33; *Sinclair v. Jackson*, 8 Cow. 543; *Antoni v. Wright*, 22 Gratt. 833, 857; *In re Wellington*, 16 Pick. 87, 96; *Jones v. Black*, 48 Ala. 540; *Williamson v. Carlton*, 51 Me. 449.

³ *State v. Elam*, 21 Mo. App. 290; *Kamerick v. Castleman*, 29 Mo. App. 658; *Post*, § 49.

Appellate Court can foreclose the right of the parties by deciding that no such question is involved in the case.¹

§ 34. Statutory Jurisdiction—The subject of the statutory jurisdiction of the Supreme Court may be introduced by repeating what has been in substance already said, that the whole appellate jurisdiction, however created, is in that tribunal, save only as parts or parcels of the jurisdiction have been taken from it and lodged elsewhere. The act creating the Appellate Court does take some of the jurisdiction from the Supreme Court, and to that act we must look to ascertain what jurisdiction has been taken from the Supreme Court.² In considering, as we shall presently do, the subject of the jurisdiction of the Appellate Court we shall show what classes of cases go to that tribunal and, in doing that, shall incidentally show what cases remain in the Supreme Court.

§ 35. Classes of Cases Taken from the Jurisdiction of the Supreme Court—The cases which fall within the jurisdiction of the Appellate Court may, in a very general way,³ be said to be these: All prosecutions for misdemeanors, actions which originate before a justice of the peace, all actions for the recovery of money only where the amount in controversy does not exceed one thousand dollars, all actions for the recovery of specific per-

¹ *Ex parte Sweeney*, 126 Ind. 583; *Chaplin v. Commissioners of Highways*, 126 Ill. 264, 274; *McCormick v. St. Louis, etc., Co.*, 20 Mo. App. 65; *State v. Kaub*, 15 Mo. App. 433; *Clarkson v. Guernsey, etc., Co.*, 22 Mo. App. 109; *Benson v. Christian (Ind.)*, Nov. 19, 1891; *Benson v. Christian (Ind. App. Ct.)*, Oct. 30, 1891. This is in harmony with the general doctrine that the ultimate decision of the question, whether a case is or is not appealable, must be made by the tribunal which the law invests with power to finally decide the case. Whether an appeal lies is generally a question for the higher court, since it must determine its own jurisdiction; that question

can not be determined by an inferior tribunal. The effect of the order of the Supreme Court directing a transfer of the case has been held to conclusively adjudge that no constitutional questions are presented. *State v. Farrell*, 23 Mo. App. 176; *State v. Kaub*, 23 Mo. App. 177.

² Act approved February 28, 1891, Acts of 1891, p. 39. See, *Post*, Chapter IV, *Ex parte Sweeney*, 126 Ind. 583.

³ It is only necessary to speak of the cases within the jurisdiction of the Appellate Court in a very general way as the subject is treated at length in Chapter IV. See, also, *Ex parte Sweeney*, 126 Ind. 583.

sonal property, all actions for the recovery of demised premises where the relation of landlord and tenant exists, and appeals from judgments or orders allowing or disallowing claims against decedents' estates. These cases, with all their incidents, are within the jurisdiction of the Appellate Court saving and excepting always cases where the validity of a statute, Federal or State, is involved, and cases where some other controlling element carries it to the Supreme Court.¹ Upon a like principle it must be held that all other cases wherein an appeal lies, with all their incidents, are within the jurisdiction of the old tribunal. The decisions that have been announced give full recognition to the doctrine that the incidents go where the principal goes.²

§ 36. **Incidents of a Class go with it**—The rule that the incidents of a class of cases follow the class is founded on principle and is required to prevent interminable confusion. The foundation doctrine is that the grant of a principal right or power carries all the necessary incidents, and this doctrine runs through all jurisprudence.³ If any other rule than that stated be adopted confusion that can neither be removed nor cleared away will result, for without such a rule cases would necessarily be dissected into parts and distributed piecemeal. The only mode in which this evil can be prevented is by a strict adherence to the rule that all the incidents go with the class. The only inconvenience or confusion that can arise from an adherence to this rule is that growing out of the difficulty of determining what is the principal and what the incident, but this difficulty is infinitely less serious than the perplexing difficulties which would certainly result from an attempt to sever a class of cases into fragmentary parts.

§ 37. **Equity Cases**—The rule that the incidents go with the

¹ *Duckworth v. Mosier* (Nov. 5, 1891). See, *Post*, § 40, and authorities collected in note.

² *Baker v. Groves*, 126 Ind. 593; *Evansville, etc., Co. v. Swift*, 128 Ind. 34; *Parker et al. v. Indianapolis Nat. Bank*, 126 Ind. 595; *Harris v. Howe* (Ind.), 27 N. E. R. 561; *Courtney v. Courtney* (Oct. 10, '91).

³ *Warren v. Henly*, 31 Ia. 31; *McNamara v. Estes*, 22 Ia. 246; *New Haven v. Whitney*, 36 Conn. 373; *O'Leary v. Sloo*, 7 La. Ann. 25; *Smith v. Newbern*, 70 N. C. 14, S. C. 16 Am. R. 766; *Cook County v. McCrea*, 93 Ill. 236; *Smit v. City of Madison*, 7 Ind. 86; *Cummings v. Mayor*, 11 Paige, 596.

principal casts all cases where purely equity jurisdiction is invoked to the Supreme Court,¹ but it by no means carries there all cases in which equitable principles are applied.² Even justices of the peace should be guided by equitable principles (and theoretically, at least, are so guided), and yet they can not exercise equity jurisdiction.³ It is, therefore, not merely where equitable principles are applied that cases fall to the Supreme Court, but it is where equity jurisdiction is invoked or equitable relief is awarded. The character of the jurisdiction, and not the rules of decision, must control. All cases where strictly equity jurisdiction is called into exercise and equitable relief must be awarded, go to the Supreme Court, since there the original jurisdiction resided and no cases of purely and exclusively equitable cognizance are taken from that tribunal. Within this general rule fall suits for injunction, suits to enforce the specific performance of contracts, suits for rescission, suits to secure the construction of wills,⁴ suits to foreclose legal and equitable liens on real property, and many other cases of purely equitable cognizance. In short, where purely equity jurisdiction is exercised or invoked the case does not leave its original place in appellate jurisdiction.

§ 38. **What are considered Equity Cases**—A test by which to determine the question of jurisdiction is supplied by the maxim that "Equity acts specifically, and not by way of compensation." Where a specific decree is required then, as a general rule, jurisdiction is in the Supreme Court. It may be that a money judgment should be embodied in a decree and still the jurisdiction remain in that court, inasmuch as where specific relief is requisite there is in such cases something more than recovery "of money only." Wherever a specific decree is

¹ *Ex parte Sweeney*, 126 Ind. 583.

² *Baker v. Groves*, 126 Ind. 593.

³ *Albrecht v. C. C. Foster Lumber Co.*, 26 N. E. R. 157, and cases cited. There is a palpable difference between equitable principles and equity jurisdiction. The equity jurisdiction can only be exercised by a court invested with

equity power, but equitable principles may be administered by any court.

⁴ *Faught v. Faught et al.*, 98 Ind. 470; *Stewart v. Stewart*, 31 Ala. 207; *Car-michael v. Browder*, 3 How. (Miss.) 252; *Rosenberg v. Frank*, 58 Cal. 387; *People v. Davidson*, 30 Cal. 379.

necessary an additional element is annexed, and inseparably annexed, to a money recovery, although a money recovery may be also adjudged as part of the decree which awards the specific relief.

§ 39. **Foreclosure of Liens on Property**—Decisions of our own court fully illustrate and enforce the rule that the fact that a money recovery is embodied in a decree does not control the question of jurisdiction. The cases referred to are those which declare that a suit to foreclose a mortgage lien is one of equity cognizance, although there may also be a money recovery upon a note secured by the mortgage.¹ The underlying principle is that the equitable element is the controlling one, and, as such, gives character to the case.² It is evident that the rule asserted in the cases referred to is the correct one when it is brought to mind how stubbornly the early English chancellors fought to establish the authority of equity in foreclosure suits, and how firmly the maxim quoted is rooted in our jurisprudence. To sanction the division which must necessarily be made if it be granted that where there is a money recovery the case is not of equity jurisdiction, although there is a specific decree, would lead to disastrous results, for, in almost every case of the foreclosure of a lien a sum is decreed to be due, and, although the sum adjudged to be due is not always woven into a personal judgment yet this is often done.³

¹ *Carmichael v. Adams*, 91 Ind. 526; *Brighton v. White*, 128 Ind. 320; *Rogers v. Union Central Ins. Co.*, 111 Ind. 343; *Kedy v. Kramer*, Ind. App. Ct., 28 N. E. Rep. 1121. The doctrine applies to a suit to foreclose a chattel mortgage. *Brown v. Russell & Co.*, 105 Ind. 46. This principle applies to suits to set aside fraudulent conveyances. *Fields v. Holzman*, 93 Ind. 205; *Israel v. Jackson*, 93 Ind. 543. See, generally, *Lake Erie, etc., Co. v. Griffin*, 92 Ind. 487; *Lake v. Lake*, 99 Ind. 339.

² *Armstrong v. Gilchrist*, 2 Johns Cases, 424; *Hepburn v. Dunlop*, 1 Wheat. 179; *Oelrichs v. Spain*, 15 Wal.

211; *Souder's Appeal*, 57 Pa. St. 498; *McGown v. Remington*, 12 Pa. St. 56; *Henderson v. Dickey*, 50 Mo. 161; *Phelan v. Boylan*, 25 Wis. 679, 1 Pom. Eq. Jur., Sec. 231; *Kimble v. Seal*, 92 Ind. 276.

³ The principle that jurisdiction for one purpose is jurisdiction for all purposes would be violated by dissecting a case into parts and giving one court jurisdiction over one element and another court jurisdiction over another. There must be one dominating element which, "like Aaron's serpent, rules all the rest."

§ 40. **Title to Land, Cases Involving**—All cases concerning the title to real estate except cases arising between landlord and tenant are within the jurisdiction of the Supreme Court. This is true whether the case is one of legal or equitable cognizance, for no authority over questions affecting the title to real property is conferred upon the Appellate Court, and the jurisdiction remains where the great body of appellate jurisdiction is vested. It is, indeed, possible that in cases where it is the right of parties to put the title in issue, and they do appropriately so put it in issue that it must be decided, the jurisdiction is in the Supreme Court, although the action was originally between landlord and tenant. This conclusion seems warranted by the words of the act creating the Appellate Court, for they confine the jurisdiction of that court to cases where the relation of landlord and tenant exists, and where the relief sought is the possession of the "leased premises."¹ If a title destroying that relation is so asserted as to require an adjudication it is difficult to conceive why the case is not within the jurisdiction of the tribunal invested with authority over all questions of title. It can, however, seldom happen that a question of title can be put in issue since the familiar rule that a tenant can not deny the title of his landlord is of such wide sweep, that in the great majority of cases where the relation of landlord and tenant ex-

¹ *Duckworth v. Mosier* (Nov. 4, 1891). Here, again, the principle that what is not taken from the Supreme Court there remains, is of controlling importance. What is not excluded from the jurisdiction of that court is there still. The form of the action or suit in which the title to real estate is involved is not of controlling importance. If title to land is rightfully put in issue so that the final decision must take from one party the land and give it to another, the ultimate appellate jurisdiction is in the Supreme Court. This is the effect of the decisions in *Duckworth v. Mosier* (Nov. 4, 1891), and *Evansville, etc., Co. v. Swift*, 128 Ind. 341. The doctrine is declared and enforced

under an appellate system similar in many respects to ours. *Snell v. Snell*, 123 Ill. 403; *Frank v. King*, 121 Ill. 250; *Brace v. Black*, 125 Ill. 33; *Rice v. Hall*, 21 Ill. App. Ct. 288; *Lehman v. Rothbarth*, 111 Ill. 194; *Commissioners v. Kelsey*, 120 Ill. 483; *Kilgour v. Drain Commissioners*, 111 Ill. 348; *Moyer v. Swygart*, 21 Ill. App. Ct. 497. *Gage v. Scales*, 100 Ill. 218; *Chicago, etc., Co. v. Watson*, 105 Ill. 217. The cases to which we have referred present illustrations of many forms in which the question has arisen, and they unite in declaring the rule substantially as we have stated it. See, *post*, §§ 51, 52, Chapter IV.

ists, no question of title can be made. But there may, we suppose, be rare cases where, although the action was originally commenced by one claiming as landlord, the question of title can be put in issue as fully and directly as in any other class of cases, as, for instance, where it is clearly and properly shown that the landlord's title has been lost since the execution of the lease, and the tenant holds under another lessor.¹ Where the title can be put in issue and is actually and appropriately put in issue, it would seem to be the dominating question, completely overshadowing the question of the right of the lessor, as against the lessee, to the possession of the demised premises.²

§ 41. **Prosecutions for Felony—Habeas Corpus**—It is hardly necessary to say that all prosecutions for misdemeanors, no matter where they originate, are within the jurisdiction of the Appellate Court, except, of course, where the validity of a statute is involved, and hence they are excluded from the jurisdiction of the older tribunal. The vesting of the new court with jurisdiction in cases of misdemeanor leaves all prosecutions for felony within the jurisdiction of the Supreme Court. It would seem that all *habeas corpus* proceedings, although the arrest may grow out of a prosecution for a misdemeanor, must be within the jurisdiction of that court, since jurisdiction of such cases is not taken from it.

¹ *Tobin v. Young*, 124 Ind. 507; *Sims v. Cooper*, 106 Ind. 87; *Willison v. Watkins*, 3 Pet. 43; *Jackson v. Wheeler*, 6 Johns. 272.

² *Kinney v. Doe*, 8 Blackf. 350; *Kellum v. Berkshire, etc., Co.*, 101 Ind. 455; *Delaney v. Fox*, 2 C. B. N. S. 768; *Elliot v. Smith*, 23 Pa. St. 131; *Weichselbaum v. Curlett*, 20 Kan. 709; *Sharpe v. Kelley*, 5 Denio. 431; *Whiting v. Edmunds*, 94 N. Y. 309; *Fuller v. Sweet*, 30 Mich. 237. Where the title to land is properly put in issue the justice of the peace ceases to have authority to do anything more than certify the case to the circuit court. *Kiphart v. Brennemen*, 25 Ind. 152; *Short v. Bridwell*, 15 Ind. 211; *O'Connell v. Gillespie*, 17 Ind. 459; *Burgett v. Bothwell*, 86 Ind. 149. Some of the expressions contained in the cases cited seem to conflict with the doctrine of the well-considered case of *Judy v. Citizen*, 10 Ind. 18, and so far as they do so they are probably erroneous. The doctrine is that title is not in issue, for even an owner can not resort to force. *Archer v. Knight*, 61 Ind. 311, 313; *People v. King*, 2 Caines, 98; *People v. Leonard*, 11 Johns. 504; *Schroeder's McDonald Treatise*, 30, 485. To oust the jurisdiction of the justice it must appear that the title is actually in issue. *McLoh v. DeMott*, 79 Ind. 502.

§ 42. **Actions to Recover Statutory Penalties**—Where lies the jurisdiction in *quasi* criminal cases, that is, in actions to recover statutory penalties, is a question of some difficulty. We venture, however, to suggest that where the amount in controversy does not exceed one thousand dollars, the jurisdiction is in the Appellate Court. The reason which leads us to this conclusion is that the ultimate relief obtainable is the recovery of money only, and the remedy is a civil action.¹ Where, however, the validity of a statute is involved, the jurisdiction is in the Supreme Court.

§ 43. **Municipal Ordinances**—There is an anomalous class of cases which presents a special difficulty. The class to which we refer is that of prosecutions to recover penalties for the violation of municipal ordinances. It seems, however, that where the validity of the ordinance is in issue the jurisdiction remains in the Supreme Court, but where the simple question is whether the facts show a violation of the ordinance the jurisdiction is in the Appellate Court.² The enactment of a municipal ordinance is the exercise of a local legislative power and a municipal ordinance is, in effect, a local statute,³ so that in cases where its validity is challenged the question is one of power,⁴ hence it is reasonable to conclude that such a case, that is, a case where the question is purely one of power, is for the Supreme Court. Questions affecting the mere form observed or disregarded in enacting the ordinance, as, for instance, whether it was regularly recorded, will not make the case one for the Supreme Court.⁵ Where no question of power is involved, the case is for

¹ *Durham v. State*, 117 Ind. 477; *The Western Union Tel. Co. v. Scircle*, 103 Ind. 227; *United States v. Colt, Peters* C. C. R. 145; *Washington v. Eaton*, 4 Cranch C. C. 352.

² *City of Hammond v. The New York, etc., R. R. Co.*, 126 Ind. 597.

³ *Town of Elwood v. The Citizens', etc., Co.*, 114 Ind. 332; *The Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; *Blanchard v. Bissell*, 11 Ohio St. 96;

State v. Lee, 29 Minn. 445, S. C. 4 Crim. Law Mag. 79, 81.

⁴ If any other rule be adopted, it will defeat the provision of the Appellate Court act, which excludes questions of the validity of a statute from the jurisdiction of the newly created tribunal, and it would, also, contravene the principle that jurisdiction not taken from the older tribunal still remains.

⁵ *City of Hammond v. New York, etc., Co.*, 126 Ind. 597.

the Appellate Court inasmuch as the action is, in its essential features, a civil action to enforce a statutory penalty,¹ and the question whether the ordinance was, or was not, regularly passed is merely an incidental one, as is the question whether the evidence shows a violation of the ordinance. Under the rule heretofore stated, these incidental questions travel with the principal ones; where the latter go, they go.

§ 44. Where the Principal Appellate Jurisdiction is Vested—It is evident, without going further into details, that the great body of appellate jurisdiction still remains in the Supreme Court. Among the classes of cases not heretofore enumerated may be named, information in the nature of *quo warranto*, writs of prohibition, contest of elections, contests of wills, proceedings in partition, suits to quiet title, actions for mandate, and many other suits and actions. It may, indeed, be said, although at the expense of repetition, that all classes of actions and suits not within the jurisdiction of the Appellate Court are within the jurisdiction of the Supreme Court, provided, of course, that the action or suit is one wherein an appeal will lie.

§ 45. Inherent Powers—It is to be understood that the jurisdiction of the Supreme Court, as well as that of the Appellate Court, is essentially appellate and not original.² Under the general power which all courts of their rank possess they may issue writs of mandate or of injunction in aid of their appellate jurisdiction. They may determine in the first instance, their own powers and duties, for it is clear that no inferior tribunal can determine for them what their powers and duties are.³ They may protect their own records and prohibit interference with their legitimate powers and duties.⁴ Where the powers an

¹ *Bogart v. City of New Albany*, 1 Ind. 38; *City of Indianapolis v. Fairchild*, 1 Ind. 315; *Levy v. State*, 6 Ind. 281; *City of Goshen v. Croxton*, 34 Ind. 239; *City of Greensburgh v. Corwin*, 58 Ind. 518; *Town of Brookville v. Gagle*, 73 Ind. 117; *Hardebrook v. Town of Ligonier*, 95 Ind. 1.

² *Keeler v. Keeler*, 39 Ind. 153.

³ *State v. Noble*, 118 Ind. 350.

⁴ *En parte Griffith*, 118 Ind. 83.

duties are prescribed by the constitution the legislature is powerless to add to or detract from them.¹ In awarding writs of mandate, or of prohibition, or of injunction, appellate courts do not exercise original jurisdiction, but they exercise authority vested in them as courts and because the authority is essential to their existence or to the exercise of functions as courts of justice.

§ 46. **Opinions—Constitutional Requirements**—The constitution requires that the Supreme Court shall “give a statement in writing of each question arising in the record of such case and the decision of the court thereon.”² This provision has received considerable attention and given rise to much diversity of opinion.³ In one of the earlier cases it was intimated that it was merely directory,⁴ but this is not consistent with the settled rule governing the subject of constitutional construction, inasmuch as it completely nullifies the force of clear and explicit words where there is neither contradiction nor confusion. But the construction placed upon the provision by the later cases does not follow the earlier case in the particular indicated. The provision does not, however, require the court to decide every question discussed by counsel, nor, indeed, every question that may be found in the record since the record may contain questions so unimportant as to be entirely destitute of influence. It requires a decision upon every question essential to a final disposition of the case before the court, and upon no others. It requires, also, a statement in writing upon each question decided, but it does not require a statement of a question not decided. A decision of questions essential to a complete disposition of the particular case before the court is all that is required, and is, indeed, all that can with propriety be made, since to

¹ *Vaughn v. Harp*, 49 Ark. 160; *In re Hand v. Taylor*, 4 Ind. 409; *Rice v. Janitor*, 35 Wis. 410; *Commissioners v. State*, 7 Ind. 332; *Ferguson v. Harrison*, 7 Ind. 610; *Clark v. Trovinger*, 8 Ind. 334; *Boggs v. State*, 8 Ind. 463.

² Article 7, § 5.

³ *Henry v. State Bank*, 3 Ind. 216;

⁴ *Willets v. Ridgway*, 9 Ind. 367.

decide other questions would often be to volunteer a judgment without excuse.¹

¹ *Lake Shore, etc., R. Co. v. Cincinnati, etc., Co.*, 116 Ind. 578, 590. In *Trayser v. Trustees of Indiana Asbury University*, 39 Ind. 556, it was said: "Three things must concur before a question, within the meaning of the constitution, arises in the record: First, the question must be fully and clearly stated in the transcript; second, there must be an assignment of error covering the point; third, it must be a question, the decision of which is necessary to the final determination of the cause."

It is proper to say of the case from which we have quoted that in one particular it asserts an erroneous rule and that is in asserting that the court is bound to decide a point not made in the brief of counsel. The court is not bound to hunt for points, nor would it be fair to adverse counsel to do so, for points ought to be made so that opposing counsel may have an opportunity to meet them. It is fair to assume that counsel will make and argue all the material points that arise in the case.

CHAPTER IV.

THE APPELLATE COURT.

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| 47. Jurisdictional clause of the act creating the Appellate Court. | 61. Interest and costs which accrue subsequent to the appeal. |
| 48. Entire case goes to one court. | 62. Remittitur—Effect on question of jurisdiction. |
| 49. Appellate Court has no jurisdiction of constitutional questions. | 63. Counter-claim as affecting jurisdiction. |
| 50. No definite system of classification adopted. | 64. Counter-claim—Change of the character of case by. |
| 51. Actions originating before a justice of the peace. | 65. Actions for the recovery of personal property. |
| 52. Actions involving title to real estate. | 66. Value of property in controversy not material. |
| 53. Amount in controversy before justice of the peace determines jurisdiction. | 67. Exceptional cases involving title to personal property. |
| 54. Amount in controversy in trial court—General rule. | 68. Actions between landlord and tenant. |
| 55. Amount—Exceptional cases. | 69. Rule where title is put in issue. |
| 56. Jurisdiction as dependent upon amount. | 70. Decedents' estates—Claims against. |
| 57. Money recoveries only. | 71. Rules of practice. |
| 58. Effect of the limiting words of the statute. | 72. Supreme Court decisions control. |
| 59. Determination of the amount in controversy. | 73. Transfer of cases. |
| 60. Effect of judgment in the trial court upon the question of the amount in controversy. | 74. Disqualification of one judge—Jurisdiction not ousted. |

§ 47. Jurisdictional clause of the act creating the Appellate Court
—The act creating the Appellate Court distributes to that court part of the appellate jurisdiction of the State and designates the classes of cases over which it is given authority.¹ The express designation and enumeration of the classes over which its jurisdiction is extended leaves all others within the jurisdiction of the Supreme Court. In addition to the reasons given in the

¹ Act of February 28, 1891, Acts of 1891, p. 39.

preceding chapter for the conclusion, that the jurisdiction not distributed to the new tribunal remains in the old, may be assigned this reason: the express mention of one thing implies the exclusion of others. This familiar rule applies to constitutions,¹ to statutes and to contracts, and hence must apply to the act creating the Appellate Court.

§ 48. Entire case goes to one Court—The principle, to which we have often referred,² forbidding the dissection of a case into parts, requires that a case should go bodily into one or the other of the appellate tribunals of the State.³ Plainly enough all the incidents go where the issue which gives character to the case indicates that the case belongs, so that if the main features of a case impress upon it a character such as makes it a member of one of the classes over which the Appellate Court is given authority the incidents annexed do not affect the question of jurisdiction. The question as to where jurisdiction lies, is, it is safe to say, to be solved by ascertaining what element or factor so predominates as to fix the nature of the case. In enumerating and discussing, as we shall presently do, the classes of cases which go to the Appellate Court we desire to be understood as meaning that the classes named carry with them all their usual and necessary incidents.

§ 49. Appellate Court has no Jurisdiction of Constitutional Questions—It is true that the Appellate Court can not entertain jurisdiction of constitutional questions, but it may so far assume control of a case presenting such questions as to certify it to the Supreme Court.⁴ An error in selecting the appellate tribunal

¹ *In re* Courts of Lancaster, 4 Pa. L. Jr. Rep. 315; *King v. Hopkins*, 57 N. H. 334; *Turner v. Althaus*, 6 Neb. 54.

² We have considered the doctrine that the incidents go with the principal in another place. *Ante*. §§ 36, 40.

³ This general principle is illustrated by the case of *Freeman v. St. Louis Quarry Co.*, 30 Mo. App. 362. It was there held that where the Appellate Court could not take jurisdiction over

one of the parties—a county—the case could not be divided but must be certified to the Supreme Court.

⁴ *Ante*, §§ 32, 33; *State v. Armstrong*, 35 Mo. App. 49. See, generally, *Arnold v. Hawkins*, 27 Mo. App. 476. The Appellate Court can not entertain jurisdiction, although the constitutional question involved may be settled by decisions of the higher court. *State v. Kansas City Court (Mo.)*, 16 S. W. R.

is prevented from working disastrous results by the provisions of the act authorizing the transmission of cases from one appellate tribunal to the other, but, nevertheless, a lawyer who takes pride in his work will be careful to make the proper choice. As the path is yet untrodden, and as there is some room for diversity of opinion—for the statutory provisions are not free from ambiguity—it is probable that it will require time and experience to construct a uniform system of procedure.

§ 50. No definite System of Classification Adopted—An analysis of the statutory provision defining the jurisdiction of the Appellate Court will show that the General Assembly did not proceed upon a definite and uniform system in designating the classes of cases of which that court is given jurisdiction.¹ Some of the classes are determined by the character of their members alone, while one, at least, of the classes is complex, inasmuch as it involves both character and amount. The first class—prosecutions for misdemeanors—is determined by the character of its members, irrespective of the amount involved.² If, however, the penalty prescribed makes the case one of felony, then its character is such that jurisdiction falls to the Supreme Court. It is, indeed, the penalty prescribed that gives character to the case. The second class, composed of cases “originating before a justice of the peace where the amount in controversy exceeds fifty dollars exclusive of costs,” is determined by the character of the tribunal in which its members originate, and, so far at least as concerns the question of jurisdiction between the new and the old court, the amount in controversy is not important,³

It is clear that the conclusion asserted in the case cited is correct, since the higher court ought, on principle, have authority over all such questions, and the entire subject should be within the jurisdiction of that tribunal, so that if errors have been committed it can rectify them. It should be there so as to prevent conflict and confusion. It may, indeed, well be doubted whether final jurisdiction over constitutional questions can be vested elsewhere than in the highest court of the State.

¹ § 1, Act of February 28, 1891; Acts 1891, p. 39.

² It may be said once for all that each and every class is subject to the fundamental and decisive exception created by the principle that no constitutional question can be determined by the Appellate Court.

³ The amount is important, as will presently appear, in determining whether there is any right of appeal.

but, as will hereafter be shown, there may be cases which originate in a justice's court that must finally go to the Supreme Court.¹ The third class, comprising "actions for the recovery of money only where the amount in controversy does not exceed one thousand dollars," blends the elements of character and amount, for if the character of the case is not such as to make it one "for the recovery of money only" it is not within the jurisdiction of the Appellate Court, no matter what may be the amount in controversy, but an action may be for the recovery of money only and still not be within the jurisdiction of that court if the amount in controversy exceeds one thousand dollars. The fourth class, "all cases for the recovery of specific personal property," is designated in very comprehensive terms, and is determined solely by the character of its members. The fifth class, "actions between landlord and tenant for the recovery of the possession of the leased premises," is founded upon the principle of character. This is also true of the sixth class, "all cases of appeals from orders allowing or disallowing claims against decedents' estates."

§ 51. **Actions originating before a Justice of the Peace**—The second class of cases, the class composed of cases which originate before justices of the peace, requires some consideration. It may be said, at the outset, that comprehensive as is the language employed in specifying the class, still, it must be true that there are cases which originate before a justice of the peace that must go from the circuit or superior court to the Supreme Court. The most important cases which, although originating before a justice of the peace, go to that court are those in which the title to real estate is actually in issue. It must, of course, be clear that the title is involved and that it is put in issue in the proper method, but if title is actually involved and is appropriately put in issue, it must always be the controlling factor, and, as such, invariably give character to the case. If the issue of title does give character to a case and is paramount, then all other things are mere incidents, and the case must go where the principal carries it.

¹ See *ante*, § 40, *post*, § 51.

§ 52. **Actions involving Title to real estate**—It may be well enough to further fortify our conclusion that the issue of title to real estate is the principal element in every case where it is the direct and controlling question, by illustrations and authorities, although we have elsewhere given the question consideration.¹ The common law, as every one knows, regarded land with peculiar favor and placed it in a much higher rank than personal property. The method of conveying title was peculiar, and land was free from judgment liens. But it is not necessary to go beyond our own laws, for they give to land a high place and they have always excluded questions of title from the jurisdiction of subordinate tribunals. A forcible illustration is supplied by the exclusion of questions of title from the jurisdiction of the common pleas court which once formed part of our judicial system.² But more striking is the illustration supplied by the statutes and the decisions, which assert that where the title to land is properly put in issue in an action before a justice of the peace his jurisdiction ceases and the case is transformed into one for the circuit court.³ There is in such instances a change of jurisdiction because the new issue radically alters the character of the case. The case, although commenced in a subordinate tribunal, travels beyond its jurisdiction to a higher court, and, when it gets there by the true road, it becomes a case within the jurisdiction of the higher court as effectually as if it had there originated. If this be true it must also be true that the appeal, when taken, is from the case within the jurisdiction of the higher court and not from the subordinate statutory tribunal. The conclusion asserted by us, it may with propriety be further said, is necessary to give harmony to our system of procedure and to pre-

¹ *Ante*, § 40.

² *Dixon v. Hill*, 8 Ind. 147; *City of Lamasco v. Brinkmeyer*, 12 Ind. 349; *Clark v. Trovinger*, 8 Ind. 334; *Cromwell v. Lowe*, 14 Ind. 234.

³ R. S. 1881, § 1434; *Bibbler v. Walser*, 69 Ind. 362; *Kiphart v. Brennemen*, 25 Ind. 152; *Short v. Bridwell*, 15 Ind. 211; *O'Connell v. Gillespie*, 17 Ind. 459;

McClure v. White, 9 Ind. 208; *Parker v. Russell*, 3 Blackf. 411; *Bispham v. Inskeep*, 1 Cox, 231. The title must, of course, be in issue in a case where it can be put in issue, and it must be so in issue that a decision upon it must be rendered. *Melloh v. Demott*, 79 Ind. 502; *Burgett v. Bothwell*, 86 Ind. 149.

vent the great subject of the ownership of land from being divided up and distributed among different courts. The strong and clear purpose of the courts and law-makers has always been to unify and make certain the principles of real property law, as, to cite one of many instances, is illustrated by the often expressed determination of courts to adhere to a decision of doubtful soundness because "it has become a rule of property." But, without going further into the subject, we venture to say that the deeper it is explored the stronger will be the evidence supporting our conclusion, for an infinite variety of decisions may be collected wherein the purpose to keep the rules of real property law uniform and firm by keeping jurisdiction of cases involving interests and estates in land in one tribunal is clearly manifested.¹

§ 53. Amount in controversy before Justices of the Peace determines Jurisdiction—The amount in controversy in actions originating before a justice of the peace determines the question whether there is any right of appeal, for if the amount, excluding costs, is less than fifty dollars no right of appeal exists.² As the provision in the act of 1891 is substantially the same as that contained in the statute regulating appeals to the Supreme Court in cases originating before a justice of the peace, the construction given that statute must be deemed the one which the act of 1891 is to receive. The rule established by the decisions is that at least fifty dollars, exclusive of costs, must be actually in controversy, so that the question is to be determined by ascertaining what amount is actually involved. It is evident that where there is a judgment for less than fifty dollars and the plaintiff is content, there is, as a general rule, no right of ap-

¹ *Pratt v. Kendig*, 128 Ill. 293, S. C. 21 N. E. Rep. 495; *Moyer v. Swygart*, 125 Ill. 262, S. C. 17 N. E. Rep. 450; *Bice v. Hall*, 120 Ill. 597, S. C. 12 N. E. Rep. 236; *Oswald v. Wolf*, 25 Ill. App. Co. 501; *Le Moyne v. Harding*, 132 Ill. 78, S. C. 23 N. E. Rep. 416; *Stunz v. Stunz*, 131 Ill. 309, S. C. 23 N. E. Rep. 410; *Hughes v. Swope* (Ky.), 1 S. W. Rep. 394; *Nichols v. Otto*, 132 Ill. 91, S. C. 23 N. E. Rep. 411; *Getman v. Ingersoll*, 117 N. Y. 75, S. C. 22 N. E. Rep. 750; *Pierce v. George*, 30 Mo. App. 650; *Moultrie v. Dixon*, 26 So. Car. 296, S. C. 2 S. E. Rep. 24.

² *Ante*, §§ 47, 48.

peal.¹ But to this general rule there are exceptions.² If the defendant, by a plea of set-off or by a counter-claim, shows, by the statement of material facts, and not merely by a formal demand or prayer, that he is entitled to a judgment for fifty dollars or more, then the right of appeal exists.

§ 54. **Amount in Controversy in the Trial Court—General rule—**The general rule is that the amount in controversy in the tribunal where the case originated is, in cases where the amount alone is determinative, the test by which the question of jurisdiction is to be determined. It is possible that there may be exceptions to this general rule, as there are to most general rules, but if there be exceptions they are so rare as to serve to prove rather than destroy the general rule. Our decisions lay down the general rule as we have stated it, and it has long prevailed.³

§ 55. **Amount—Exceptional Cases—**Elements may be added which will change the operation of the general rule, for it may happen that an added element will so completely transform the character of the case as to leave the amount an incident only and as such overshadowed by a principal issue. We have in another place endeavored to show that where the question of title is directly and legitimately put in issue it becomes the influential and determining element. Other cases may be conceived in which the question of amount gives way before some more important element. This statement finds support from

¹ *Ex parte Sweeney*, 126 Ind. 583, S. C. 27 N. E. Rep. 127; *Cincinnati, etc., Co. v. McDade*, 111 Ind. 23, 26; *Winship v. Block*, 96 Ind. 446; *Parsley v. Eskew*, 73 Ind. 558; *Wagner v. Kastner*, 79 Ind. 162; *Baltimore, etc., Co. v. Johnson*, 83 Ind. 57; *Galbreath v. Trump*, 83 Ind. 381; *Breidert v. Krueger*, 76 Ind. 55; *Sprinkle v. Toney*, 73 Ind. 592; *Halleck v. Weller*, 72 Ind. 342; *Dailey v. City of Indianapolis*, 53 Ind. 483; *Moffitt v. Wilson*, 44 Ind. 476; *Bowers v. Town of Elwood*, 45 Ind. 34; *Donovan v. Town of Huntington*, 24 Ind. 321; *Jones v. Yetman*, 6 Ind. 46.

² In the preceding chapter we have shown that where the validity of municipal ordinance is directly in issue the jurisdiction is in the Supreme Court. *Ante*, § 43; *City of Hammond v. New York, etc., R. R. Co.*, 126 Ind. 597.

³ *Overton v. Overton*, 17 Ind. 226; *Bogart v. City of New Albany*, 1 Ind. 38; *Tripp v. Elliott*, 5 Blackf. 168; *Reed v. Sering*, 7 Blackf. 135. There may however, be cases where the amount alone is not determinative, and where this is true the reason of the rule fails and so, also, does the rule.

the case wherein it was held that, although the amount in controversy was not sufficient to give the Supreme Court jurisdiction, yet, as there was an order abating a nuisance, an appeal would lie.¹

§ 56. **Jurisdiction as dependent upon Amount**—As appears from the analysis given at another place, of the section of the act distributing jurisdiction to the Appellate Court, the amount in controversy is one of the important elements which determines the question of jurisdiction in the third class of cases. In ascertaining the amount in controversy, as has already been suggested, regard is to be had to the material facts alleged in the pleadings, or apparent of record, for the amount actually involved can not be justly said to be that named in the formal demand or prayer for judgment. If it were granted that the question of jurisdiction may be determined by a naked formal demand, or a bare general allegation, it would result in permitting parties to settle the question of jurisdiction by a formal allegation or demand, and thus involve a violation of the established rule that parties can not create jurisdiction of the subject. It is, therefore, correctly held that a naked allegation or demand is not the basis upon which jurisdiction is to be asserted.² The substantial facts appearing in the pleadings, or record, are of controlling influence, and it is from them that the question

¹ *Vonderweit v. Town of Centerville*, 15 Ind. 447. The doctrine of this case is re-asserted in *Hall v. Spurgeon*, 23 Ind. 73, where the court gives as an example of cases wherein the amount in controversy is not determinative of the question of jurisdiction, the following: "Where the defendant claims a set-off which is disallowed, or there is a judgment of forfeiture in addition to the money judgment."

² *Painter v. Guirl*, 71 Ind. 240; *Sprinkle v. Toney*, 73 Ind. 592; *Cincinnati, etc., Co. v. McDade*, 111 Ind. 26; *Ex parte Sweeney*, 126 Ind. 583, S. C. 27 N. E. Rep. 127; *Lee v. Watson*, 1 Wall. 337; *Harmony Club v. New Orleans*

Gas Light Co. (La.), 7 So. Rep. 538. See, generally, *McCoy v. McCoy*, 33 W. Va. 60, S. C. 10 S. E. Rep. 19; *Callan v. Bransford*, 10 S. E. Rep. 317; *Quimby v. Hopping*, 52 N. J. L. 117, S. C. 10 Atl. Rep. 123; *Clark v. Gresham (Miss.)*, 7 So. Rep. 224; *State v. St. Louis Court of Appeals*, 87 Mo. 569; *Pochelu v. Catonnet*, 40 La. Ann. 327, S. C. 4 So. Rep. 74. Where the controversy is by admissions in the pleadings reduced below the sum of one thousand dollars jurisdiction is in the Appellate Court. *Knapp v. Deyo*, 108 N. Y. 518, S. C. 15 N. E. Rep. 540; *Campbell v. Mandeville*, 110 N. Y. 628, S. C. 17 N. E. Rep. 866.

is to be determined. If it appears from such facts that the amount in controversy exceeds one thousand dollars the jurisdiction is in the Supreme Court, except, of course, where the law expressly vests the Appellate Court with jurisdiction irrespective of the amount involved.

§ 57. **Money Recoveries only**—Where the action is one for the recovery of money only, and the controversy is over a sum not exceeding one thousand dollars, the appellate jurisdiction is in the Appellate Court, no matter what may be the character of the action. The test is whether the principal element gives the case the character of an action for the recovery of money only, for if it is an action for the recovery of money only, and the amount involved does not exceed one thousand dollars, then, the case, with all its necessary incidents, falls to the Appellate Court, whatever may be its class. Whether it is an action *ex contractu*, or an action *ex delicto*, the case goes to that tribunal, if only a money recovery is obtainable. The nature of the action is not of controlling influence unless it is such as to make it one where the principal element renders the money recovery a mere incident. This general doctrine was asserted by the decisions made upon the statute defining the jurisdiction of the old common pleas court,¹ and the doctrine is the only one defensible on principle. If any other doctrine were asserted, perplexity and confusion would inevitably result, producing a conflict that no court could control.

§ 58. **Effect of the limiting words of the Statute**—The limitation created by the words "for the recovery of money only," is an important one, as appears from what has been said in another place.² It is unnecessary to here enlarge upon the question presented by the limiting words referred to, for it seems very clear, from what has been elsewhere shown, that the addition of a principal element may make a case one in which the money recovery is a mere incident. Wherever the money recovery is an incident to some principal issue, and the principal issue im-

¹ *McCole v. State*, 10 Ind. 50; *Hawkins v. State*, 24 Ind. 288.

² *Ante*, §§ 35, 36.

presses upon the case such a character as to bring it within the jurisdiction of the Supreme Court, there it must go, but where a money recovery is the principal element, the case falls to the new tribunal.

§ 59. **Determination of the Amount in Controversy**—It is not possible to lay down a rule which will in all cases determine the amount in controversy. It is easy enough to declare that all cases for the recovery of money only where the amount in controversy does not exceed one thousand dollars are within the jurisdiction of the Appellate Court, but to say what the amount in controversy actually is will be found, in some instances, to be very difficult. One class of cases, that of actions for personal injuries, will supply instances of special difficulty. There can, of course, be no difficulty in such cases where the judgment exceeds one thousand dollars, or in cases where it is for a less amount, and the plaintiff is satisfied, but there may be cases where it is less than that sum, and the plaintiff claims more, in which very serious difficulty will be encountered. So there will be difficulty in cases of that class where a demurrer is sustained to a complaint. As much as can now be safely said, is that if there is fair reason for debate as to the amount as appears from an examination of the material facts, jurisdiction is ordinarily in the Supreme Court. The fundamental principle that all jurisdiction not distributed to the Appellate Court remains in that tribunal, requires that where there is fair doubt as to where the jurisdiction lies, the doubt should be resolved in favor of the court having authority over all cases not placed elsewhere by statute.¹

§ 60. **Effect of Judgment in the Trial Court upon the question of the Amount in Controversy**—It is not every case that can be assigned to the proper tribunal by a simple inspection of the verdict or judgment, for there may be cases where a plaintiff recovers less than one thousand dollars when a much greater sum should be awarded him. It is probably true that the judgment is *prima facie* evidence of the amount in dispute, but it can

¹ *Ex parte Sweeney*, 126 Ind. 583.

not always be conclusive. Thus a plaintiff may sue upon a contract entitling him to more than one thousand dollars, recover much less, and unsuccessfully move for a new trial on account of error in assessing the amount of his recovery. In such a case it seems clear that if the substantial allegations or facts disclose a fair dispute as to the amount claimed in excess of the judgment, there is a controversy involving a sum in excess of one thousand dollars.¹ Suppose, for example, that a plaintiff should sue on a bond providing for the payment of three thousand dollars as liquidated damages, and that the law entitles him to recover the sum named as liquidated damages, but the trial court should, under an erroneous view of the law, deny him such damages and direct a verdict for him in the sum of seven hundred dollars, does it not seem clear that he may appeal to the Supreme Court?² Or, again, suppose it to be shown by a special finding that a defendant is entitled on his counterclaim to a judgment for five thousand dollars and that he is only awarded one thousand dollars, would not the Supreme Court have jurisdiction? Illustrative cases might easily be multiplied, but these are sufficient, as we believe, to show that where there is a fair question as to whether a party who unsuccessfully claims judgment for more than one thousand dollars is not entitled to a larger judgment, he may appeal to the Supreme Court, although the verdict and judgment are in his favor, but for a sum less than he has put in controversy by sub-

¹ There is some confusion in the decisions of the Supreme Court of the United States upon the general question. In *Wilson v. Daniel*, 3 Dall, 400; a very broad doctrine was declared, and in *Spear v. Place*, 11 How. (U. S.) 522, 526, that case is cited with approval. But in *Gordon v. Ogden*, 3 Peters, 33, it was said that *Wilson v. Daniel* had been departed from in practice, although Marshall, C. J., said: "We should be much inclined to adhere to *Wilson v. Daniel* had not a contrary practice since prevailed." The decision in *Wise v. Columbian Turnpike Co.*, 7 Cranch, 276, is not opposed to the doctrine of

Wilson v. Daniel, for all that it decides is that the amount in controversy can not be determined by the claim. *Wilson v. Daniels* is, as it seems to us, rightly decided in so far as it holds, as Ellsworth, C. J., expresses it, that, we are not to regard the verdict or judgment as the rule for ascertaining the value of the matter in dispute between the parties," although the doctrine ought, perhaps, to be qualified by adding that the verdict or judgment is not conclusive as to the amount in controversy.

² *Barry v. Edmunds*, 116 U. S. 550, 560.

stantial allegations. It is, of course, implied in what has been said that the sum in controversy exceeds one thousand dollars.

§ 61. **Interest and costs which accrue subsequent to the Appeal—** The general rule is that the amount recovered in the court of original jurisdiction governs.¹ We have already spoken of the exceptions to this general rule, and we shall here speak very generally of its scope and effect. This rule requires that the amount as established by the judgment, and not what is subsequently added to it in the form of such incidents as interest or costs, shall alone be considered in determining whether the amount involved gives jurisdiction. It is obvious that, under a system like ours, where the questions arising on appeal are to be determined by the record, the jurisdictional amount must be ascertained from the record and not from extrinsic evidence. The amount of the judgment as it is disclosed by the record, irrespective of accrued interest, must, as a general rule determine the question of jurisdiction.² It has, indeed, been held under the former statute regulating appeals to the Supreme Court that interest which accrued prior to the judgment must be excluded, but this decision is of doubtful soundness.³ The decision just mentioned can not, however, govern appeals under the present statute for that does not exclude interest which accrued prior to the judgment and is included in the amount recovered.⁴

¹ *Overton v. Overton*, 17 Ind. 226; *Bruce v. Manchester Co.*, 117 U. S. 514; *Bogart v. The City of New Albany*, 1 Ind. 38; *Tripp v. Elliott*, 5 Blackf. 168;

Reed v. Sering, 7 Blackf. 135. A sum paid after the commencement of the action can not, it is held, be taken into consideration so as to swell the jurisdictional amount. *Guiry v. Garland* (La.), 6 So. Rep. 563.

² *Ex parte Sweeney*, 126 Ind. 583; *Bank of United States v. Daniel*, 12 Peters, 32; *Walker v. The United States*, 4 Wall. 182; *Elgin v. Marshall*, 106 U. S. 578; *Western Union Tel. Co. v. Rogers*, 93 U. S. 565; *Thompson v. Butler*, 95 U. S. 694;

³ *Wagner v. Kastner*, 79 Ind. 162.

⁴ *Zeckendorf v. Johnson*, 123 U. S. 617; *The Patapsco*, 12 Wall. 451; *The Rio Grande*, 19 Wall. 178. Interest may form an element in the amount of recovery and when included in the judgment is certainly to be taken into consideration, or, more strictly speaking, the appellate tribunal can not exclude it, and thus diminish the amount recovered. The rule goes even farther. *Littlefield v. Perry*, 21 Wall. 205; *Bates v. St. Johnsbury, etc., Co.*, 32 Fed. R. 628. Under the rule that the judgment

§ 62. *Remittitur*—Effect on question of Jurisdiction—It is held by the Supreme Court of the United States that where a *remittitur* is filed before judgment it will preclude an appeal if it reduces the recovery below the prescribed amount,¹ but if entered after judgment it will not preclude an appeal.² It is obvious that a *remittitur* before judgment is effective, since a finding or verdict is not an adjudication, but to become operative a finding or verdict must be followed by a judgment, and even then it is, in strictness, only the judgment that constitutes an adjudication. A valid *remittitur*, plainly enough, reduces the amount in controversy, but to be effective it must precede the acquisition of jurisdiction by the appellate tribunal. If it were otherwise, jurisdiction might be defeated by the act of a party performed for the purpose of defeating jurisdiction and in cases where only a trivial sum is remitted.

§ 63. *Counter-claim as affecting Jurisdiction*—A counter-claim or cross-complaint may, it is obvious, state such facts as will make an actual controversy for an amount exceeding one thousand dollars, and if the amount in controversy does exceed that sum, the cross-complainant may, and, indeed, must, appeal to the Supreme Court, if he appeals at all.³ But if the case turns wholly upon the cross-complaint or counter-claim and the cross-complainant is content with the judgment for one thousand dollars or less, the original plaintiff can not appeal, since, if the cross-complainant is satisfied, no more than the amount for which judgment was given is in controversy. There may, however, be a case where a recovery by a counter-claimant will vest in the original plaintiff a right of appeal to the Supreme Court, as, for instance, where the facts pleaded show a right on the part of the plaintiff to a recovery of more than one thousand dollars,

entered, and not what subsequently occurs, determines the jurisdictional amount, it is held that the fact that the judgment may operate upon other cases is not of controlling influence. *Elgin v. Marshall*, 106 U. S. 578; *Bruce v. Manchester, etc., Co.*, 117 U. S. 514.

¹ *Thompson v. Butler*, 95 U. S. 694; *Alabama Gold, etc., Co. v. Nichols*, 109

U. S. 232; *First National Bank v. Redick*, 110 U. S. 224.

² *New York, etc., Co. v. Fifth National Bank*, 118 U. S. 608.

³ *Ex parte Sweeney*, 126 Ind. 583; *Wysor v. Johnson*, 1 Ind. App. Ct. 419; *Dushane v. Benedict*, 120 U. S. 630; *Ryan v. Bindley*, 1 Wall. 66; *Forster, etc., Co. v. Guggemos*, 24 Mo. App. 444.

and his claim is not only defeated but a sum is awarded the adverse party upon a plea of set-off or upon a counter-claim.

§ 64. **Counter-claim—Change of character of Case by**—A counter-claim may not only create a controversy changing the dispute as to the amount, but it may also plead such facts as will radically change the nature of the case. While it is true that where a counter-claim or cross-complaint is filed the case remains in a general sense the same, yet it is also true that a counter-claim may introduce an issue into the case that will overshadow and control all others. This principle is asserted and enforced in the cases which adjudge that where a counter-claim presents a question of title it becomes the paramount issue and makes a case entitling a party to a new trial as of right.¹ It is illustrated in the cases which hold that where a suit is brought to revest title in a case where an owner is induced by fraud to part with it, title is the principal issue.² In whatever form the issue of title is made it is the determining issue,³ provided, of course, the issue is made by a party entitled to make it, and in an appropriate method. The principle we are considering finds full development and strong enforcement in partition proceedings, for in a long line of cases it is adjudged that title may be put in issue in such proceedings by the complaint or by a counter-claim, and when put in issue and adjudicated the judgment is conclusive, although in cases where no such issue is made a judgment in partition proceedings is not conclusive upon the question of title.⁴

¹ Kreitline v. Franz, 106 Ind. 359; Gullet v. Miller, 106 Ind. 75, 78; Hamman v. Mink, 99 Ind. 277; Physio-Medical College v. Wilkinson, 89 Ind. 23; Cooter v. Baston, 89 Ind. 185.

² Adams v. Wilson, 60 Ind. 560; Warburton v. Crouch, 108 Ind. 83.

³ Bisel v. Tucker, 121 Ind. 249; Miller v. Evansville National Bank, 99 Ind. 272; Hamman v. Mink, 99 Ind. 279; Moor v. Seaton, 31 Ind. 11; Bender v. Sherwood, 21 Ind. 167; Hunter v. Christian, 70 Ind. 439. See, generally, Rog-

ers v. Beach, 115 Ind. 413; Dumont v. Dufore, 27 Ind. 263; Farrar v. Clark, 97 Ind. 447.

⁴ Watson v. Camper, 119 Ind. 60; L'Hommidieu v. Cincinnati, etc., Co., 120 Ind. 435, 441; Woollery v. Grayson, 110 Ind. 149; Spencer v. McGonagle, 107 Ind. 410; Thorp v. Hanes, 107 Ind. 324; Luntz v. Greve, 102 Ind. 173, and cases cited. Miller v. Noble, 86 Ind. 527; McMahan v. Newcomer, 82 Ind. 565, and authorities cited. It will be found, as we have repeatedly

§ 65. **Actions for the recovery of Personal Property**—Actions for the recovery of “specific personal property,” with their usual incidents, are within the jurisdiction of the Appellate Court. The language is so clear and comprehensive that there is no need for construction. Under a former statute it was held that the amount involved did not affect the question of jurisdiction,¹ and this doctrine must apply to the act creating the Appellate Court. An action for the possession of specific personal property is, in its essential and primary nature, a possessory action, but it may, nevertheless, involve the question of ownership.² It is, however, not material, so far as concerns the question under immediate mention, whether the particular case does or does not involve the question of title, for it is evident that the legislature intended to place one great class of actions under the authority of the new court. Even if there were doubt, the true course would be to hold that the whole class was intended to go to one tribunal rather than to so hold as to create confusion by dividing the class and distributing its members. The class, whatever may be the value of the specific personal property in dispute, belongs, without division, to the Appellate Court. Possibly some element may be added which will create an exception, but it is, at all events, quite clear that the exceptions to the general rule will be very rare, if, indeed, there can be any, in a case where the recovery of specific personal property is sought.

§ 66. **Value of Property in controversy not material**—The language employed in designating the class of cases under immediate consideration (the fourth class) is very broad and comprehensive; there is neither limitation nor exception. No restriction is expressed or implied, for “all actions for the recovery of specific personal property” are declared to be within

said, that there is everywhere manifested a purpose to make the question of title the paramount one wherever it is appropriately and rightfully put in issue. In this there is almost universal concurrence of opinion no matter from what side the question is approached.

¹ Hall v. Durham, 113 Ind. 327; *Ex parte* Sweeney, 126 Ind. 583. See, generally, Entsminger v. Jackson, 73 Ind. 144; Kramer v. Matthews, 68 Ind. 372; Pacey v. Powell, 97 Ind. 371.

² Payne v. June, 92 Ind. 252; McFaden v. Fritz, 110 Ind. 1.

the jurisdiction of the Appellate Court. It is, therefore, immaterial what the value of the property in dispute may be, or whether the question of ownership is, or is not, involved. Nor is it material what the amount of damages may be, for irrespective of the element of damages the jurisdiction is in the new tribunal if the action is for the recovery of specific personal property. This is so for the reason that the paramount issue is that of the right to the ownership or to the possession of the specific personal property, and damages, whatever their amount, constitute a mere incident of the principal issue.¹

§ 67. **Exceptional cases involving title to Personal Property**—The fact that the title to personal property or the right to its possession may collaterally, or incidentally, be brought in controversy will not determine the question of jurisdiction irrespective of the amount in dispute between the parties. The language employed confines the fourth class to actions where the recovery of specific personal property is the dominating element. Cases of trespass or trover, as well as other actions where the recovery sought is money, and not specific personal property, are not members of the fourth class. The members of the fourth class are cases which are ordinarily classified as actions of replevin; and actions for damages, although title to personal property may be collaterally or incidentally involved, are members of an entirely different class.²

§ 68 **Actions between Landlord and Tenant**—The fifth class of cases distributed to the Appellate Court is designated as "actions between landlord and tenant for the recovery of the

¹ *Williams v. West*, 2 Ohio St. 82, 86; *White v. Van Houten*, 51 Mo. 577; *Henthall v. Watson*, 28 Mo. 360; *Herzberg v. Sachse*, 60 Md. 426; *Rodman v. Nathan*, 45 Mich. 607, 8 N. W. R. 562; *Walls v. Johnson*, 16 Ind. 374; *Morgan v. Reynolds*, 1 Mont. 163.

² A special difficulty may arise where the value of the property exceeds one thousand dollars, and it is not delivered to the plaintiff. In such a case it seems he may recover the value of the prop-

erty as damages. *Hill v. Haverstick*, 17 Ind. 517; *Chissom v. Lamcool*, 9 Ind. 530, 533; *Jones v. Dowle*, 9 M. & W. 19; *Sayward v. Warren*, 27 Me. 453; *Allen v. Crary*, 10 Wend. 349; *Cary v. Hotelling*, 1 Hill, 311; *Drake v. Wakefield*, 11 How. Pr. R. 106; *Ward v. Woodburne*, 27 Barb. 346, 353; *Van Neste v. Conover*, 5 How. Pr. R. (O. S.) 148; *Pugh v. Colloway*, 10 Ohio St. 488; *Cook v. Hamilton*, 67 Iowa, 394.

possession of the leased premises." If a mere superficial view of the language of the statute were taken to the exclusion of all other considerations, it might seem that the statute admits of no exceptions, but this view can not be adopted without violating settled principles. The familiar rule is that a statute is not to be construed as if it stood alone, but settled principles must be invoked and applied in giving it a construction. A statute must take its place in a great system and can not be considered as in itself embodying all the law, written and unwritten, upon a broad subject. This rule, taken in conjunction with the rules and principles which we have heretofore discussed,¹ and the considerations suggested in the next paragraph, leads to the conclusion that there is at least one well marked and clearly defined exception to the rule expressed in the general words employed in the statute, and that exception is a case where the title to land is appropriately put in issue by a party who has a right to put it in issue. All the cases, as we have seen, converge and harmonize upon the rule that where title to land is rightfully made an issue, it is the dominating one to which all incidents must yield. There are, of course, not many cases of the character indicated by the language of the statute in which title can rightfully be put in issue.

§ 69. Rule where Title is put in issue—The words of the statute, when analyzed and closely studied, will be found to clearly imply that the relation of landlord and tenant must exist, for unless it does exist the action is not between landlord and tenant. If the landlord has, subsequent to the creation of the tenancy, divested himself of that title, the relation of landlord and tenant ceases, and a new and different relation comes into existence.² Where, therefore, the case is one in which a person who originally entered as tenant may show a cessation or determination of the lessor's title, and he does show it in the mode provided by law, he necessarily shows that the action is not one between landlord and tenant, but is one between parties

¹ We have given reasons, and cited authorities, for our conclusion at another place. *Ante*, §§ 40, 51, 52.

² *Ante*, §§ 40, 51, 52.

occupying an entirely different relation. Thus, if it be shown that the party who entered as a tenant subsequently purchased the land directly from the person under whom he entered, or at a judicial sale, it is evident that the original relation is changed into a radically different one.¹ If such a showing is made, the main and influential question becomes one of title in the strict sense of the term. The words, "possession of the leased premises," carry out the meaning we have ascribed to the other words of the statute, for they imply that there must be property held by one party of the other under a lease. A holding under a claim, rightfully and appropriately asserted, other than that created by a lease, is not, it is hardly necessary to say, "the possession of leased premises."

§ 70. Decedents' estates—Claims against—The sixth class of cases which the statute declares shall be within the jurisdiction of the Appellate Court is thus designated: "All cases of appeals from orders allowing or disallowing claims against decedents' estates." This statutory provision is, under the rule that a statute is to be considered part of one great system, to be taken in connection with the provisions found in the act regulating the settlement of decedents' estates, and when thus taken there can be no difficulty in determining the character of the cases which form the class. The allowance or disallowance of claims implies that there is a claim by a creditor, and proceedings incidental to the main case go where the main case goes. The provision quoted does not, however, carry to the Appellate Court general probate matters, as cases involving the appointment or removal of executors or administrators, cases involving the construction of wills, cases involving the rights of heirs, devisees, or legatees, cases involving the right to sell real es-

Rhyne *v.* Guevara, 67 Miss. 139; 6 So. Rep. 736; Allen *v.* Griffin, 98 N. C. 120; Sharpe *v.* Kelly, 5 Denio, 431; Stoddard *v.* Emery, 128 Pa. St. 436, 18 Atl. R. 339; Hopcraft *v.* Keys, 9 Bing. 613; Claridge *v.* Mackenzie, 4 Man. & G. 143; Nellis *v.* Lathrop, 22 Wend. 121; Tilghman *v.* Little, 13 Ill. 239; Farris *v.* Houston, 74 Ala. 162. As these authorities show, as also do those elsewhere cited, the person who originally entered as tenant may, upon a due and sufficient showing, make a question of title destructive of the relation of landlord and tenant, and thus show that he is not in possession of "leased premises," but is in possession of premises of which he is the owner.

tate, or the like.¹ All such cases remain within the jurisdiction of the Supreme Court by force of the rule that what of appellate jurisdiction is not taken from that court continues there.

§ 71. **Rules of Practice**—The rules and practice of the Supreme Court govern the Appellate Court, and the statutory provisions concerning appeals as well as the rules and decisions of the Supreme Court, must be looked to for the rules of procedure. The evident purpose of the legislature was to prevent conflict between the decisions and the practice of the two appellate tribunals. But, while the statute in terms provides that the rules of the Supreme Court shall govern,² still, this provision must, we suppose, be understood to mean that only the general rules govern, for the Appellate Court must have power, in virtue of its existence as a court of high rank, to regulate mere matters of detail as the time of its sittings and adjournments, the course of argument and matters of a similar nature.³

§ 72. **Supreme Court Decisions Control**—It is provided in section 25 of the act creating the Appellate Court, that it “shall be governed in all things by the law as declared by the Supreme Court of this State, and that it shall not, directly or by implication, reverse or modify any decision of the Supreme Court of the State.” This is apparently an emphatic and explicit declaration, but in reality it adds nothing to the law.⁴ As we have already shown, the element of sovereignty known as the judicial must, of necessity, reside in its highest form in some judicial tribunal. It is no more possible that there can be two courts possessing the highest judicial power than that there can be two Governors, or two General Assemblies.⁵ The sphere of the highest office, body or tribunal invested with an element, or department of sovereign power is exclusive.

Ex parte Sweeney, 126 Ind. 583.

¹ Act February 28, 1891, §§ 12, 15, 25; *v. Leard*, 30 Ind. 171.

Acts 1891, p. 39.

² *Dodge v. Cole*, 97 Ill. 338.

⁴ *Julian v. Beal*, 34 Ind. 371; *Leard*

⁵ *Field v. The People*, 2 Scam. (Ill.) 79.

§ 73. **Transfer of Cases**—The act creating the Appellate Court requires that transfers of cases shall be made from one of the appellate tribunals to the other, and this provision is valid. Long recognition of the power of the General Assembly to transfer causes from one court to another would go very far to support the conclusion that the constitution grants this power even if the question were a doubtful one, for practical exposition is an important factor in the construction of constitutions or statutes.¹ Statutes have been enacted in this State transferring cases from one tribunal to another, as from the old common pleas to the circuit court; from the circuit to the criminal court, and from the circuit to the superior court, and neither from the bench nor from the bar has there been a suggestion that these enactments were invalid. The recent decisions made by the Supreme Court directing the transfer of cases, although no express statement is made upon the subject, fully recognize the validity of the provisions of the act respecting the transfer of cases.² It is evident that the question affects the remedy and not the substantive right, so that it seems very clear that it is within the power of the legislature to substitute one tribunal for another,³ provided, of course, that no constitutional right or power is taken from a constitutional tribunal, and citizens are not deprived of a right to a decision by a court created under valid laws.

§ 74. **Disqualification of one Judge—Jurisdiction not ousted**—A transfer from the docket of the Appellate Court to that of the Supreme Court may be ordered where there is one disqualified judge and the remaining four judges divide equally. The provisions concerning the course to be pursued where one judge is

¹ *Hovey v. State*, 119 Ind. 386; *Weaver v. Templin*, 113 Ind. 298, 301; *Board of Com. v. Bunting*, 111 Ind. 143; *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221; *Rogers v. Goodwin*, 2 Mass. 475; *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Ogden v. Saunders*, 12 Wheat. 213, 290; *Minor v. Happersett*, 21 Wall. 162; *State v. Park-*

inson, 5 Nev. 15; *Pike v. Megoun*, 44 Mo. 491; *People v. Board*, 100 Ill. 495; *State v. French*, 2 Pinney (Wis.), 181.

² This general doctrine is affirmed by the Supreme Court of Illinois. *Young v. Stearns*, 91 Ill. 221; *Fleischman v. Walker*, 91 Ill. 318; *Meeks v. Leach*, 91 Ill. 323; *Millard v. Board*, 116 Ill. 23.

³ *Cooley's Const. Lim.* (6th ed.), 442.

disqualified are not so clear as might be desired, but it has been held that where there are four judges capable of acting and there is not a tie, the case remains in the Appellate Court.¹ Any other conclusion would imply that the General Assembly meant to declare that the one interested judge would, or, at least, might, unduly influence the other four, and such an implication ought not to be made.

¹ *City of Hammond v. New York, etc.*, 126 Ind. 597; *Benedict v. Farlow*, 1 Ind. App. Ct. 160.

CHAPTER V.

WHAT MAY BE APPEALED FROM.

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| § 75. Appeal—Right of. | § 95. Independent issues not affecting all parties. |
| 76. Appeal is part of the remedy. | 96. Record must show final judgment. |
| 77. Appellate Jurisdiction conferred by law. | 97. Limitation of appeals to designated classes of cases controls jurisdiction. |
| 78. Only judicial questions considered on appeal. | 98. Distinct and independent claims. |
| 79. Appeals lie from judgments or decrees only. | 99. Appeal of part of a cause—Exceptional cases. |
| 80. Appeals lie only from final judgments—General rule. | 100. Interlocutory order appointing a receiver. |
| 81. What is a final judgment. | 101. Interlocutory order for payment of money. |
| 82. Difference between intermediate decisions and final judgments. | 102. Order directing execution of a written instrument. |
| 83. Final judgment disposes of entire case. | 103. Order requiring delivery of property. |
| 84. Object and scope of the rule. | 104. Order requiring assignment of instruments. |
| 85. Requisites of a final judgment. | 105. Order compelling execution of instrument of writing. |
| 86. Distinct actions. | 106. Order granting or denying an injunction. |
| 87. Appeal from judgment of review. | 107. Interlocutory order in <i>Habeas Corpus</i> proceedings. |
| 88. Order setting aside execution. | 108. Effect of appeal from an interlocutory order. |
| 89. Removal of case to Federal Court. | 109. Mode of appealing from interlocutory orders. |
| 90. Material issues must be determined. | 110. Void judgments—Appeals from. |
| 91. Rights of all parties must be adjudicated. | |
| 92. Judgment may be final, although an order may be required for its enforcement. | |
| 93. Decree in partition proceeding. | |
| 94. Form of judgment not important. | |

§ 75. **Appeal—Right of**—An appeal is the only mode provided by our laws for removing a case from an inferior tribunal to one of appellate jurisdiction. Appeals are allowed in all cases where a judicial decision is sought to be brought before the court of last resort for review. In this State we have no writs

of error. It is laid down by the authorities that the right of appeal is purely a statutory one and this is undoubtedly the general rule.¹ A party who brings an action does not by such an act acquire a vested right to a decision from a particular tribunal.² This rule is no more than an extension of the general principle that there is no vested right in a remedy.³ The rule is illustrated in the numerous cases which hold that matters of procedure are governed by the law in force at the time the remedy prescribed is administered.⁴

§ 76. **Appeal is part of the Remedy**—The principle that an appeal is part of the remedy and that the legislative authority over remedies is very comprehensive leads to the conclusion that, as a general rule, only such judgments can be appealed from as are designated, expressly or impliedly, by a statute authorizing appeals. It leads, also, to the further conclusion that the appeal must be taken in the time and mode prescribed by statute. Parties can not by their own acts appeal in a case where no appeal is authorized by law, nor can they get a case into an appellate court in an unauthorized mode.⁵

¹ *Ex parte* McCardle, 7 Wall. 506; *Butler v. Palmer*, 1 Ill. 324; *Cowgill v. Long*, 15 Ill. 202; *Miller v. Graham*, 17 Ohio St. 1; *State v. Squires*, 26 Ia. 340.

² *Mayne v. Board of Commissioners*, 123 Ind. 132; *Uwchlan Twp. Road*, 30 Pa. St. 157; *Stephenson v. Doe*, 8 Blackf. 508.

³ *Watson v. Mercer*, 8 Peters, 88; *Mather v. Chapman*, 6 Conn. 54; *People v. Supervisors*, 20 Mich. 95; *McLane v. Bonn*, 70 Ia. 752; *Bates v. Sheets*, 64 Ind. 209; *Moss v. State*, 101 Ind. 321; *Knoup v. Piqua Bank*, 1 Ohio St. 603. See, generally, *Gorley v. Sewell*, 77 Ind. 316; *Mulcahey v. Givens*, 115 Ind. 286.

⁴ *McNay v. Startton*, 109 Ill. 30; *Ladow v. Groom*, 1 Denio, 429; *Flory v. Wilson*, 83 Ind. 391; *Wait v. Van Allen*, 22 N. Y. 319; *Westmoreland Co. v. Overseers of Conemaugh Twp.*, 34 Pa. St. 232; *Moore v. Ellis*, 18 Mich. 77.

⁵ *Bacon v. Callender*, 6 Mass. 303; *Patterson v. Philbrook*, 9 Mass. 151;

§ 77. **Appellate Jurisdiction conferred by law**—As jurisdiction of appeals is created by law, it is evident that parties can not, by their own acts, create a right of appeal. To permit parties to create such a right would be to allow a violation of the rule to which we have often referred, that parties can not confer jurisdiction of the subject by consent.¹ It may, however, be well to observe in passing, although somewhat aside from our main topic, that a mere irregularity in taking an appeal may be waived.²

§ 78. **Only Judicial Questions considered on Appeal**—In another place we have shown that only judicial powers can be conferred upon the courts.³ An appellate court can not, therefore, be required or empowered to entertain jurisdiction of any other controversies than those involving judicial questions. To authorize an appeal there must be a decision by a court, or by some judicial tribunal. Appeals will not lie from decisions upon ministerial, legislative or executive questions.⁴ That there can be no appeal to a court except in cases where judicial questions are involved is well settled, but it is difficult, in some instances, to determine what are judicial questions. In many instances questions of a judicial nature are committed to *quasi* judicial tribunals, and in such cases there is often difficulty in determining whether an appeal will lie.⁵ It may be said with safety that

¹ *Sampson v. Welsh*, 24 How. (U. S.) 207; *Mills v. Brown*, 16 Peters, 425.

² *Dowell v. Caruthers*, 26 Kan. 720.

³ Appellate Tribunals, Chapter I.

⁴ *Farley v. Board of Commissioners*, 126 Ind. 468, S. C. 26 N. E. R. 174; *Bunnell v. Board*, 124 Ind. 1; *Welch v. Bowman*, 103 Ind. 252, 2 N. E. R. 722; *Platter v. Board*, 103 Ind. 360, 374; *Waller v. Wood*, 101 Ind. 138; *O'Boyle v. Shannon*, 80 Ind. 159; *City of Terre Haute v. Terre Haute, etc., Co.*, 94 Ind. 305; *Crow v. Board of Commissioners*, 118 Ind. 51; *Hanna v. Board*, 29 Ind. 170; *Pittsburgh, etc., Co. v. Board, etc.*, 28 W. Va. 264; *Allen v. Cerro Gordo Co.*, 34 Iowa, 54; *Colvig v. Klamath Co.*, 16

Oregon, 244, 19 Pac. R. 86; *Mohney v. Redbank Township (Pa.)*, 15 Atl. R. 891.

⁵ The general rule probably is that no appeal will lie. *Board v. Smith*, 40 Ind. 61; *Bosley v. Ackelmire*, 39 Ind. 386; *Cole v. Howard*, 56 Ind. 330; *Allen v. Hostetter*, 16 Ind. 15; *City of Peru v. Beares*, 55 Ind. 576; *Windman v. City of Vincennes*, 58 Ind. 480; *Trustees of the Town of Princeton v. Manck*, 35 Ind. 51; *Church v. Town of Knightstown*, 35 Ind. 177. The statute may, however, make questions of the general character referred to judicial, and grant an appeal from the decision of the inferior tribunal and thence to

where a discretionary power is conferred upon an officer or tribunal the general rule is that no appeal can be taken from a decision made by such an officer or tribunal.¹

§ 79. **Appeals lie from Judgments or Decrees only**—The rule that where the trial court has no jurisdiction the appellate tribunal has none, requires that the question in the former court should be essentially a judicial one. The inquiry is usually whether the nature of the case as it existed in the trial court was such as to call into exercise the judicial power. The fact that the case comes to the Supreme Court or to the Appellate Court, from a court of general jurisdiction, such as a circuit court, a criminal court, or a superior court, does not, as the authorities heretofore cited show, necessarily establish jurisdiction. The judicial power must be exercised, or its exercise rightfully demanded and refused, in the court of original jurisdiction, or there can be no judgment from which an appeal can be prosecuted. Where there is no judicial question to decide there can be no judgment, and it is only from judgments, using the term 'judgments' in a broad sense, that our laws authorize an appeal. If our conclusion is incorrect then there is no virtue in the ancient rule that a party must have his day in court, for this rule applies only in cases where a decision of a judicial nature is required, as purely and exclusively legislative or ministerial questions may, as is well known, be decided without notice, although it is otherwise where a judicial decision is to be given.

§ 80 **Appeals lie only from Final Judgments—General rule**—To authorize an appeal there must be a judgment.² As a general rule appeals will lie only from final judgments,³ but to this gen-

the Supreme Court, as has been done in street assessment cases and other cases of a similar character.

¹ *Weaver v. Templin*, 113 Ind. 298; *Kirkpatrick v. Taylor*, 118 Ind. 329; *Leeds v. City of Richmond*, 102 Ind. 372; *Smith v. Corporation of Washington*, 20 How. 135; *Davis v. Mayor*, 1 Duer, 151; *Platt v. Chicago, etc., Co.*, 74 Iowa, 127; *S. C.* 37 N. W. Rep. 107.

² *Dale v. Copple*, 53 Mo. 321; *Jones v. Snodgrass*, 54 Mo. 598; *Wilson v. Hulz*, 61 Mo. 445; *Western Union Tel. Co. v. Locke*, 107 Ind. 9; *Powell Appellate Proceedings*, 367.

³ *Miller v. State*, 8 Ind. 325; *Reese v. State*, 8 Ind. 416; *Hamrick v. The Danville, etc., Co.*, 30 Ind. 147; *State v. Ely*, 11 Ind. 313; *Northcutt v. Buckles*, 60 Ind. 577; *Goodwin v. Goodwin*, 48 Ind.

eral rule there are exceptions which will be presently noticed. The rule restricting appeals to cases where a final judgment has been rendered is necessary to prevent the division of a case into parts and to prevent a multiplicity of actions.¹ The rule is in strict harmony with the principle, of which we have already spoken, that cases must be decided as an entirety and by one tribunal.

§ 81. **What is a Final Judgment**—It is not always easy to determine what shall be considered a final judgment, and it will assist in clearing away difficulties to notice orders and rulings which are declared not final judgments within the meaning of the law governing appeals. A ruling upon a demurrer to a pleading, whether the ruling is for or against the demurring party, is not a final judgment.² An appeal will not lie from a ruling denying a motion to quash an indictment.³ Stating conclusions of law upon a special finding does not constitute a final judgment,⁴ nor is a ruling suppressing a deposition.⁵ Orders setting aside former orders are, as a general rule, not final judgments.⁶ Orders admitting or refusing to admit parties can

584; *Martindale v. Brown*, 18 Ind. 284; *Thiebaud v. Dufour*, 57 Ind. 598; *Reed v. Reed*, 44 Ind. 429; *Hamlyn v. Nesbit*, 37 Ind. 284; *Taylor v. Board of Commissioners of Jay Co.*, 120 Ind. 121; *State v. Spencer*, 92 Ind. 115; *State v. Evansville, etc., Co.*, 107 Ind. 581; *Guardian Savings Bank v. Reilly*, 8 Mo. App. 544; *State v. Sutterfield*, 54 Mo. 391; *Hawkins v. Massie*, 62 Mo. 552; *McCullum v. Eager*, 2 How. 61; *Walker v. Spencer*, 86 N. Y. 162; *Piedmont Manufacturing Co. v. Buxton*, 105 N. C. 74, 11 S. E. Rep. 264; *Home for Inebriates v. Kaplan* (Cal.), 24 Pac. Rep. 119; *Davie v. Davie*, 52 Ark. 221, S. C. 20 Am. St. R. 170 and note 173; *In re Davis' Estate* (Mont.), 27 Pac. Rep. 342.

¹ *Western Union Tel. Co. v. Locke*, 107 Ind. 9; *Freeman on Judgments*, §

33; *Hilliard New Trials* (2d ed.), 712; *Powell Appellate Proceedings*, 369.

² *Slagle v. Bodmer*, 58 Ind. 465; *Newell v. Gatling*, 7 Ind. 147; *National Banking, etc., Co. v. Knaup*, 55 Mo. 154; *Rubey v. Shaw*, 51 Mo. 116; *Griffee v. Mann*, 62 Md. 248; *Kirchner v. Wood*, 48 Mich. 199.

³ *Farrel v. State*, 7 Ind. 345; *Pigg v. State*, 9 Ind. 363; *Woolley v. State*, 8 Ind. 377.

⁴ *Northcutt v. Buckles*, 60 Ind. 577; *Johnson v. Northern, etc., Co.*, 39 Minn. 30, 38 N. W. Rep. 804.

⁵ *Reese v. Buck*, 9 Ind. 238.

⁶ *Wood v. Wood*, 51 Ind. 141; *Martindale v. Brown*, 18 Ind. 284. See, also, *Spaulding v. Thompson*, 12 Ind. 477; *Branham v. Ft. Wayne, etc., R. R. Co.*, 7 Ind. 524.

not be regarded as final judgments authorizing an appeal.¹ An order to produce papers or documents is not final.² The weight of authority is that no appeal will lie from an order dissolving or refusing to dissolve an attachment,³ although the cases are conflicting. Orders reforming pleadings and orders granting or denying a continuance are not final.⁴

§ 82. Difference between intermediate Decisions and Final Judgments—Confusion has been produced in some cases by failing to discriminate between rulings that may be made available on appeal and final judgments from which an appeal is authorized. It is obvious that many rulings may, when duly excepted to, be available as causes for a reversal of the judgment, and yet no one of them, nor all of them combined, constitute a final judgment within the meaning of the law governing appellate jurisdiction and procedure. Thus a ruling denying a motion in arrest of judgment is not final, although it may constitute the basis of a specification of error.⁵ An order denying a motion presenting a jurisdictional question is not a final judgment,⁶ nor is an order appointing an examiner to take testimony, although such orders may, when they affect the rights of the parties injuriously, and when presented in a proper mode, be

¹ *Lamon v. McKee*, 7 Mackey, 447, S. C. 17 Wash. Law. Rep. 806; *In re Ohm's Estate*, 82 Cal. 160, 22 Pac. R. 927.

² *Western Union Tel. Co. v. Locke*, 107 Ind. 9; *Cleveland, etc., R. R. Co. v. Closser et al.*, 126 Ind. 348; *Logan v. Pennsylvania Co.*, 132 Pa. St. 403, 19 Atl. Rep. 137.

³ *State v. Miller*, 63 Ind. 475; *Abbott v. Zeigler*, 9 Ind. 511; *Forbes v. Porter*, 23 Fla. 47, 1 So. Rep. 336; *Snively v. Abbott Buggy Co.*, 36 Kan. 106, 12 Pac. Rep. 522; *Simpson v. Kirschbaum*, 43 Kan. 36, 22 Pac. Rep. 1018; *Duncan v. Forgey*, 25 Mo. App. 310; *Contra, Quebec Bank v. Carroll* (S. D.), 44 N. W. Rep. 723; *Red River, etc., Bank v.*

Freeman (N. D.), 46 N. W. Rep. 36. See *post*, § 88, note 3. *Haebler v. Bernharth*, 115 N. Y. 459, is a case where the judgment was final upon the attachment, as it was in favor of a third person.

⁴ *Read v. Gooding*, 20 Fla. 773; *Wilson v. City of Wheeling*, 19 W. Va. 323; *Carpenter v. Reynolds*, 58 Wis. 666; *Wiggins v. McCoy*, 87 N. C. 499.

⁵ *People v. Toal* (Cal.), 23 Pac. Rep. 203. See, generally, *Murphy v. King*, 6 Mon. 30, 9 Pac. Rep. 585; *Davis v. Donner*, 82 Cal. 35, 22 Pac. Rep. 879.

⁶ *School District of Adams County v. Cooper*, 29 Neb. 433, S. C. 45 N. W. Rep. 618.

grounds for the assignment of errors on appeal.¹ An order refusing a non-suit or an order refusing to dismiss is not a final judgment, although, if erroneous, the error may be made available.² But such an order may become final if the defendant stands upon his motion and final judgment is given upon it. Orders of reference or orders regarding the mode of trial are matters on which specifications of error may be ultimately founded,³ but they are not, as a general rule, final judgments.⁴ An order declaring a recognizance is not, it has been held, a final judgment authorizing an appeal.⁵

§ 83. **Final Judgment disposes of the entire case**—No order is final in such a sense as to constitute a final judgment unless it disposes of the main case so far as there is power in the trial court to decide upon the questions presented by the issues, no matter how clearly and decisively the order may indicate what the ultimate judgment will be.⁶ Until there is an ultimate judgment the case is not finally disposed of inasmuch as the trial court may change its rulings, award a *venire de novo*, grant a new trial, or make some such order, notwithstanding

¹ See, generally, *Davie v. Davie*, 52 Ark. 224, S. C. 12 S. W. Rep. 558; *Hilliard v. Oram*, 106 N. C. 467, S. C. 11 S. E. Rep. 514; *Woods v. Dickinson*, 7 Mackey, 301; *Blackwell v. McCaine*, 105 N. C. 460, S. C. 11 S. E. Rep. 360.

² *Witkowski v. Hern*, 82 Cal. 604, 23 Pac. Rep. 132; *Simpson v. Kirchbaum*, 43 Kan. 36; *Simpson v. Rothschild*, 43 Kan. 33, 22 Pac. Rep. 1019; *Grimes v. Chamberlain*, S. C. 27 Neb. 605, 43 N. W. Rep. 395. See, generally, *List v. Jockheck* (Kan.), 27 Pac. Rep. 184; *Clark v. Fitch* (Neb.), 49 N. W. Rep. 374; *Sander, etc., Co. v. Yesler's Estate* (Wash.), 27 Pac. Rep. 269; *Gilmore v. Ham*, 15 N. Y. Supp. 391.

³ We do not mean to be understood that specifications of error may be directly made upon such orders or rulings, for, as will hereafter be shown, the orders and rulings must first be presented to the trial court for review, and upon

the ultimate ruling the specification of error must be made.

⁴ *Schnitzius v. Bailey* (N. J.), 18 Atl. Rep. 192; *Kille v. Reading Iron Works* (Pa.), 19 Atl. Rep. 547; *Wallace v. Douglas*, 105 N. C. 42; *Smith v. Thomson*, 26 So. Car. 607; *Lowndes v. Miller*, 25 So. Car. 119; *Conant v. Riseborough*, 30 Ill. App. 498.

⁵ *People v. Stimer* (Mich.), 46 N. W. Rep. 28.

⁶ *Gilpatrick v. Glidden*, 82 Me. 201, 19 Atl. Rep. 166. This is really nothing more than the logical expansion of the settled general rule that from intermediate rulings or interlocutory orders an appeal will not lie. *Johannes v. Young*, 42 Wis. 401; *Joint School Dist. v. Kemen*, 68 Wis. 246; *Webster, etc., Co. v. St. Croix Co.*, 63 Wis. 647; *Hoey v. Pierson*, 67 Wis. 262, 267; *Goldmark v. Rosenfeld*, 69 Wis. 469.

the fact that in other rulings it may have clearly manifested a purpose to carry its rulings into the ultimate judgment or decree. A decretal order although interlocutory in its nature may, of course, be carried forward and embodied in a final decree¹ and thus become an essential part of that decree, but until it is so embodied in the final decree no appeal will lie. The rule that no matter how decisive may seem the ruling of the trial court it is not a final judgment,² is well illustrated by the cases in which rulings were made denying a motion for a judgment on a special verdict or on the answers of a jury to special interrogatories,³ for such a ruling is seemingly as clearly indicative of what the final judgment will be, as it is possible for any order to be, except, of course, the ultimate judgment itself.

§ 84. Object and Scope of the Rule—The general rule that appeals lie only from final judgments is so essential to the orderly administration of justice, and has so much to commend it, that it is with reason that statutory provisions creating exceptions are construed with some strictness. The doctrine is that where a general rule exists, and a party asserts that his case forms an exception to the rule, he must show substantial grounds for his

¹ *Farmers Loan and Trust Co. v. Canada, etc., R. Co.*, 127 Ind. 250.

² It is questionable whether the decision in the case of *Gruhl v. Gruhl*, 123 Ind. 86, can be supported upon any ground, for the allowance was a mere incident of the main suit for divorce; but if the decision in that case can be upheld upon any ground it must be upon the ground that section 1042 of the statute, by reference to the practice in suits for injunctions, impliedly authorizes an appeal. If the decision can in any event be sustained its doctrine should be limited and not extended.

³ *Murray v. Scribner*, 70 Wis. 228; *Treat v. Hiles*, 75 Wis. 265. In the first of the cases cited it was said by *Cassoday, J.*, in speaking of the ruling on a motion for judgment on the special

verdict, said: "No judgment has as yet been entered. The mere fact that the order for judgment includes an order denying the defendant's motion for judgment, does not make the order appealable, since every order for judgment wholly in favor of one party necessarily precludes any judgment in favor of the other party. In other words, the two orders mentioned are together, in effect, but one order for judgment in favor of the plaintiff and against the defendant." It is true, we may say in passing, that the Wisconsin statute is different from ours, but the ruling principle is not essentially changed by the difference in the two statutes. *R. S. of Wis.*, § 3069; *R. S. of Ind.* 1881, §§ 632, 646.

claim, or the case will be brought under the rule.¹ This doctrine is applied with liberality to prevent appeals from intermediate rulings or interlocutory orders, for, in almost every form in which the question has been presented, the courts have exhibited their reluctance to multiply or recognize exceptions to the general rule.² One who asserts that his case constitutes an exception to the rule must be prepared to show a solid basis for his claim, or the general rule will be preferred to the exclusion of his claim. The object of the rule is to prevent the multiplication of appeals, and to require parties to submit a case once for all. Its scope is comprehensive, and few exceptions break its force or narrow its operation.

§ 85. Requisites of a Final Judgment—A judgment may be final in such a sense as to authorize an appeal although it may create no lien and may be, in some respects, vague and uncertain, for the strict rule which applies where the question is as to the sufficiency of a judgment does not always govern where

¹ The Indianapolis, etc., Co. v. Watson, 114 Ind. 20.

² In addition to the authorities already referred to upon the question of what are interlocutory orders and intermediate rulings from which an appeal will lie, the following cases may be cited, showing what orders are regarded as interlocutory or intermediate: A decree that does not settle the amount of the recovery. *Hunter v. Hunter*, 100 Ill. 519; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429; *Burlington, etc., Co. v. Simmons*, 123 U. S. 52; *Railroad Co. v. Swasey*, 23 Wall. 405. An order vacating a judgment and admitting parties to defend. *McCulloch v. Dodge*, 8 Kan. 476; *Prentice v. Rice*, 2 Dougl. (Mich.) 296; *In re Studdart*, 30 Minn. 553; *Owne v. Going*, 7 Col. 85; *Young v. Matthiesen, etc., Co.*, 105 Ill. 26; but see *Morse v. Stockman*, 65 Wis. 36. Admitting or refusing to admit parties. *Coburn v. Smart*, 53 Cal. 742; *State v. Parish Judge*, 27 La. Ann. 184. An

order respecting a guardian's report and directing another report. *Pfeiffer v. Crane*, 89 Ind. 485. An order that a bill be taken *pro confesso*. *Russell v. Lathrop*, 122 Mass. 300. An order to interplead. *Barth v. Rosenfield*, 36 Md. 604. Orders respecting time of trial and place on calendar. *Morgan v. Keenan*, 27 So. Car. 248, 3 S. E. Rep. 297; *Shearouse v. Smith*, 83 Ga. 520, 11 S. E. Rep. 560. An order disposing of the case as to part of the issues or parties. *Liliensterne v. Lewis (Texas)*, 12 S. W. Rep. 750. In the following cases will be found illustrations of some other phases of the subject of interlocutory orders: *Hazelhurst v. Morris*, 28 Md. 67; *Sellers v. Union Lumber Co.*, 36 Wis. 398; *Eastham v. Sallis*, 60 Tex. 576; *Macnevin v. Macnevin*, 63 Cal. 186; *Low v. Crown Point, etc., Co.*, 2 Nev. 75; *Scott v. Burton*, 6 Tex. 322, S. C. 55 Am. Dec. 782; *Hawkins v. Massie*, 62 Mo. 582.

the question is simply as to the right to appeal. There is a distinction between the two classes of cases, for there may often be an appeal from an order so defective in form as not to be sufficient to support an action upon it, or so defective as not to be strong enough to resist a direct assault. The test, to outline it in a rough way, is not whether the order will support a complaint upon it as a judgment, or create a lien or resist a direct attack, but whether it puts an end to the particular case as to all the parties and all the issues. As illustrating the doctrine stated may be taken the case wherein it was held that an appeal will lie from an order setting aside a commissioner's sale entered upon the exceptions of the purchaser.¹ Of the cases out of the usual line, but illustrating what has been said, may be adduced cases such as those wherein an order is made disbarring an attorney, discharging a guardian, and the like.² Cases of the class represented by the particular instances proceed, as a rigid analysis will disclose, although this is not always avowed, upon the theory that the order or judgment puts an end to the whole controversy involved in the particular instance, although it does not adjudicate upon the entire subject in such a manner as to terminate all litigation that can arise concerning or affecting the general subject.

§ 86. Distinct Actions—A complaint for a new trial for causes discovered after the term constitutes the foundation of a new and distinct action, as is held by the later cases, and from a

¹ *Hollett v. Evans et al.*, 28 Ind. 61. An appeal will lie from an order directing an execution to issue. *Entrop v. Williams*, 11 Minn. 381.

² Order disbarring an attorney. *Ex parte Trippe*, 66 Ind. 531. Removal of a guardian. *Ward v. Angevine*, 46 Ind. 415. Order regarding custody of a child. *Henson v. Walts*, 40 Ind. 170. But the general rule respecting guardianships, decedents' estates, insolvents' estates, trust estates and similar matters, is that no appeal lies from an order approving a current account or report. The theory generally asserted by the adjudged

cases is that as long as the estate is open there is no appeal from interlocutory or intermediate orders. *Pfeiffer v. Crane*, 89 Ind. 485; *Goodwin v. Goodwin*, 48 Ind. 584; *Pate v. Moore*, 79 Ind. 20; *Candy v. Hanmore*, 76 Ind. 125; *Sanders v. Loy*, 61 Ind. 298; *Cravens v. Chambers*, 55 Ind. 5; *Parsons v. Milford*, 67 Ind. 489; *Lang v. The State*, 67 Ind. 577; *Heffner v. Day*, 54 Ark. 79, S. C. 14 S. W. Rep. 1090. For an example of a final judgment in the case of an insolvent's estate, see, *Bradford v. Higgins* (Neb.), 47 N. W. Rep. 749.

judgment in such an action an appeal will lie.¹ The element which gives the peculiar character to the class of cases of which we are speaking is that which marks each of its members as a distinct and independent action, for, without this element, such a case would fall within the ordinary rule which treats a motion for a new trial as an incident of the main proceeding. If the motion for a new trial is no more than an incident, then, of course, no appeal will lie from the isolated ruling upon it,² although questions presented by it will be considered on an appeal from the final judgment.

§ 87. Appeal from a judgment of Review—An appeal will lie from a final judgment in a suit to review a judgment.³ The decisions which declare and enforce the rule we have just stated impliedly assert the doctrine of which we have often spoken, that is, that a judgment which puts an end to the particular case so far as an end can be put to it in the court where it is pending is a final judgment from which an appeal will lie.⁴

¹ *Hines v. Driver*, 89 Ind. 339, overruling *House v. Wright*, 22 Ind. 383; *White v. Harvey*, 23 Ind. 55, and citing. as sustaining the rule, the cases of *McCall v. Hitchcock*, 7 Bush. (Ky.) 615; *Belt v. Davis*, 1 Cal. 134; *Kee v. McDonald*, 17 Ind. 518; *Glidewell v. Daggy*, 21 Ind. 95; *Huntington v. Drake*, 24 Ind. 347; *Houston v. Bruner*, 39 Ind. 376; *Sanders v. Loy*, 45 Ind. 229; *Hiatt v. Ballinger*, 59 Ind. 303; *Hill v. Roach*, 72 Ind. 57; *Kitch v. Otis*, 79 Ind. 96. In *Harvey v. Fink*, 111 Ind. 249, *Hines v. Driver*, *supra*, is approved and followed; see, also, *Hines v. Driver*, 100 Ind. 315, 316.

² *State v. Ely*, 11 Ind. 313; *State v. Spencer*, 92 Ind. 115; *Lawson v. Moore*, 44 Ala. 274; *Ex parte Sims*, 44 Ala. 248; *McDonough v. Nicholson*, 46 Mo. 35; *Artman v. West Point, etc., Co.*, 16 Neb. 572; *Houston v. Starr*, 12 Tex. 424; *Tucker v. Sandridge*, 82 Va. 532.

³ *Keeper v. Force*, 86 Ind. 81; *Brown v. Keyser*, 53 Ind. 85. See, also, *Rich-*

ardson v. Houk, 45 Ind. 451; *Leech v. Perry*, 77 Ind. 422.

⁴ In *Brown v. Keyser*, *supra*, it was said: "A judgment for or against a review of a former judgment puts an end to the action for a review. If the judgment is against a review, the whole proceedings are at end. If the judgment is for the review, as in this case, the action for review is ended, and no further proceedings are to be had in that action. Any further proceedings contemplated are to be had on the original action and not on the action for review." The argument contained in the extract made from the opinion in *Brown v. Keyser*, gives support to the decision in *Hines v. Driver*, 89 Ind. 339, inasmuch as it may be justly said that where there are further proceedings to be had in the event that a new trial is awarded, they are to be had in the original case, and if a new trial is denied the original judgment remains undisturbed.

But where the judgment sought to be reviewed is one from which an appeal will not lie, then no appeal can be taken from the judgment in the suit for review.¹ This ruling is right, since to hold otherwise would be to affirm that what a party can not do directly he may do by indirection.

§ 88. **Order setting aside an Execution**—An order refusing to set aside an execution has been held to be a final judgment from which an appeal may be taken.² Where the only issue in the case is as to the right to have an execution issued, the order refusing to direct its issue, or an order directing it to issue, may well be considered a final judgment for the reason that it effectually puts an end to the particular case. But if the order were merely incident to other proceedings in the same case, requiring for their complete determination a judgment upon other questions than the right to an execution, the order can not be justly regarded as a final judgment. This must be so for the reason that where the order comes short of adjudicating upon all the issues it is not a final judgment authorizing an appeal.³

§ 89. **Removal of case to Federal Court**—Whether an appeal will lie from an order transferring, or refusing to transfer, a case to a Federal Court under the act of Congress is a question upon which there is a diversity of opinion. In the first of our decisions upon the subject it was held that an appeal would not

¹ *Klebar v. Town of Corydon*, 53 Ind. 95.

² *Wright v. Rogers*, 26 Ind. 218; *Scott v. Allen*, 1 Texas, 508.

³ *Nat. Bank of Kingwood v. Jarvis*, 26 W. Va. 785. The principle asserted in the cases which hold that an order vacating judgments and admitting parties to defend are interlocutory support our conclusion. *McCulloch v. Dodge*, 8 Kan. 476; *Brown v. Edgerton*, 14 Neb. 453; *Kermeyer v. Kansas, etc., Co.*, 18 Kan. 215; *Owen v. Going*, 7 Col. 85. So, also, do the decisions upon a motion to dissolve attachments. *Cutter v.*

Gumberts, 3 Eng. (Ark.) 449; *Woodruff v. Rose*, 43 Ala. 382; *Bray v. Laird*, 44 Ala. 295; *Wearen v. Smith*, 80 Ky. 216; *Butcher v. Taylor*, 18 Kan. 558; *Abbott v. Zeigler*, 9 Ind. 511; *Harrison v. Thurston*, 11 Fla. 307; *Baldwin v. Wright*, 3 Gill. (Md.) 241; *Snavely v. Abbott Buggy Co.*, 36 Kan. 106; *Wilson v. Shepherd*, 15 Neb. 15; *Ante*, § 83. In *Theirman v. Vahle*, 32 Ind. 400, the doctrine of *Abbott v. Zeigler*, *supra*, is disapproved, but the later case of *State v. Miller*, 63 Ind. 475, overrules, and correctly, the case of *Theirman v. Vahle*.

lie,¹ but this case was subsequently overruled.² The question is not free from difficulty for the language of the act is imperative and seems to leave nothing for the court in which the application is filed to do, except to send the case to the Federal Court.³ The Federal Courts, as some of the cases cited show, do, at all events, assert the right to exercise control over the State courts for the protection of the party who petitions for a removal.

§ 90. **Material Issues must be determined**—The general rule is that a judgment is not final unless it disposes of all the issues as to all of the parties. If issues are not determined, or if the rights of one or more of the parties are left undecided, there is, in general, no such final judgment as will authorize or warrant an appeal. But the judgment may be final although some act essential to its enforcement may remain to be done. If the judgment settles all rights and all issues its enforcement is a subsequent consideration that will not change its character.⁴

¹ *City of Aurora v. West*, 25 Ind. 148. To a similar effect are the cases of *Jackson v. The Alabama, etc., Co.*, 58 Miss. 648; *Jones v. Davenport*, 7 Colw. (Tenn.) 145; *Stevens v. Phoenix Insurance Co.*, 41 N. Y. 149; *Bell v. Dix*, 49 N. Y. 232.

² *Burson v. National Park Bank*, 40 Ind. 173, citing *Akerly v. Vilas*, 24 Wis. 165; *Whiton v. Chicago, etc., Co.*, 25 Wis. 424; *Home Life Ins. Co. v. Dunn*, 20 Ohio St. 175; *Kanouse v. Martin*, 15 How. (U. S.) 198. The decision in *Burson v. National Park Bank*, *supra*, is supported by the cases of *Rosenfield v. Condict*, 44 Texas. 464; *State v. The Judge*, 23 La. Ann. 29; *Bryant v. Rich*, 106 Mass. 180; *Crane v. Reeder*, 28 Mich. 527; *Darst v. Bates*, 51 Ill. 439; *Mahone v. Manchester*, 111 Mass. 72; *Hough v. Western, etc., Co.*, 1 Bissell, 425.

³ *Insurance Co. v. Dunn*, 19 Wall. 214; *Green v. Creighton*, 23 How. 90; *Fashnacht v. Frank*, 23 Wall. 416; *The Removal Cases*, 100 U. S. 457; *Good-*

rich v. Hunton, 29 La. Ann. 372; *Erie R. R. Co. v. Stringer*, 32 Ohio St. 468; *Ellerman v. New Orleans, etc., Co.*, 2 Woods C. C. 120; *Insurance Co. v. Morse*, 20 Wall. 445; *Fisk v. Union, etc., Co.*, 6 Blatch. 362; *French v. Hay*, 22 Wall. 250. See, generally, *Indianapolis, etc., Co. v. Risley*, 50 Ind. 60; *Union Tel. Co. v. Dickinson*, 40 Ind. 444; *Atlas, etc., Co. v. Byrus*, 45 Ind. 133.

⁴ In *The St. Louis, etc., Co. v. The Southern Express Co.*, 108 U. S. 24, it was said by Waite, C. J., that: "As we had occasion to say at the present term in *Bostwick v. Brinkerhoff*, 106 U. S. 3, and *Grant v. Phoenix Ins. Co.*, 106 U. S. 429, a decree is final for the purpose of an appeal to this court, when it terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution what has been determined." It follows from this that if the decree or judgment leaves no question affecting the merits

An order may sometimes so effectually determine all the issues as to all the parties as to have the effect of a final judgment or decree,¹ but this effect it can not have if it be merely interlocutory or intermediate, requiring for its completion and consummation a final decree or judgment putting an end to the litigation in the particular case.² If the order is one which settles the controversy as to all of the parties in the particular case, it is final as to that instance although it may not cover the entire subject upon which the issues touch,³ but, under the familiar rule that what may be litigated under the issues is deemed to have been adjudicated, it will cover all that might properly have been litigated.⁴

§ 91. **Rights of all parties must be Adjudicated**—The fundamental principle is that the case, in all its parts, must be disposed of in so far as it is before the court, under the issues, otherwise it will not be regarded as one in which an appeal will lie.⁵ This principle, taken in conjunction with the kindred one that the law does not favor the decision of controversies piece-

open to controversy between any of the parties, it is final in such a sense, at least, as to authorize an appeal. Whether it does settle all equities and all questions of law and fact, is, of course, to be determined from the record in the particular case. The order of the trial court granting an appeal does not determine the question of the right to an appeal, as that is a question for the decision of the appellate tribunal. *Callan v. May*, 2 Black, 541; *Smith v. Traub's Heirs*, 9 Pet. 4.

¹ *In re Estate Gilbert*, 104 N. Y. 200, S. C. 10 N. E. Rep. 148; *Vermilye v. Vermilye*, 32 Minn. 499, S. C. 18 N. W. Rep. 832; *Spitley v. Frost*, 15 Fed. Rep. 299; *Dwight v. St. John*, 25 N. Y. 203; *In re estate of Ten Eyck*, 36 Hun. 575; *Hobbs v. Beckwith*, 6 Ohio St. 252; *Maysville, etc., Co. v. Punnett*, 15 B. Monr. 47; *Eaton v. Ryan*, 5 Neb. 47; *Rector v. Rotton*, 3 Neb. 171.

² *Eastham v. Sallis*, 60 Texas, 576;

Williamson v. Field, 2 Barb. Ch. 281; *Harris v. Clark*, 4 How. Pr. R. 78; *Whiting v. Bank*, 13 Pet. 6; *Bronson v. Railroad Co.*, 2 Black, 524.

³ *Belt v. Davis*, 1 Cal. 134; *Weston v. Charlestown*, 2 Pet. 449; *Klink v. Cusseta*, 30 Ga. 504; *United States v. Schooner Peggy*, 1 Cranch. 103.

⁴ *Fischli v. Fischli*, 1 Blackf. 360; *Wilson v. Buell*, 117 Ind. 315, 317, and cases cited; *Wright v. Anderson*, 117 Ind. 349, 354, and cases cited; *Lawrence v. Beecher*, 116 Ind. 312, 314; *Moore v. State*, 114 Ind. 414, 421; *Center Tp. v. Board*, 110 Ind. 579; *Balfie v. Lammers*, 109 Ind. 347; *Bundy v. Cunningham*, 107 Ind. 360, 363, and cases cited.

⁵ *McCollum v. Eager*, 2 How. (U. S.) 61; *Craighead v. Wilson*, 18 How. (U. S.) 199; *Ayres v. Carver*, 17 How. (U. S.) 591, 594; *Rutherford v. Fisher*, 4 Dall. 22; *Young v. Gundy*, 6 Cranch, 51; *Chateau v. Rice*, 1 Minn. 24.

meal, requires that the case be effectually and finally disposed of as to all the parties¹ before the court and upon all the material issues tendered by them for decision.² It is, indeed, not legally possible to conceive how there can be more than one final decree or judgment in a single case, so that it must be true that there is only one final judgment or decree from which an appeal will lie.³ Even in the exceptional cases (to be hereafter noticed) in which appeals are allowed from orders or decrees affecting part only of the issues, there is no trenching upon the doctrine that there can only be one final judgment in a single case, for those cases give full recognition to the general rule by assuming the character of acknowledged exceptions. They proceed upon the theory that there are cases in which an appeal will lie from an interlocutory order, not upon the theory that the rulings which may be appealed from are final judgments.

§ 92. Judgment may be final, although an order may be required for its enforcement—The phase of the general subject of the finality of judgments presented by the proposition, that where all the issues are so decided as to terminate the controversy, although acts essential to the enforcement remain to be done, is illustrated by the cases wherein it is held that a decree in partition is conclusive when it settles the main issue, although reports must be made by a commissioner and acted upon by the court.⁴ Some of the cases cited carry the doctrine to an extreme length, and it is very doubtful whether they are not opposed by

¹ *Watkins v. Mason*, 11 Oregon, 72; *Owens v. Mitchell*, 33 Tex. 225; *Whitaker v. Gee*, 61 Tex. 217; *Masterson v. Williams* (Tex.), 11 S. W. Rep. 531; *Schultz v. McLean* (Cal.), 18 Pac. Rep. 775; *Peck v. Vandenberg*, 30 Cal. 11; *Delcep v. Hunter*, 1 Sneed, 100; *Harrison v. Farnsworth*, 1 Heisk. 751; *Crittenden v. Methodist, etc., Church*, 8 How. Pr. R. 327.

² *University v. The Bank*, 92 N. C. 651; *Low v. Crown Point Mining Co.*, 2 Nev. 75; *Perkins v. Fourniquet*, 6 How. (U. S.) 206; *Pulliam v. Christian*, 6 How. (U. S.) 209.

³ *State v. Templin*, 122 Ind. 235. The issues must all be involved in every case, and upon all there must be a final judgment, or the case can never come to an end. *Lonsdale v. Brown*, 4 Wash. C. C. 148.

⁴ *Fleenor v. Driskill*, 97 Ind. 27; *Kreitline v. Franz*, 106 Ind. 359; *Jackson v. Myers*, 120 Ind. 504; *Ansley v. Robinson*, 16 Ala. 793; *Banton v. Campbell*, 2 Dana, 421; *Damouth v. Klock*, 28 Mich. 163; *Beatty v. Beatty* (Ky.), 5 S. W. Rep. 771.

the weight of authority; one, at least, of the cases cited is in some respects against authority.¹ The decisions of our own court affirm that the decree ordering partition and appointing commissioners is not a final one authorizing an appeal.² The great weight of authority supports this doctrine.³

§ 93. **Decree in Partition Proceedings**—It is held in the cases cited in the preceding note, and in other cases, that an appeal will lie from the order confirming the report of the commissioners and directing a sale of the land because of its indivisibility.⁴ There is reason for the doctrine that an appeal will lie from an order confirming a report of commissioners appointed under a prior order, for if the judgment should be reversed or modified on appeal, expense would be entailed upon the parties without corresponding benefit. Not only may this reason be assigned, but another reason may also be adduced, and that is this: The sale by the commissioners necessarily follows, and hence is nothing more than the enforcement of a decree by which the rights of all the parties have been finally adjudicated. But to hold that there may be an appeal from the order appointing commissioners to make partition, can not be defended upon the grounds suggested, nor, indeed, can it be successfully defended upon any ground.

§ 94. **Form of Judgment not important**—Form is not a matter of much importance in determining whether a judgment is or is not final. If the controversy is ended between the parties so far as the court can end it, then the judgment is final, regardless

¹ *Jackson v. Myers*, 120 Ind. 504.

² *Rennick v. Chandler*, 59 Ind. 354; *Davis v. Davis*, 36 Ind. 160; *Kern v. Maginniss*, 41 Ind. 398; *Wood v. Wilkinson*, 13 Ind. 352; *Clester v. Gibson*, 15 Ind. 10; *Hunter v. Miller*, 17 Ind. 88; *Cook v. Knickerbocker*, 11 Ind. 230; *Griffin v. Griffin*, 10 Ind. 170; *Hunter v. Miller*, 11 Ind. 356.

³ *Buller v. Lenzee*, 100 Mo. 95, S. C. 13 S. W. Rep. 344; *Pipkin v. Allen*, 29 Mo. 229; *Davie v. Davie*, 52 Ark. 224,

S. C. 12 S. W. Rep. 558; *Tilton v. Vail*, 117 N. Y. 520, S. C. 23 N. E. Rep. 120; *Green v. Fisk*, 103 U. S. 518; *Gesell's Appeal*, 84 Pa. St. 238; *Templeman v. Steptoe*, 1 Munf. 339; *Putnam v. Lewis*, 1 Fla. 455; *Holloway v. Holloway*, 103 Mo. 274, 11 S. W. Rep. 233; *Gates v. Salmon*, 28 Cal. 320; *Mills v. Miller*, 2 Neb. 299; *Ivory v. Delore*, 26 Mo. 505.

⁴ *Benefiel v. Aughe*, 93 Ind. 401, 404; *McFarland v. Hall*, 17 Tex. 676.

of mere matters of form.¹ This must necessarily be true, since if the order terminates the litigation in the court where it is pending, nothing more can there be done, except, perhaps, to prepare for an appeal. It is obvious that under this rule an order dismissing a case over the objection of the plaintiff may constitute a final judgment.² But a plaintiff who voluntarily dismisses his action can not appeal.³ Judgment rendered upon demurrer is final,⁴ but, as we have already said, a ruling on demurrer is not a final judgment. A decree may be final, although rendered upon a cross-complaint filed by an intervening creditor.⁵

§ 95. **Independent Issues not affecting all Parties**—There may be cases, where an entire and distinct issue is formed between some of the parties without affecting other parties or interests, in which an appeal will lie although the decree does not cover the entire subject of the suit.⁶ But such cases are rare and the exceptions to the general rule can not be multiplied without mischievous results, hence no case can be regarded as beyond the scope of the general rule unless its peculiarities are so strong and so well marked as to leave little doubt that it is a case of such an unique character that it can not be brought under the general rule without doing injustice.

¹ *Zoller v. McDonald*, 23 Cal. 136; *Doubling v. Polack*, 18 Cal. 625; *Leese v. Sherwood*, 21 Cal. 164.

² *English v. Devarro*, 5 Blackf. 588; *Lines v. Benner*, 52 Ind. 195; *Koons v. Williamson*, 90 Ind. 599; *Rox v. Bennett*, 1 H. Blacks, 432; *Hartford Fire Ins. Co. v. Green*, 52 Miss. 332; *Stoppenbach v. Zohrlaut*, 21 Wis. 385; *Borne v. Kansas City*, 51 Mo. 454; *Scriven v. Hursh*, 39 Mich. 98; *Eddleman v. McGlathery (Tex.)*, 11 S. W. Rep. 1100; *Rodgers v. Russell*, 11 Neb. 361, S. C. 9 N. W. Rep. 547; *Murdock v. Martin*, 132 Pa. St. 86, 18 Atl. Rep. 1114. A defendant can not, as a general rule, appeal from a voluntary non-suit suf-

fered by the plaintiff. *Holdridge v. Marsh*, 28 Mo. App. 283.

³ *Wilson v. The Aetna Ins. Co.*, 3 Ind. 557; *Vestal v. Burditt*, 6 Blackf. 555; *Kelsey v. Ross*, 6 Blackf. 536.

⁴ *Matter v. Campbell*, 71 Ind. 512, distinguishing *Slagle v. Bodmer*, 58 Ind. 465. See, also, *Scheiffelin v. Weathered*, 19 Ore. 172, 23 Pac. Rep. 893.

⁵ *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207.

⁶ *Trustees v. Greenough*, 105 U. S. 527; *Hinckley v. Gilman*, 94 U. S. 467; *Williams v. Morgan*, 111 U. S. 684; *Fosdick v. Schall*, 99 U. S. 235; *Farmer's Loan and Trust Co., Petitioner*, 129 U. S. 206, 213.

§ 96. **Record must show final Judgment**—The record must show a final judgment or the appeal will be dismissed.¹ If a final judgment was in fact entered and is by a clerical error omitted from the transcript, the omission may, of course, be supplied. Upon a proper application the appellate tribunal would undoubtedly cause the error to be corrected, but it could not by direct action of its own remedy the defect. Parties may by agreement supply the omission, but they can not by agreement make a final judgment if none, in fact, was rendered. Errors or irregularities may be corrected by agreement, or, by agreement waived, but a record can not be made by agreement where there is no foundation for it.

§ 97. **Limitation of Appeals to designated classes of cases controls Jurisdiction**—The judgment appealed from must be rendered in a case where the amount in controversy or the character of the action or suit is such as to bring it within the statute, for, as a general rule, such a consideration as amount or character is jurisdictional in its nature.² Where the statute fixes the amount which must be involved in the controversy to authorize an appeal the amount conclusively determines the right of appeal unless the character of the case is such as to make it appealable irrespective of the question of the amount involved. The decisions regard the statutory provisions limiting the right of appeal to designated classes of cases as creating jurisdictional barriers within which the courts must confine themselves, al-

¹ *Wingo v. State*, 99 Ind. 343; *Shroyer v. Lawrence*, 9 Ind. 322. In the case last named it was said: "In addition to the objection that there is no final judgment it may be assumed that the appellate jurisdiction of this court can, in no instance, be conferred by the agreement of parties." The final judgment is, as a general rule, decisive of the question of the right to appeal, and as this right must, ordinarily, appear from the record, it is essential that it show a final disposition of the controversy. *Logan v. Harris*, 90

N. C. 7; *Horicon Shooting Club v. Gorsline*, 73 Wis. 196, 41 N.W. Rep. 78; *State v. Brown*, 44 Ind. 329. If judgment has been rendered an appeal will lie although a finding is not shown. *Askren v. State*, 51 Ind. 592, distinguishing *State v. Brown*, *supra*.

² In former chapters we have discussed the questions arising on the statutory provisions prescribing the amount which must be in controversy to justify an appeal. See "The Supreme Court," Chapter III, "The Appellate Court," Chapter IV.

though the parties make no objections to the court's entertaining jurisdiction.¹

§ 98. **Distinct and Independent claims**—The amount in controversy in the trial court generally controls,² and where there is a single indivisible claim there is little difficulty in determining the question of the right to prosecute an appeal, but there are instances where real difficulty may arise. Thus an administrator may be made liable to several parties and the aggregate amount recovered as to him exceed the amount which gives the right of appeal, although as to each of the claimants the amount considered distributively would not be sufficient to authorize an appeal by each claimant. In such a case it would seem that the administrator might appeal from the judgment against him, for the fact that the amount is to be distributed does not lessen the amount recovered against him.³ Where the claims are entirely separate and distinct and as such rest on different grounds, the rule indicated can not apply.⁴ As was said in a former chapter, the claims of different and distinct parties involving separate rights can not be so combined as to give jurisdiction.⁵ Where the aggregate amount is sufficient to authorize

¹ *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. Rep. 1126; *Bienefeld v. Fresno Milling Co.*, 82 Cal. 425, S. C. 22 Pac. Rep. 1113; *Crane v. Farmer* (Col.), 23 Pac. Rep. 455; *Aultman, etc., Co. v. Wier*, 134 Ill. 137, 24 N. E. Rep. 771; *Guidry v. Garland*, 41 La. Ann. 756, S. C. 6 So. Rep. 563; *Harrison v. Moss*, 41 La. Ann. 239, 6 So. Rep. 528; *Clark v. Gresham*, 67 Miss. 203, 7 So. Rep. 224; *Quimby v. Hopping* (N. J.), 19 Atl. Rep. 123; *McCoy v. McCoy*, 33 W. Va. 60, 10 S. E. Rep. 19; *New York Elevated R. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608.

² *Knapp v. Deyo*, 108 N. Y. 518; *Clark v. Gresham*, 67 Miss. 203, 7 So. Rep. 224; *Finch v. Hartpence*, 29 Neb. 368, 45 N. W. Rep. 684; *Lake Erie, etc., Co. v. Faught*, 129 Ill. 257, 21 N. E. Rep. 620; *Buckland v. Shepherd*, 77 Iowa, 329, 42 N. W. Rep. 311; *Wolff v.*

Mathews (Mo.), 11 S. W. Rep. 563; *Campbell v. Mandeville*, 110 N. Y. 628, 17 N. E. Rep. 866; *Moore v. Boner*, 7 Bush. 26; *The D. R. Marton*, 91 U. S. 365; *Josuez v. Conner*, 75 N. Y. 156; *Galbreath v. Trump*, 83 Ind. 381. See, *ante*, Chapter IV.

³ *Saunders v. Waggoner*, 82 Va. 316; *Martin v. Fielder*, 82 Va. 455; *Scott's Succession*, 41 La. 668, S. C. 6 So. Rep. 792; *Cassidy's Succession*, 40 La. Ann. 327, S. C. 5 So. Rep. 292. See, generally, *Powers v. Yonkers*, 114 N. Y. 145, 21 N. E. Rep. 132; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577.

⁴ *Hartook v. Crawford*, 85 Va. 413, 7 S. E. Rep. 538; *Thompson v. Adams*, 82 Va. 672.

⁵ *McCarty v. Hamaker*, 82 Va. 471; *Harrison v. Moss*, 41 La. Ann. 239, S. C. 6 So. Rep. 528; *Davis v. Bargas*, 41

an appeal, the fact that the decree provides for its payment in installments does not preclude an appeal.¹ If the judgments, although in favor of different parties, are bound together as an entirety because of the nature of the cause of action on which they all rest and out of which they grow, as, for instance, where the whole debt is secured by one instrument, the several judgments may be combined so as to give a right of appeal.²

§ 99. **Appeals of part of a case—Exceptional cases**—There is a class of cases which apparently form an exception to the general rule that an appeal will not lie from part of a case, but the cases forming this class will be found on investigation to be apparent rather than actual exceptions. The class to which we refer is composed of cases wherein an issue, distinct, entire and complete, is formed between some of the parties and upon which issue a final judgment is given affecting only the interests and rights of the parties to that issue. An illustration of the exceptional class of cases under immediate mention is supplied by a case wherein it was held by the Supreme Court of the United States that a purchaser of a railroad from a receiver might appeal from a judgment allowing a claim filed against the receiver.³ So an order authorizing a receiver to borrow money was held to be an order from which an appeal will lie by a person interested as a lienholder, but this is pressing the doctrine to its utmost verge.⁴ Orders of a similar general character have been held to be appealable.⁵ In cases of the kind

La. Ann. 313, S. C. 6 So. Rep. 469; Ad-
amson's Appeal, 110 Pa. St. 459; Fourth
National Bank v. Stout, 113 U. S. 684;
Renn v. Samos, 42 Texas, 104; Terry
v. Hatch, 93 U. S. 44; Umlauf v. Um-
lauf, 103 Ill. 651; Zable v. Harris, 82
Ky. 473. See, generally, Farwell v.
Becker, 129 Ill. 261, 21 N. E. Rep. 792;
Langan v. Langan, 83 Cal. 618, S. C. 23
Pac. Rep. 1084; Aultman, etc., Co. v.
Weir, 134 Ill. 137, 24 N. E. Rep. 771;
Telford v. Garrels, 132 Ill. 550, 24 N.
E. Rep. 573; Owens v. Branson, 28
Mo. App. 584.

¹ State v. Judge, etc., 21 La. Ann. 65.

² Rodd v. Heartt, 17 Wall. 354; The
Rio Grande, 19 Wall. 178.

³ Louisville, etc., Co. v. Wilson, 138
U. S. 501, 11 Sup. Ct. Rep. 405, dis-
tinguishing Central Trust Co. v. Grant
Locomotive Works, 135 U. S. 207, 10
Sup. Ct. Rep. 736. See Gibson v.
Schufeldt, 122 U. S. 27; Philadelphia,
etc., v. Little, 41 N. J. Eq. 519, S. C. 7
Atl. R. 356.

⁴ Matter of Farmers Loan Trust Co.
Petitioners, 129 U. S. 206.

⁵ Reeder v. Machen *et al.*, 57 Md. 56;
Williams v. Morgan, 111 U. S. 684;
Bradford v. Higgins (Neb.), 47 N. W.
Rep. 749.

indicated each claim is treated as a complete right of action in itself,¹ divisible and distinct from all others. But, after all, the cases constitute, as suggested, an apparent rather than an actual exception to the general rule, for the class is composed of cases where the judgment is final as to the particular issue and the parties to it, and the issue is one which neither affects the main action nor the parties generally. If the issue does affect the main action and does involve the rights of others than the parties to the particular issue, there can be no appeal until there has been a decree or judgment upon all the issues as to all the parties. It is only upon the ground that the issue on which the order is based is entirely isolated from all others and concerns the parties to it, and no others, that the order can be considered final. Where the order does completely put an end to the particular issue and fully settles the controversy as to all the parties affected by it,² then it may be considered as a final judgment, otherwise it can not be treated as anything more than a non-appealable interlocutory order. Of course, a statute or a rule of court, where there is power to make such a rule, may give an appeal from an interlocutory order,³ but our statute confines the right of appeal to the interlocutory orders named.

§ 100. Interlocutory Order appointing a Receiver—One of the principal exceptions to the general rule that appeals will lie only from final judgments is that in cases where parties seek the appointment of a receiver. The statute expressly provides for an appeal from an order appointing, or refusing to appoint, a receiver.⁴ The statutory provisions upon this subject are explicit, and there is little need of extended comment. It may be said, however, that an appeal may be taken from the order on the petition for a receiver without awaiting the final judgment.⁵

¹ *Elgin v. Marshall*, 106 U. S. 578; *Tupper et al. v. Wise*, 110 U. S. 398; *Fourth Nat. Bank v. Stout*, 113 U. S. 684.

² *Ex parte Spencer*, 95 N. C. 271.

³ *Martin v. Martin*, 14 Ore. 165.

⁴ R. S. 1881, § 1231.

⁵ *Dale v. Kent*, 58 Ind. 584; *Pressley v. Lamb*, 105 Ind. 171. If the appointment of a receiver is properly made as to the complaining party, the fact that the appointment was erroneous as to some other party will not warrant a reversal. *Rapp v. Reehling*, 122 Ind. 255.

Where the appeal is taken directly from the order, it must be perfected within ten days.¹ The time can not be extended by agreement.² But while a party may, if he so elects, appeal directly from the order, he is not bound to do so, for he may await the final decree and make available the questions presented by the ruling on the petition.³ An appeal from the interlocutory order does not bring up any other questions except such as are legitimately connected with the granting or refusal of the order.⁴ It has been held that a refusal to grant an application for a change of judge presents a question for consideration on an appeal from the interlocutory order.⁵ Where the appeal is from the order the principal case remains in the trial court, and the pleadings may there be changed or amended,⁶ but, of course, such amendments or changes can not affect the questions presented by the record taken up on appeal.

§ 101. **Interlocutory Order for payment of money**—An appeal will lie from an interlocutory order requiring a party to make a specific payment of money.⁷ We have somewhat restricted the statutory words in our statement for those words are, “the payment of money,” and in thus restricting the language we think we have not erred. If the language employed by the framers of the statute should be given a broad meaning it would bring within its sweep ordinary judgments for money, and it is

This ruling rests upon the principle that only the party injured by a ruling can successfully complain of it on appeal. *Pattison v. Smith*, 93 Ind. 447; *Cool v. The Peters Box, etc., Co.*, 87 Ind. 531. See, generally, *Hellebush v. Blake*, 119 Ind. 349.

¹ *Vance v. Schayer*, 76 Ind. 194. Prior to the act of 1875 the decisions were that an appeal would not lie from an order appointing a receiver. *Wood v. Brewer*, 9 Ind. 86; *Fuller v. Adams*, 12 Ind. 559.

² *Flory v. Wilson*, 83 Ind. 391. This ruling is in harmony with the general doctrine that consent can not give an appellate court jurisdiction of the subject.

Smythe v. Boswell, 117 Ind. 365. In *Hursh v. Hursh*, 99 Ind. 500, the order was made on the 16th of July and the appeal was perfected on the 26th, and it was held to be in time.

³ *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510.

⁴ *Main v. Ginthert*, 92 Ind. 180; *Pouder v. Tate*, 96 Ind. 330; *Hursh et al. v. Hursh*, 99 Ind. 500, 503; *Naylor v. Sidener*, 106 Ind. 179.

⁵ *Shoemaker v. Smith*, 74 Ind. 71. Cited in *Shoemaker v. Smith*, 100 Ind. 40.

⁶ *Naylor v. Sidener*, 106 Ind. 179, 184.

⁷ R. S., § 646, subdivision 1.

evident that such a result was not intended. If a wide effect be ascribed to the statutory provision under consideration it would bring that provision into direct conflict with settled rules and other statutory provisions, and that, it seems clear to us, the legislature did not mean to do. The statute applies to an order to pay money into court on proceedings supplementary to execution.¹ An order to pay money into court made upon the application of a receiver is, as it has been held, within the rule declared by the statute.² The class of cases embraced within the scope of the statute under consideration has been characterized as one in which the denial of an appeal is likely to work such hardship that it is the duty of the courts to deal with members of the class with liberality.³ It is safe to say, at all events, that the provision allowing an appeal is in furtherance of justice, and that it is just to extend its operation by a liberal construction rather than to narrow it by a strict and rigid interpretation.

§ 102. Order directing execution of a written instrument—An interlocutory order commanding the execution of “an instru-

¹ *McKnight v. Knisely*, 25 Ind. 336; *Pounds v. Chatham*, 96 Ind. 342. In the case first named it was said: “It is contended that the words ‘payment of money’ mean the payment from one party to a suit to another, that they do not embrace orders for the payment of money into court. This is not a fair construction of the clause under consideration. This is a remedial statute, and must be liberally construed. The evils intended to be remedied were that the defendants were often compelled to part with their money under erroneous interlocutory orders of the common pleas and circuit courts and were subjected to the inconvenience of having it tied up to await the slow process of long litigation without the right of appeal until after final judgment.”

² *Cook v. Citizens National Bank*, 73 Ind. 256; *Coykendall v. Way*, 29 Minn. 162. It has been held that an order re-

quiring the delivery of property to a receiver is not appealable in the absence of a statute authorizing appeals from such orders. *Foray v. Conrad*, 6 How. U. S. 201; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429. In view of the fact, brought out very prominently in the case last mentioned, that the possession of the receiver is that of the court, and that he holds money or property to be delivered upon a final decree to the party entitled thereto, it may well be doubted whether the decision in *Cook v. Citizens National Bank* is sound. For interesting cases defining the right of the court to direct the payment of money to one of its officers, see *Dillon v. Connecticut, etc., Ins. Co.*, 44 Md. 386; *McKim v. Thompson*, 1 Bland Ch. 150; *Contee v. Dawson*, 2 Bland, 264, 269.

³ *Merle v. Andrews*, 4 Tex. 200; *Stovall v. Banks*, 10 Wall. 583.

ment of writing" may be appealed from.¹ The language of the statute is very comprehensive and seems to authorize an appeal in any case where an order is made requiring the execution of a written instrument, but it is difficult to conceive many cases to which it can apply. The statute creates an exception to the general rule and hence embraces only such a case as bears the essential marks of an exception. The language employed can not be construed as authorizing an appeal by a party who asks, but fails to secure, an order compelling the execution of a written instrument, for there is no valid reason for straining the words beyond their plain meaning. The provision under examination is probably borrowed from the chancery practice which was more liberal in allowing reviews by appellate tribunals than that of the common law.²

§ 103. **Orders requiring Delivery of Property**—The statutory provision declaring that appeals may be taken from interlocutory orders "for the delivery of the possession of real property or the sale thereof," does not appear to have been often invoked.³ It has, however, been held to apply to a case wherein an order of sale was made upon the petition of an administrator.⁴ The provision under immediate mention is broad enough to include all cases where there is an order for the sale of real property and there seems to be no valid reason for limiting it to a particular class of cases. The decisions which declare that an appeal will lie from an order in a partition suit directing the sale of land might well be rested upon the statutory provision under consideration, for its terms are very comprehensive.

¹ R. S., § 646, subdivision 1.

² The chancery practice as enforced by some of the courts allowed an appeal from an interlocutory order which effectually disposed of the branch of the case upon which it professed to operate. *Wing v. Warner*, 2 Doug. (Mich.) 288; *Lewis v. Campau*, 14 Mich. 458; *Kingsbury v. Kingsbury*, 20 Mich. 212; *Patterson v. Hopkins*, 23 Mich. 541; *Barry v. Briggs*, 22 Mich.

201; *Witbeck v. Chittenden*, 50 Mich. 426; *Maxfield v. Freeman*, 39 Mich. 64.

³ R. S., § 646, subdivision 2.

⁴ *Simpson v. Pearson*, 31 Ind. 1. In this case it was said that the ruling was not in conflict with the doctrine declared in the cases of *Staley v. Dorset*, 11 Ind. 367; *Love v. Mikals*, 12 Ind. 439; and *Berry v. Berry*, 22 Ind. 275. Order for the delivery of personal property, *In re Jones*, 33 Minn. 405.

§ 104. **Order requiring Assignment of Instruments**—An interlocutory order compelling “the delivery or assignment of any securities, evidences of debt, documents or things in action” is one from which an appeal will lie, although it is essentially interlocutory.¹ This provision, like the one discussed in the preceding paragraph, is borrowed from the chancery practice. It applies, however, only to cases where the order operates upon a party so as to take from him a substantial right as a party litigant. It does not apply to intermediate orders requiring the production of mere instruments of evidence for use on the trial or for inspection. To give the statute a construction that would make it operate on instruments of evidence, sought to be used as evidence only, would bring it into conflict with the cardinal rule that there is no right of appeal where the order does not affect the merits² as well as the rule that cases can not be appealed in fragments. An order affecting a matter of evidence may unquestionably affect the merits of a controversy (and so, indeed, do rulings on the pleadings and on motions), but it does not affect the merits in that final and decisive manner which takes from it the character of an intermediate and non-appealable order. The authorities declare the rule to be that an order for the production of books or papers for inspection, or for use as an instrument of evidence is not appealable.³ Confusion of a very mischievous tendency would result from a rule which would allow appeals from orders requiring the production of instruments of evidence, for it would lead to appeals in cases where promissory notes, mortgages, receipts or the like are ordered to be produced, and thus make litigation almost interminable.⁴

¹ R. S., § 646, subdivision 1. This provision does not authorize an appeal from an order refusing to approve the report of an assignee under the voluntary assignment law. *Cravens v. Chambers*, 55 Ind. 5.

² *State v. Brown*, 5 Ore. 119; *Watkins v. Mason*, 11 Ore. 72.

³ *Western Union Telegraph Co. v. Locke*, 107 Ind. 9; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 9 Law. Anno. Rep. 754, 761; *Logan v. Penn-*

sylvania Co., 132 Pa. St. 403; *Lester v. Berkowitz*, 125 Ill. 307; S. C. 17 N. E. Rep. 706.

⁴ It is, no doubt, the duty of a trial court to restrict an order for the production of books or documents so that only competent parts shall be open to inspection. The failure to limit the order, where there is an appropriate and timely request, would unquestionably be error, and if injury resulted might be cause for reversal, but such an

§ 105. Orders compelling Execution of Instruments of writing—From an interlocutory order compelling the execution of an instrument of writing an appeal will lie.¹ This provision has seldom been under consideration by the court. It is expressed in sweeping language, but nevertheless it has necessarily a very limited scope, since there are not many cases where an interlocutory order is entered compelling the execution of a written instrument. Broad as is the language employed it seems that it can not apply to mere formal evidentiary instruments, that is, instruments for use as mere matter of evidence on a trial, for it is evident when reference is made to the chancery practice from which the provision is taken, that only such instruments are meant as require a decree to coerce their execution. A mere instrument of evidence does not need a decree to compel its execution, although it is true that an instrument executed pursuant to a decree may be used as evidence. It has been held that an appeal will lie from an order directing the execution of a deed,² and this is in harmony with the principle just stated.

§ 106. Orders granting or denying Injunctions—An appeal will lie from an order "granting or dissolving, or overruling motions to dissolve, an injunction in term, and granting an injunction in vacation."³ In giving practical effect to this provision the court has held that there is a difference between a temporary injunction and a restraining order. The difference between a restraining order and a temporary injunction is that the restraining order is granted for a limited time and that time is held to be such as will enable the complainant to give the defendant notice, while a temporary injunction can only be granted upon notice.⁴ The distinction is important in appellate procedure for

order, although erroneous, is not one from which an appeal may be prosecuted.

¹ R. S., § 646, subdivision 1.

² *Rinchart v. Bowen*, 44 Ind. 353.

³ R. S., § 646, subdivision 3.

⁴ *Flagg v. Sloan*, 16 Ind. 432; *The Cincinnati, etc., Co. v. Huncheon*, 16 Ind. 436; *Applegate v. Edwards*, 45 Ind. 329; *Pleasants v. Vevay, etc., Co.*, 42

Ind. 391; *Ogle v. Dill*, 55 Ind. 130. In *Wallace v. McVey*, 6 Ind. 300, 303, it was said: "The restraining order contemplated by this section is limited in its operation, and extends only to such reasonable time as may be necessary to notify the opposite party. Temporary injunctions are usually granted in vacation and in terms they continue in force until the further order of the

the reason that an appeal will not lie from an order granting a temporary restraining order,¹ while an appeal will lie from an order granting or dissolving a temporary injunction² if made in term, although no appeal lies from an order made in vacation denying an injunction.³ But from an order made in vacation granting a temporary injunction an appeal will lie.⁴ It has been held that if a party does not appeal from an interlocutory order, made in term, overruling a motion to dissolve a temporary restraining order that he can not take advantage of the ruling on appeal, although the ruling may be erroneous,⁵ but this doctrine must, as we suppose, be taken with some qualification, for

court, which is frequently for several months." See, generally, *City of Columbus v. The Hydraulic, etc., Co.*, 33 Ind. 435.

¹ See cases cited in note 2; *Cincinnati, etc., Co. v. Huncheon*, 16 Ind. 436; *Rule v. Gumaer (Colo.)*, 21 Pac. Rep. 905; *In re Barret's Appeal (Pa.)*, 13 Atl. Rep. 72; *East, etc., Co. v. Williams*, 71 Texas, 444, 9 S. W. Rep. 436. See, also, *Ewald v. Coleman*, 19 Ind. 66; *Spaulding v. Thompson*, 12 Ind. 477; *Mahncke v. City of Tacoma*, 1 Wash. 18, 23 Pac. Rep. 804. In *Sheward v. Citizen's Water Co. (Cal.)*, 27 Pac. Rep. 439, it was held that where a temporary injunction was granted and on final hearing made perpetual, that an appeal would lie only from the final decree. The court said, "Upon the entry of the final decree this provisional remedy was merged in the perpetual injunction thereby granted to the plaintiff and ceased to have any operative effect upon the defendant. Its functions having thus terminated, there was thereafter no existing order granting an injunction from which an appeal could be taken." See, also, *Webber v. Wilcox*, 45 Cal. 301; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327; *Gardner v. Gardner*, 87 N. Y. 14; *Jackson v. Bunnell*, 113 N. Y. 216, 220, 21 N.

E. Rep. 79. It is undoubtedly true that when the temporary order is merged in the permanent one, an appeal will not lie from the former.

² *Michigan, etc., Co. v. Northern, etc., Co.*, 3 Ind. 239; *Bradley v. Bearss*, 4 Ind. 186; *Bronenberg v. Board*, 41 Ind. 502.

³ In the case of *Pleasants v. The Vevay, etc., Co.*, 42 Ind. 391, it was said: "It should be observed that an appeal is given from an interlocutory order granting or dissolving, or overruling motions to dissolve, an injunction in term. Before an appeal lies there must be either an injunction, granted in term or vacation, or an injunction must be dissolved in term, or a motion to dissolve must be overruled in term. An appeal lies from the refusal of a judge, in vacation, to grant an injunction, or, for dissolving in vacation an injunction, or for overruling in vacation a motion to dissolve. The only case in which an appeal lies to this court, under the third clause of said section, from an order made in vacation, is for granting an injunction."

⁴ *Bronenberg v. Board*, 41 Ind. 502. See *Fisk v. The Patriot, etc., Co.*, 54 Ind. 479, 481.

⁵ *Becknell v. Becknell*, 110 Ind. 42, 53.

if the final decree should deny an injunction, although other relief might be decreed, it seems clear that the defendant might, upon an appeal from the final judgment, avail himself of the error in overruling the motion to dissolve, provided, of course, that it be made to appear that the error was prejudicial to him. It is difficult to conceive why a party may not avail himself of a ruling awarding the extraordinary writ of injunction in a case where the plaintiff has no right to it. The case is different where the temporary order is made permanent by being carried into a perpetual injunction by the final decree, for in such a case there can be no prejudicial error.¹ To make an error in ruling upon application for an injunction available on appeal the record must affirmatively show the proper motion or pleadings and due exceptions.² An appeal from an interlocutory order in suits for an injunction does not put an end to the entire suit, but simply carries to the appellate tribunal the rulings connected with the order.³

§ 107. **Interlocutory orders in Habeas Corpus proceedings**—Appeals are authorized in cases where interlocutory orders are made in applications for a writ of *habeas corpus*.⁴ The appeal from an interlocutory order must be taken in term and as provided in the statutory enactment especially applicable to appeals from interlocutory orders.⁵ If not taken as that enactment requires it will be deemed to have been abandoned.⁶ But the abandonment of the right to appeal from an interlocutory order does not preclude an appeal, under the general provis-

¹ Board of Commissioners v. Markle, 46 Ind. 96, 99; Heagy v. Black, 90 Ind. 534.

² Clark v. Shaw, 101 Ind. 563; Heagy v. Black, 90 Ind. 534; Slagle v. Bodmer, 58 Ind. 465; Newell v. Gatling, 7 Ind. 147. See, generally, State v. Chase, 41 Ind. 356.

³ Rayle v. The Indianapolis, etc., Co., 40 Ind. 347, citing Thompson v. Adams, 2 Ind. 151; Gray v. Baldwin, 8 Blackf. 164.

⁴ R. S., § 646, subdivision 4; Speer v. Davis, 38 Ind. 271.

⁵ R. S., § 647.

⁶ The State v. Banks, 25 Ind. 495. In this case it was said: "The appeal prayed was evidently abandoned by a failure to file the record within the time limited by statute. If the appeal can be sustained, it must be on the ground that it might be taken in vacation, at any time within three years after the rendition of the judgment, in the circuit court."

ions of the statute, from the final judgment pronounced in the case.¹ Although an appeal will lie from a final judgment in a case of an application for a writ of *habeas corpus*, the proceeding is not an ordinary civil action, but is strictly a special proceeding under the statute.² Appeals in cases of *habeas corpus* must be taken to the Supreme Court. Submission on appeal may be made, on motion, at any time after the appeal is perfected, provided notice has been given to the adverse party or his attorney. Three days' notice of the motion is required and the notice may be served by the sheriff or by any other person, or, there may be an acknowledgment of service. Proof of service must be filed with the clerk. Submission may also be made on call or by agreement.³

§ 108. **Effect of Appeal from an Interlocutory Order**—It is evident that the system of procedure created by the statute regulating appeals from interlocutory orders is a peculiar one, and that the ordinary rules governing appeals generally do not fully apply. The decisions upon the subject of appeals from interlocutory orders made upon applications for the appointment of receivers lay down a principle that must apply generally, at least, to all appeals from the interlocutory orders we have been considering, and that principle, stated in a rough

¹ *Nichols v. Cornelius*, 7 Ind. 611; *Henson v. Walts*, 40 Ind. 170.

² *Baker v. Gordon*, 23 Ind. 204; *Garner v. Gordon*, 41 Ind. 92. The sufficiency of the petition must be questioned by a motion to quash the writ. *Milligan v. The State*, 97 Ind. 355; *Willis v. Bayles*, 105 Ind. 363. What the petition should show, *In re Cuddy*, 131 U. S. 280; *Ex parte Walpole*, 84 Cal. 584, 24 Pac. Rep. 308. A return to a writ of *habeas corpus* must be challenged by an exception and not by a demurrer. *Sturgeon v. Gray*, 96 Ind. 166; *Joab v. Sheets*, 99 Ind. 328; *McGlennan v. Margowski*, 90 Ind. 150; *Cunningham v. Thomas*, 25 Ind. 171. But an irregularity in the procedure which does not work substantial injury

will not be fatal. *McGrew v. McCarty*, 78 Ind. 496. A jury trial is not demandable. *Orr v. Miller*, 98 Ind. 436. A writ of *habeas corpus* does not perform the functions of an appeal or of a bill of review, mere errors can not be corrected by it. *Smith v. Hess*, 91 Ind. 424; *Lowery v. Howard*, 103 Ind. 440; *Lucas v. Hawkins*, 102 Ind. 64; *Ex parte Spencer*, 83 Cal. 460, 23 Pac. Rep. 395; *Ex parte Millett*, 37 Mo. App. 76; *Davis v. Beason*, 133 U. S. 333; *Wright v. Wright*, 74 Wis. 439. 43 N. W. Rep. 145. A return good upon one ground will prevail against a general exception. *Brooke v. Logan*, 112 Ind. 183.

³ Supreme Court Rule XIX.

way, is, that only such questions are brought before the appellate tribunal as are connected with the interlocutory order appealed from, or, as it has been expressed, "such matters as lead up to the order." The statute certainly does not contemplate a decision upon the entire case where there is nothing more than an appeal from an interlocutory order; it is, indeed, impossible to conceive how it can be within the power of parties to invoke a decision upon an entire controversy where only a part of it is brought before the appellate tribunal.¹ There may be cases where a ruling on an interlocutory order can not be understood or disposed of without considering the complaint and determining its sufficiency, since the complaint may so far involve the ruling in the order as to require a decision upon it,² but ordinarily the only question affecting the sufficiency of the complaint that can be considered on an appeal from an interlocutory order is such as is directly involved in the order and necessary to a judgment upon it.

§ 109. Mode of Appealing from Interlocutory Orders—Appeals from the interlocutory orders made appealable by statute must be taken as the statute especially applicable to such cases provides.³ A bond must be filed and the appeal must be taken at the term at which the order is made, if made in term time, but if not made in term time, then, at the time it is made or during the next term.⁴ The right to appeal from interlocutory orders is, as appears from what has been said, a peculiar one, and governed by special rules.⁵ We have seen, in discussing the rule governing appeals in receivership cases, that there is a

¹ In *Berry v. Gravel*, 11 Iowa, 135, the court said, in speaking of an appeal from an interlocutory order, that, "such an appeal does not bring up the main case for review here, except so far as material to the understanding and disposition of that from which the party appeals." The case from which we have quoted holds that an appeal will lie from an interlocutory order dissolving an attachment, but the ruling on that point is based on a peculiar statute

and can not be considered as authoritative under such a statute as ours.

² *Learmoth v. Veeder*, 11 Wis. 138; *Lyon v. Blossom*, 4 Duer (N. Y.), 318.

³ R. S. 1881, § 647.

⁴ *Simpson v. Pearson*, 31 Ind. 1; *Baker v. Griffitt*, 83 Ind. 411, 415.

⁵ In *Wood v. Brewer*, 9 Ind. 86, it was said: "An appeal does not lie from an interlocutory order, except by statute."

marked peculiarity which distinguishes such cases from appeals in ordinary civil actions, and what is true of such cases is, in principle, substantially true of all appeals from interlocutory orders.

§ 110. **Void Judgments—Appeals from**—An appeal will lie from a void judgment.¹ There is solid reason for this rule inasmuch as it enables a party injured by such a judgment to remove it from the record without injury to the rights of adverse parties, for they can have no rights under a judgment which has no force. It is a sacrifice of substance to a barren technicality to hold, as some of the courts do, that no relief can be had against a void judgment. Our court has, whenever the question has been presented, refused to enforce any such a rule, and has granted relief, although the proceeding was a nullity.²

¹ Louisville, etc., Co. v. Lockridge, 93 Ind. 191; Board of Com. v. Logansport, etc., Co., 88 Ind. 199; Cain v. Goda, 84 Ind. 209; Dyer v. Board, 84 Ind. 542; Shoultz v. McPheeters, 79 Ind. 373, 379; Brown v. Goble, 97 Ind. 86; Shoemaker v. Board, 36 Ind. 175. Other courts have asserted the same doctrine. Trul-

lenger v. Todd, 5 Oregon, 36; Smith v. Ellendale Mill Co., 4 Oregon, 70; Coffey v. Wilson, 2 Ala. 701; Evans v. Adams, 3 Green, L. (N. J.), 373; People v. Ferris, 35 N. Y. 125.

² Leary v. Dyson, 98 Ind. 317; Bishop v. Moorman, 98 Ind. 1.

CHAPTER VI.

THE TIME WITHIN WHICH AN APPEAL MAY BE TAKEN.

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| <p>§ 111. Limitation of time is jurisdictional.</p> <p>112. Time can not be enlarged.</p> <p>113. Cases regarded as exceptions—Peculiar features of.</p> <p>114. Time not extended to the party in fault.</p> <p>115. Diligence exacted.</p> <p>116. Petition for leave to appeal after the expiration of the time limited.</p> <p>117. Rule where the delay is caused by the act of the court.</p> <p>118. When the time begins to run.</p> <p>119. Final judgment and entry—Time begins to run from.</p> <p>120. Independent actions.</p> <p>121. When the right of appeal matures.</p> | <p>§ 122. Computation of time—The beginning.</p> <p>123. Collateral and independent matters.</p> <p>124. How the date of the final judgment is ascertained.</p> <p>125. Day the judgment is entered excluded.</p> <p>126. The meaning of the words months and years.</p> <p>127. Non-judicial days.</p> <p>128. The appeal must be fully perfected within the time prescribed.</p> <p>129. Bar, by limitation, of part of the appellants.</p> <p>130. Parties under disabilities.</p> |
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§ 111. **Limitation of Time is Jurisdictional**—The time within which an appeal must be taken is fixed by law and the appeal must be taken within the time designated.¹ The provision which limits the time is jurisdictional in its nature.² As the

¹ *Bornheimer v. Baldwin*, 42 Cal. 27; *Mo.* 468; *Zeckendorf v. Zeckendorf*, 1 *McCourtney v. Fortune*, 42 Cal. 387; *Ariz.* 401; *Joyce v. Dickey*, 104 Ind. 183; *Day v. City of Huntington*, 78 Ind. 280; *McLaughlin v. State*, 66 Ind. 193; *Hoston v. Ducker*, 86 Ky. 123.

² *Cherry Tp. v. Marion Tp.*, 96 Pa. St. 528; *Mason v. Gibson*, 13 Ill. App. 463; *Clutter v. Riddle*, 124 Ind. 500, 25 N. E. Rep. 6; *Starke v. Jenkins*, 1 Wash. Ter. 421; *Westmoreland County v. Conemaugh Tp.*, 34 Pa. St. 231; *Hoag v. Alleghany City*, 21 Pitts. Law Journal, 46; *Wait v. Van Allen*, 23 N. Y. 26 Kan. 720; *Randolph v. Mauck*, 78

time within which an appeal must be taken is jurisdictional it results that the court can not ordinarily enlarge the time nor can the parties extend it by agreement.¹ The familiar rule that consent can not confer jurisdiction precludes the parties from extending the time, and as the time within which an appeal must be taken is a matter to be fixed and regulated by the law-making power, the courts can not enlarge it. There is a clear distinction between cases where the question is as to the right to entertain jurisdiction of the person and cases where the party fails to bring his appeal to the appellate tribunal within the time fixed by law. In the one case the party may voluntarily submit to the jurisdiction of the court, but in the other he can not create jurisdiction where the law does not provide for it, or has otherwise provided.²

§ 112. Time can not be enlarged—The rule that the court can

319; *MacLachlan v. McLaughlin*, 126 Ill. 427, 18 N. E. Rep. 544. In the case of *Rose v. Tyrrell*, 25 Wis. 563, it was held that a statute extending the time in a particular case was unconstitutional. See, also, *Meriweather v. Whitley*, 38 Texas, 525.

¹ *Flory v. Willson*, 83 Ind. 391; *Buntin v. Hooper*, 59 Ind. 589; *Day v. City of Huntington*, 78 Ind. 280; *Joyce v. Dickey*, 104 Ind. 183; *Verges v. Roush*, 1 Neb. 113; *Patterson v. Woodland*, 28 Neb. 250, 44 N. W. Rep. 112; *Cogswell v. Hogan*, 1 Wash. 4, 23 Pac. Rep. 835. See, generally, *Douglass v. Neguelona*, 88 Tenn. 769, 14 S. W. Rep. 283; *Callahan v. Portland, etc., Co.*, 17 Ore. 556, 21 Pac. Rep. 870; *Walsh v. The United States*, 23 Ct. of Cl. 1; *Radford v. Folsom*, 131 U. S. 392; *Herrick v. Racine, etc., Co.*, 43 Wis. 93. In the case of *Holloran v. The Midland Railway Co. (Ind.)*, 28 N. E. Rep. 549, the doctrine stated in the text is explicitly affirmed. It is also impliedly asserted in the cases declaring that time is jurisdictional where appeals are taken under the special statute governing ap-

peals in matters affecting decedents' estates. *Simons v. Simons*, 28 N. E. Rep. 702, and cases cited. See, also, the cases cited in the chapter which treats of appeals in cases affecting the estates of decedents. *Post*, Chapter XIV.

² In the case of *Caillot v. Deetken*, 113 U. S. 213, it was said: "It has been repeatedly decided by this court that where no return has been made to a writ of error by filing the transcript or the record here, either before or during the term of the court next succeeding the filing of the writ in the circuit court, this court has acquired no jurisdiction of the case, and the writ having then expired, can acquire none under that writ and it must therefore be dismissed." *Villabolas v. The United States*, 6 How. 81; *Castro v. The United States*, 3 Wall. 46; *Mussina v. Gavazos*, 6 Wall. 355, 358; *Murdock v. Memphis*, 20 Wall. 590, 624. If the question of time affects the jurisdiction of the case and not merely jurisdiction of the person, then, there can be no doubt that our cases are right in holding that the time can not be extended by agreement.

not enlarge the time for taking an appeal must be regarded as established,¹ but the court may, nevertheless, relieve a party in the proper case against fraud or accident.² In relieving a party against fraud or accident the court does not extend the time for taking the appeal by breaking down the provisions of the statute limiting the time within which appeals must be taken. The principle applied is a familiar one, for it is very often applied to the statute of frauds and to the general statute of limitations. The fraud of a party will prevent him from taking advantage of either of the statutes named, and so it will in cases where the statute limits the time for taking appeals. Our own court has given recognition to the doctrine that relief will be granted where the appeal is prevented by the fraud of the adverse party.³ The general principle is asserted and enforced by other courts.⁴ Where the facts are such that the court, upon their proper presentation, would enlarge the time, it is competent for the parties to extend it by agreement, but if there are no such facts, the time can not be extended by the agreement of the parties.⁵

§ 113. Cases regarded as Exceptions, peculiar features of—The cases in which an appeal will be allowed after the expiration of the time fixed by the statute are exceptional ones, and their distinguishing features are the equitable elements which enter

¹ It may not be improper to say that jurisdiction, but they hold that fraud power to extend the time for appealing in matters affecting decedents' estates is expressly conferred by law.

² We mean the word accident to carry the signification attached to it by the courts of chancery; we do not mean to be understood as intimating that relief will be awarded in cases of ordinary accidents, or in cases where there is lack of diligence, or in cases where any culpable fault or negligence is attributable to the appellant.

³ *Smythe v. Boswell*, 117 Ind. 365; *Boswell v. Boswell*, 117 Ind. 599. These cases recognize the rule that if the appeal is not taken in time, there is no

⁴ *Dobson v. Dobson*, 7 Neb. 296; *Fox v. Fields*, 12 Heisk. (Tenn.) 31; *United Lines Tel. Co. v. Stevens*, 67 Md. 156; *Lake v. Halbert*, 2 Dall. 41; *Chaffee v. McIntosh*, 36 La. Ann. 824; *McIhane v. Holland*, 111 Pa. St. 634; *Miller v. Camp*, 28 Neb. 412, 44 N. W. Rep. 486; *Moyer v. Strahl*, 10 Wis. 83; *Cradick v. Pritchett*, Peck (Tenn.), 17; *Holt v. Edmondson*, 31 Ga. 357; *Congdon v. Congdon*, 59 Vt. 597, S. C. 10 Atl. Rep. 732.

⁵ *Climie v. Odell*, 20 Mich. 12. See *Fairchild v. Daten*, 38 Cal. 286.

into them. Without the presence of these elements the time fixed by the statute can not be extended. These controlling elements must be shown clearly and strongly or the statute will be enforced as it is written, for the rule is firmly settled that a party who seeks to escape the provisions of the statute must have a very strong and clear case.

§ 114. Time not extended to the Party in Fault—If the appellant's fault has prevented an appeal within the time allowed by law, the court can not aid him, for the court can only interfere where the principles of equity authorize the interference, and where the failure was due entirely to causes which the party could not control.¹ A mistake as to matter of law will not be a sufficient excuse.² The decisions declare that there is a difference between the rules of the court and the provisions of a statute, and that the provisions of a mandatory statute can not be relaxed.³

§ 115. Diligence exacted—The appellant who seeks to secure an appeal after the statutory time has expired asks extraordinary relief, and he must act with diligence and do promptly and completely what he can to prevent further delay; if he does not, his remissness will deprive him of an appeal, although if he had proceeded more diligently he might have avoided the effect of the first delay. It is necessary for him to file the transcript in the appellate tribunal and with it a verified petition⁴ showing the facts on which he relies as excusing his failure to appeal within the time designated by the statute. The transcript, together with the assignment of errors, should be filed with the petition or before its filing, because this is essential to the au-

¹ *Contee v. Pratt*, 9 Md. 67; *Lincoln, etc., Works v. Hall*, 27 Neb. 874, 44 N. W. Rep. 45. See *Chase v. Bates*, 81 Me. 182, S. C. 16 Atl. Rep. 542; *Jackson v. Goddard*, 1 Mass. 230.

² *Ihley v. Thompson*, 32 So. Car. 582; *Calvo v. Railroad (So. Car.)*, 10 S. E. Rep. 389. See *Wallace v. Carter*, 32 So. Car. 314, 9 S. E. Rep. 659; *Burbank v.*

Rivers, 20 Nev. 159, 18 Pa. Rep. 753; *Short v. Sparrow*, 96 N. C. 348, S. C. 2 S. E. Rep. 233.

³ *Yturbide v. United States*, 22 How. (U. S.) 290; *Dooling v. Moore*, 20 Cal. 141; *Van Steenwyck v. Miller*, 18 Wis. 320; *Smith v. State*, 48 Ark. 148, 2 S. W. Rep. 661.

⁴ *Jackson v. Goddard*, 1 Mass. 230.

thority of the appellate tribunal,¹ and because it is proper that the appellant should in this mode manifest his purpose and ability to proceed promptly.² Notice should be given the adverse party, for he is under no duty to take heed of any proceedings of which he is not duly notified.³ There may, of course, be cases where the transcript can not be filed with the petition, as, for instance, where the clerk refuses to prepare one, but, unless some excuse is shown, the transcript together with the assignment of errors should be filed before or at the time the petition is filed.

§ 116 **Petition for leave to Appeal after the expiration of the Time limited**—A petition for leave to appeal after the expiration of the time fixed by law, must as we have indicated, present a clear and strong case.⁴ The requisites of such a petition make it necessary that it should be drawn with care, for it can not be aided by intendment. It ought to show substantial merit in the appeal, and, to do this, must show the nature of the questions involved. It will not be sufficient to refer generally to the transcript, for the petition must be good on its face. The facts constituting the excuse for the failure to appeal within the time fixed by statute must be specifically and certainly pleaded; it will not be sufficient to plead mere conclusions or to plead by way of recital. Clear, direct and positive statements of facts are required.

¹ The transcript is essential because appellate tribunals decide appeals upon the record, and where there is no record there can, as a general rule, be no appellate jurisdiction.

² The published decisions do not cover this point so far as we can find, but it has long been the practice to require the filing of the transcript and assignment of errors before entertaining any petition for injunction, mandate or leave to appeal. The principle which justifies this practice is analogous to that which requires a tender of a deed or

money in cases of specific performance and the like.

³ The proceeding to secure an appeal after the time limited is essentially an original one. See *ante*, § 112, n.

⁴ This is so because the party who asks such relief must make a case which calls into exercise the inherent equity power of the court, and to do this successfully he must make such a showing as creates a case in the nature of an original suit. It must, as to all matters alleged by way of excusing the failure to perfect the appeal in time, be an original auxiliary proceeding.

§ 117. Rule where the delay is caused by the act of the Court—

It is said in general terms by the authorities to which we have referred, and by many more, that the time for taking an appeal can not be extended by agreement or by order of the court,¹ but, as we have shown, this rule, general and firmly settled as it is, does not always preclude an appeal and to the instances upon which it does not fully operate we add another of a different nature. Where the time is lost without the fault of the party and solely by reason of the action or non-action of the court, the statute does not operate because the loss of time is not attributable to the acts of the parties. The rule that the delay or wrong of the court shall not prejudice a party, rests upon the maxim, "An act of the court shall prejudice no man."² Where, however, the fault of the party concurs with that of the court the maxim will not prevail to save an appeal not taken within the time fixed by law.³

§ 118. When the Time begins to run—The general rule is that there must be an entry of judgment before an appeal can be taken, and it must follow that until the judgment is entered the time within which an appeal must be taken does not begin to run. As an appeal taken before an entry of judgment is premature, it may be dismissed on motion. There is some conflict in the adjudged cases, but the decided weight of authority supports the rule we have stated.⁴ It seems clear upon prin-

¹ *Salles v. Butler*, 27 N. Y. 638; *Clapp v. Hawley*, 97 N. Y. 610; *Miller v. Shall*, 67 Barb. 446; *Morrison v. Morrison*, 16 Hun. 507, 511; *Fry v. Bennett*, 16 How. Pr. 385; *People v. Eldridge*, 7 How. Pr. 108; *Bryant v. Bryant*, 4 Abbott's Pr. N. S. 138.

² *Brooms Legal Maxims* (8 Am. Ed.), 121. The author cites many English cases showing the operation and force of the maxim, and to them may be added the following American cases: *Boody v. Watson*, 64 N. H. 162, 9 Atl. Rep. 794, 817; *Doe v. Parker*, 3 Sm. & M., 114; *Tucker v. Gordon*, 7 How. (Miss.) 306.

³ *Freeman v. Tranah*, 12 C. B. 406.

⁴ *Providence, etc., Co. v. Goodyear*, 6 Wall. 153; *Milwaukee, etc., Co. v. Pabst*, 64 Wis. 244; *Kimple v. Conway*, 69 Cal. 71; *Schroder v. Schmidt*, 71 Cal. 399; *Thomas v. Anderson*, 55 Cal. 43; *Valle v. Harrison*, 93 U. S. 233; *Polleys v. Black River, etc., Co.*, 113 U. S. 81; *Radford v. Folsom*, 123 U. S. 725; *Exley v. Berryhill*, 36 Minn. 117, 30 N. W. Rep. 439. See, generally, *In re Fifteenth Av.*, 54 Cal. 179; *McLaughlin v. Doherty*, 54 Cal. 519; *First Nat. Bank v. Gary*, 14 So. Car. 571; *Black v. Peters*, 64 Ga. 628; *Savings, etc., Co. v. Horton*, 63 Cal. 310; *Fehring v. Swineford*, 33 Wis. 550; *Johannes v. Young*, 42 Wis. 401.

ciple that the rule stated must be the correct one, for until there is an entry of judgment there is no authentic record evidence of a final disposition of the case, and that there is a final judgment must, as a general rule, appear from the record. It has, however, been held that where the entry is of the wrong date, and it is subsequently corrected by *nunc pro tunc* entry so as to make the record show the true date, the time for appealing runs from that date.¹ But this doctrine is one to be cautiously applied, if, indeed, it can be defended at all, for the adverse party, who is without fault and is misled by an entry, ought not be deprived of his right of appeal by changing the date of the judgment. If he has full knowledge of the facts and is aware of the true date, and of the mistake in the entry, then it is probable that he is in no situation to complain, but if he is free from fault or negligence and is misled by the entry that was originally made he ought not to be made to suffer.²

§ 119. **Final judgment and entry—Time commences to run from—** The right to appeal, as a general rule, dates from the time that a complete judgment is rendered and recorded.³ This rule is the true one since as long as there is no final judgment it is within the power of the trial court to change its rulings, and as long as this power exists the case must be within the jurisdiction of the lower court. A case can, as a general rule, only pass from the jurisdiction of the court of original jurisdiction by a final judgment. It seems to necessarily follow that where a motion in arrest, or for a *venire de novo*, or for a new trial remains undisposed of there is no right of appeal, since, as will be

¹ *Anderson v. Mitchell*, 58 Ind. 592; *Gray v. Palmer*, 28 Cal. 416; *Genella v. Relyea*, 32 Cal. 159.

² In *Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. Rep. 384, it was held that the right to appeal does not mature until the judgment is entered, and that a *nunc pro tunc* entry fixing the date prior to the appeal does not change the rule. See *Credit Co. v. Arkansas, etc., Co.*, 128 U. S. 258.

³ *State v. Burns*, 66 Mo. 227; *United*

States v. Gomez, 1 Wall. 690; *Winters v. Ethell*, 132 U. S. 207; *Richardson v. Rogers*, 37 Minn. 461, 35 N. W. Rep. 270. In *Camblos v. Butterfield*, 15 Abbott Pr. R. (N. S.) 197, it was held that where the judgment completely ends the litigation he must appeal from that judgment within the time prescribed without waiting for the ultimate judgment. It may well be doubted whether this doctrine can have a general application.

hereafter shown, two courts can not have jurisdiction of the same case at the same time,¹ save in very rare instances. It is in accordance with this doctrine that it is held that where the court decides to reconsider its judgment the right of appeal dates from the ultimate judgment,² and the same rule applies where there is an amended decree.³ Upon the same principle it has been held by our own court,⁴ and by other courts,⁵ that where there is a pending motion for a new trial the right of appeal does not mature until there is a ruling denying the motion.

§ 120. **Independent actions**—It is to be remembered that a complaint for a new trial filed after the term is an independent proceeding,⁶ and hence what is said in the preceding paragraph can have no application to such a case. It can not, indeed, apply to cases, whatever their nature, in which the motion is a purely collateral one, or one introducing new elements into the case. The reason for the rule fails in such cases as those indicated, inasmuch as the judgment in the cases falling under the rule disposes of all the matters before the court at the time it was

¹ See "Effect of the Appeal."

² *First Nat. Bank v. Briggs*, 34 Minn. 266. A similar doctrine was asserted in *Bowers v. M'Nutt*, 5 Blackf. 231.

³ *United States v. Gomez*, 1 Wall. 690, 699. In *Owens v. Crossett*, 104 Ill. 468, it was held that where a judgment was pronounced in vacation the right of appeal accrued at the next ensuing term.

⁴ *New York, etc., Co. v. Doane*, 105 Ind. 92; *Colchen v. Ninde*, 120 Ind. 88, 90. In the first of the cases cited it was said: "A motion for a new trial is not a collateral one, but is one directly connected with the judgment, and is essential to present for review errors occurring in the trial, and so long as it remains undisposed of there can be no final judgment within the meaning of the statute regulating appeals. A pending motion for a new trial keeps the cause in the trial court, provided, of course, that the motion was reasonably filed."

⁵ *Webster v. Spindler*, 36 Mo. App. 355; *Phillippi v. McLean*, 5 Mo. App. 586; *Boggs v. Caldwell County*, 28 Mo. 586; *Railroad Co. v. Bradleys*, 7 Wall. 575; *Doss v. Tyack*, 14 How. 297; *Wheeler v. Harris*, 13 Wall. 51. In *Murdock v. District of Columbia*, 23 Ct. of Cl. 41, it was said, speaking of a motion for a new trial, that, "This motion, by the general rules of law on the subject, undoubtedly suspended the finality of the judgment, leaving the same in the control of the court to determine whether it should be disturbed or should stand, and it suspended the obligation as to the time within which to file an appeal until the final disposition of the matter," citing *Brockett v. Brockett*, 2 How. (U. S.) 238; *Slaughterhouse Cases*, 10 Wall. 289; *Cambuston v. United States*, 95 U. S. 287. See *Mann v. Haley*, 45 Cal. 63.

⁶ *Hines v. Driver*, 89 Ind. 339; *Harvey v. Fink*, 111 Ind. 249.

rendered, and this is sufficient to impress upon it the character of a complete and final judgment. If the judgment does dispose of all pending matters it is final, and may be appealed from,¹ but if it leaves any pending matter essential to a complete disposition of the case to be disposed of, it is not final in such a sense as to authorize an appeal.²

§ 121. **When the right of Appeal matures**—The disposition of pending motions in cases where they terminate the particular controversy ends the authority of the trial court in the particular case, and when this occurs the right of appeal matures. What is done afterwards can not effect the case thus ended by a ruling upon all pending motions. The principle is not broken upon by the fact that the party may pursue a new and distinct remedy. The rule we assert is well illustrated by the case wherein it was held that where a new trial, moved for after the close of the term, was granted, but the order granting it was subsequently vacated, the right of appeal did not date from the time judgment in the second trial was rendered, but from the date of the original judgment.³ Nor is the general rule that a party must prosecute his appeal within the time prescribed avoided by showing that there have been other ineffectual appeals.⁴

§ 122. **Computation of Time—The beginning**—It is laid down as a general rule, as we have elsewhere said, that time is to be computed from the date of the entry of the judgment.⁵ This

¹ *Lodge v. Tweell*, 135 U. S. 232; *Sweet v. Merki*, 27 Ill. App. 245; *Chambers v. Hoover*, 3 Wash. Ty. 20, S. C. 13 Pac. Rep. 905.

² *Bush v. State* (Miss.), 6 So. Rep. 647; *Piedmont Manf. Co. v. Buxton*, 105 N. C. 74; *State v. Hightower*, 33 S. C. 598, 11 S. E. Rep. 579. In a former chapter (Chapter V, "What may be Appealed from") we marked the difference between the finality of a judgment when considered with respect to the right to appeal from it and when considered from another point of view.

The difference is clearly pointed out in the case of *Webster v. Spindler*, 36 Mo. App. 355. That case also collects cases showing that the matter of time is so far jurisdictional that it can not be waived by consent.

³ *Jenkins v. Corwin*, 55 Ind. 21. See *Hardin v. Watson*, 85 Tenn. 593, 4 S. W. Rep. 37.

⁴ *Long v. Emery*, 49 Ind. 200.

⁵ *Harshman v. Armstrong*, 43 Ind. 126; *Crawford v. Prairie, etc., Co.*, 44 Ind. 361; *Wright v. Manns*, 111 Ind. 422; *Hursh v. Hursh*, 99 Ind. 500. See,

seems correct, inasmuch as there is no authentic evidence of the existence of a judgment until it is entered of record in due form, and yet it is difficult, if not impossible, to reconcile with this general rule the decision that when, by a *nunc pro tunc* entry, a judgment is given a retrospective effect, the right to appeal ripens with the date fixed by the *nunc pro tunc* entry. It is apparent, at all events, that the doctrine that the entry may have a retroactive effect upon the right of appeal is one to be limited and to be sparingly and grudgingly applied. An entry, in due form, of a judgment should, it seems to us, be deemed *prima facie*, at least, to express the true date of the judgment.

§ 123. **Collateral and Independent matters**—The fact that a judgment in an independent and distinct action or proceeding is remotely or incidentally connected with a former judgment does not require that the time for appealing shall be reckoned from the date of the original judgment. Where the original judgment necessarily and directly comes in question, then, the time the right of appeal accrues is the date of that judgment. But there may be a distinct and independent proceeding notwithstanding the fact that it may grow out of a judgment rendered in an action between the same parties. Thus a judgment quashing an execution may be independent of the original judgment, and, if it is, it may be appealed from within the time prescribed by law.¹

§ 124. **How the date of the Final Judgment is Ascertained**—The date of the rendition of the judgment is to be ascertained from the record. The general rule is that all information of that nature must be conveyed by the record to the appellate tribunal.

generally, *Glore v. Hare*, 4 Neb. 131; *Switch Co.*, 75 Cal. 426, 7 Am. St. Rep. 183; *Gray v. Winder*, 77 Cal. 525, 20 Pac. Rep. 47; *In re Fisher's Estate*, 75 Cal. 523, 17 Pac. Rep. 640; *Co. v. Thomas*, 10 Mo. App. 457; *McClintock v. Theiss*, 74 Ind. 200.
Atchison, etc., Co. v. Dougan, 39 Kan. 181; *Kuhnert v. Conde*, 39 Kan. 265, 18 Pac. Rep. 193; *Heilbron v. Fowler*
¹ *Wright v. Rogers*, 26 Ind. 218; *McAllister v. The State*, 81 Ind. 256.

The recitals of the record are conclusive, for, as a general rule, the record controls the decision on appeal. What appears of record ordinarily imports absolute verity and the parties will not be heard "to aver against it." Errors in the record may be corrected in the appropriate method, but until the proper steps are taken to correct them and the correction is duly made, it is conclusive upon the question of the time the judgment was rendered as well as upon all matters which the law requires shall appear of record.¹

§ 125. **Day the Judgment is entered excluded**—The general rule for the computation of time is that the day on which the judgment was rendered shall be excluded, and the day on which the last act effectuating the appeal is done shall be included.² This rule is applied in matters of procedure generally,³ and should be steadily adhered to in appellate practice for the sake of uniformity and certainty, if for no other reason. The earlier cases asserted a different rule and for a time there was much uncertainty, but it has long been held that the first day is to be excluded and the last included so that the question can not be regarded as an open one.⁴ The statute requires that the rule should be that stated, for it is general in its terms.⁵

§ 126. **Meaning of the words "Years" and "Months"**—The term "years" and the term "months" are declared by our

¹ *McAllister v. The State*, 81 Ind. 256.

² *Wright v. Manns*, 111 Ind. 422; *Hursh v. Hursh*, 99 Ind. 500; *Noble v. Murphy*, 27 Ind. 502; *State v. Thorn*, 28 Ind. 306; *Byers v. Hickman*, 36 Ind. 359; *Faure v. The United States Express Co.*, 23 Ind. 48; *Gallt v. Finch*, 24 How. Pr. R. 193; *State v. Weld*, 39 Minn. 426, 40 N. W. Rep. 561; *State v. Town of Winter Park*, 25 Fla. 371, 5 So. Rep. 818; *Deere, etc., Co. v. Hucht*, 32 Mo. App. 153; *Seward v. Hayden*, 105 Mass. 158.

³ *Vogel v. State*, 107 Ind. 374; *Hill v. Pressley*, 96 Ind. 447; *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220;

Towell v. Hollweg, 81 Ind. 154; *Womack v. McAhren*, 9 Ind. 6; *Martin v. Reed*, 9 Ind. 180; *Blair v. Davis*, 9 Ind. 236; *State v. Thorn*, 28 Ind. 306; *Tucker v. White*, 19 Ind. 253; *Fox v. Allensville, etc., Co.*, 46 Ind. 31.

⁴ The rule as now established was asserted in *Hathaway v. Hathaway*, 2 Ind. 513, and in *Swift v. Tousey*, 5 Ind. 196, but the contrary was held in *Jacobs v. Graham*, 1 Blackf. 392, *Ryman v. Clark*, 4 Blackf. 329, and *Long v. McClure*, 5 Blackf. 319.

⁵ R. S. 1881, § 1280; *Schoonover v. Irwin*, 58 Ind. 287.

statute to mean months and years of the Christian calendar.¹ The month February is ordinarily reckoned as a calendar month, but when a given number of days are specified in a statute regard is to be had to the actual number of days of that month. February of the leap year has, according to the latest decision upon the subject,² twenty-nine legal days, for the 28th and 29th are to be reckoned as separate law days and not as one day. To reach the conclusion that the 28th and 29th days of February of the leap year each constituted a full day in law the court was compelled to overrule several decisions.³ While the departure from the rule *stare decisis* seems hardly defensible, yet it must be owned that the decision asserting that the two days are distinct in law as well as in fact is grounded in reason.⁴ It is only when a period of time less than a month is specified, or when time is specified by days that the question whether the 28th and 29th of February are to be computed as one day, or as two days, becomes material.⁵

§ 127. **Non Judicial Days**—The common law rule is that Sunday is not a judicial day.⁶ The common law rule that Sunday

¹ R. S. 1881, § 240. See, generally, *Engleman v. State*, 2 Ind. 91; *Sheets v. Selden*, 2 Wall. 177; *Union Bank v. Forrest*, 3 Cranch C. C. 218; *Gross v. Fowler*, 21 Cal. 392; *Commonwealth v. Lehigh Valley Co.*, 129 Pa. St. 429, 18 Atl. Rep. 406. For definition of the term, "a week of time," see *In re Tyson*, 13 Col. 482, 22 Pac. Rep. 810. "Day and days." *City of Denver v. Pearce*, 13 Col. 383, 22 Pac. Rep. 774. See note to case last named. 6 Law Rep., Ann., 541. See, generally, *Hedderich v. State*, 101 Ind. 564; *Gibson v. Keyes*, 112 Ind. 568; *Benson v. Adams*, 69 Ind. 353; *Hale's Appeal*, 44 Pa. St. 438; *Haines v. State*, 7 Tex. App. 30. Distinction between "day" and "date." *Bement v. Trenton, etc., Co.*, 3 Vr. (N. J.) 513, 515; *Woolrych on Legal Time*, 123. Designation of time in a writ.

Searles v. Averhoff, 28 Neb. 668, 44 N. W. Rep. 872. See, generally, *Woods v. Brezzinski*, 57 Conn. 471, 18 Atl. Rep. 252.

² *Helphenstine v. Vincennes National Bank*, 65 Ind. 582.

³ *Swift v. Tousey*, 5 Ind. 196; *Craft v. The State Bank of Ind.*, 7 Ind. 219; *Kohler v. Montgomery*, 17 Ind. 220; *Porter v. Holloway*, 43 Ind. 35.

⁴ 10 Central Law Journal, 158.

⁵ *King v. Worminghall*, 6 M. & S. 350; *King v. Ackley*, 3 Term Rep. 250. See, generally, *Lister v. Stanley*, 1 Mod. 112.

⁶ Mr. Woolrych says: "So, where a notice of a motion is to be made on Monday it was held that it ought to be served on Friday, inasmuch for that purpose Sunday is no day." *Legal Time*, 96.

is "no day," is yet enforced in many cases,¹ but it does not prevail so fully and generally as it did formerly. Where the last day specified by the code of practice falls on Sunday it is to be excluded.² Intervening Sundays are to be counted,³ but if the last day specified in matters relating to practice and procedure, however it may be as to contracts, is Sunday, the act may be done on the following day.⁴

§ 128. The Appeal must be fully perfected within the Time prescribed—The appeal must be fully perfected within the time prescribed by the statute; it is not enough to take some steps toward effecting an appeal, for all that the statute requires to be done in order to perfect an appeal must be performed within the time limited.⁵ An appeal can not be justly said to be taken where a thing essential to its effectiveness remains undone, and what is essential must be done within the time limited, inasmuch as there is no warrant or authority for doing it after the expiration of the time prescribed by law. This consideration seems, in itself, sufficient to justify the conclusion we have stated, but is by no means the only one by which it is supported. The right to an appeal is granted upon the condition that all of several designated acts shall be performed, and not upon the condition that any number of the entire series of acts designated less than the whole shall be performed by the party asserting the right. The time prescribed is for taking the appeal, not merely for doing some act essential to an appeal within the prescribed time and omitting others. If a party may omit one step, or delay one step, until after the expiration

¹ *Street v. United States*, 133 U. S. 299; *Porter v. Pierce*, 120 N. Y. 217, S. C. 7 Law. Rep. Ann. 847; *Qualter v. State*, 120 Ind. 92; 22 N. E. Rep. 100; *Carothers v. Wheeler*, 1 Ore. 194; *Michie v. Michie*, 17 Gratt. (Va.) 109.

² R. S., § 1280.

³ *Womack v. McAhren*, 9 Ind. 6.

⁴ *Williams v. State*, 5 Ind. 235.

⁵ *Holloran v. Midland Railway Co.* (Ind.), 28 N. E. Rep. 549. In the case cited it was said: "The time allowed within which an appeal may be taken

is one year, whether the appeal be by the whole or a portion of the co-parties, and the appeal must be perfected within that time." Among the cases cited were *Arbuckle v. Swim*, 123 Ind. 208, 24 N. E. Rep. 105; *Hawkins v. McDougal*, 126 Ind. 544, 25 N. E. Rep. 708; *Joyce v. Dickey*, 104 Ind. 183, 3 N. E. Rep. 252; *Herzog v. Chambers*, 61 Ind. 333. There may, of course, be cases where delay in perfecting an appeal can be excluded, but such cases form exceptions to the general rule.

of the time, he may omit or delay another and another. To establish a rule which would tolerate such a practice would destroy all certainty and uniformity and build up a deformed and distorted system of mere arbitrary instances. A worse system than that, or one more directly opposed to sound principle, can scarcely be imagined. The reasons supporting our conclusions seem so cogent that it is hardly worth while to look to the adjudged cases, but if they are considered, additional support will be found to be yielded by them to that conclusion. The matter of time is, as the cases declare, and as we have shown, jurisdictional,¹ and, as it is jurisdictional, it must follow that the whole appeal, not merely part of it, must be perfected within the time limited, for there is no authority for doing anything essential to the validity of the appeal after that time. Where the law provides that acts shall be done within a fixed period, acts done after the expiration of that period are, as it has been often held, of no effect. The decisions, which declare that if what is essential to the existence of appellate jurisdiction is not done as the statute defining the jurisdiction prescribes the jurisdiction does not exist, give support to our conclusion.² Nearer to the direct question are the decisions which affirm that it is not enough to give notice of an appeal within the year,³ and as

¹ *Ante*, § 111. See, also, *Edmonson v. Bloomshire*, 7 Wall. 306. In this case the party petitioned for leave to file a bond after the time required by law, but the court refused to permit it to be done. It was said, in speaking of a former case, "Other cases followed that and in *Musina v. Cavazos*, decided at the last term, the whole doctrine is reviewed and the rule placed distinctly on the ground that this court has no jurisdiction unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court." It was also said: "In the case of the *United States v. Curry*, Chief Justice

Taney answering the objection that the rule was extremely technical, replied, that nothing could be treated by this court as merely technical, and for that reason be disregarded, which was prescribed by Congress as the mode for excising the court's appellate jurisdiction."

² *Brooks v. Norris*, 11 How. (U. S.) 204; *Credit Co. v. Arkansas Co.*, 128 U. S. 25; *Farrar v. Churchill*, 135 U. S. 609; *The Lucy*, 8 Wall. 307; *Steamer Virginia v. West*, 19 How. 182; *United States v. Gomez*, 1 Wall. 690; *Mesa v. United States*, 2 Black. 721; *Castro v. United States*, 3 Wall. 46; *Scarborough v. Pargoud*, 108 U. S. 567; *Washington County v. Durant*, 7 Wall. 694.

³ *Johnson v. Stephenson*, 104 Ind. 368. The case of *Evans v. Galloway*, 20 Ind.

far as they go they are in close agreement with the cases cited in the note to the opening sentence of this paragraph. The decisions upon the subject of the filing the assignment of errors are closely analogous to those cited, inasmuch as they adjudge that however much may be done within the year there is no appeal if the assignment of errors is not filed within that period.¹ The reasons we have stated are strongly fortified by the consideration of the practical benefit which would result from the rule we state, and the evil consequences which would flow from a contrary doctrine. As it is always proper to consider the consequences of a rule of practice, as it is, indeed, of a statute,² it may not be inappropriate to allude to the consequences which would flow from a doctrine that would permit parties to take some of the steps essential to an appeal after the expiration of the prescribed time. It is quite certain some steps must be taken within the time, and if the rule be that if some only of the requisite steps need be taken, how is it possible to lay down any general rule for determining what shall be their character or their number? If the rule mentioned should prevail, the courts would be for much of their time occupied in determining whether the steps taken in the particular instances were sufficient in number and weighty enough in importance to save the appeal. If parties may do part of the acts required after the year has expired it will be in their power to cause delays and thus defeat one of the chief objects of the law. From whatever side the question is viewed it is clear that the safe and sound conclusion is that every step required to make an appeal effective must be taken within the time limited by law, and that every step prescribed by law is essential to the appeal.

479, received very little consideration, and is full of legal heresy. It is, however, so effectually overruled by subsequent cases as to require no examination. *Harshman v. Armstrong*, 43 Ind. 126, 129; *Wright v. Manns*, 111 Ind. 422, 424.

¹ *Laurence v. Wood*, 122 Ind. 452; *Bacon v. Witherow*, 110 Ind. 94; *Breeding v. Shinn*, 11 Ind. 547; *State v. De-*

lano, 34 Ind. 52; *Thoma v. State*, 86 Ind. 182; *Thomas v. Service*, 90 Ind. 128; *Snyder v. State*, 124 Ind. 335. See "The Assignment of Errors," Chapter XVI

² *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; *United States v. Kirby*, 7 Wall. 482; *Lawson v. Pulaski Co.*, 3 Ark. 1, 16; *Palairot's Appeal*, 67 Pa. St. 479.

§ 129. **Bar, by Limitation, of part of the Appellants**—Where part of the appellants are barred because of a failure to appeal in time, those not barred may prosecute the appeal, and the names of those who are barred may be struck from the record.¹ The provision of the statute essentially changes the common law rule,² and it is difficult to perceive how it can have a very extended practical effect. It can, indeed, have little, if any, effect, except where the persons not barred are under disability, for where there is an essentially independent and distinct several right, the possessor of it may prosecute a separate appeal, but where the interest is joint and not several or severable, it is difficult to understand how one of the joint parties can prosecute an appeal, except under the statute providing for prosecuting an appeal upon notice to co-parties. It would certainly violate settled principles to permit him to do so, since a recovery by him would necessarily enure to the benefit of those joined in interest with him, or else to his sole benefit. In either case wrong would result. If he secures all where he was only entitled to part, it would be wrong, because he would get what another is entitled to receive; if his appeal secures his joint party benefit, it would also be wrong, because this would secure to a party who has not obeyed the law all he could have obtained by obeying it. It is probable that the framers of the statute intended to confine its operation to persons under disability,³ but the language employed is comprehensive enough to include all persons and classes. There is, at least, plausible reason for the construction suggested, inasmuch as the associated words and provisions refer to persons under disability. It may well be held, as we believe, that it was the legislative in-

¹ R. S., § 634; *McEndree v. McEndree*, 12 Ind. 97; *Hawkins v. Hawkins*, 28 Ind. 66.

² *Jacobs v. Graham*, 1 Blackf. 392. In discussing the pleadings of the appellee, we have shown that the question whether the appeal is barred by the statute of limitations may be presented by a motion to dismiss the appeal. As a motion is appropriate it must follow

that the errors assigned are not conclusively confessed.

³ R. S., § 633. The intention to save only those under disability is manifested in the provisions of section 635, which declare that co-parties receiving notice and not joining in the appeal shall take no benefit from the appeal unless under "legal disabilities."

tion that the section of the statute containing the provision under immediate discussion should only apply to the persons saved from the bar by the last clause of the preceding section; that is, persons under legal disability. Another reason for the construction mentioned is that the provisions of the statute as to the rights of co-parties refusing to join in appeal after notice seem to contemplate that the joint judgment appealed from must be one in which persons under disability are not interested. If the statute providing for proceeding with the appeal by those not barred be given a construction different from that suggested, it would seem to bring it into conflict with the section respecting co-parties.¹ Still another reason is, that the statute is to be construed in connection with the common law, and in connection with other statutory provisions, since all form parts of one great system, and these rules and provisions indicate that only persons under disability can, as a general rule, escape the statute of limitations.

§ 130. **Parties under Disabilities**—The rule limiting the time within which an appeal must be taken to one year does not operate upon persons under legal disabilities.² A party under a legal disability at the time the judgment is rendered "may appeal at any time within one year after his disability is removed." As to who are under legal disabilities it is foreign to the scope of this work to treat at length, but it may not

¹ The last sentence of the statute respecting co-parties (§ 635) reads thus: "If they decline to join, their names may be struck out, on motion, and they shall not take an appeal afterwards, nor shall they derive any benefit from the appeal unless from the necessity of the case, except persons under legal disabilities." This provision can hardly mean to allow parties not under disability to secure a benefit unless they appeal in time, for if they do not appeal, the judgment below stands against

them, but if persons are under a disability, the appeal may benefit them, so that it seems that the right to proceed with the appeal exists only in favor of those whose disabilities prevent a bar, and that the prosecution of an appeal by one of several co-parties can not be proceeded with under the section making provision for proceeding where part are barred, except where the bar is avoided because of the disabilities of those who do proceed.

² R. S., § 633.

be inappropriate to say that it is probable that under the enabling statutes, a married woman can not be considered as a person under a legal disability, within the meaning of the statute regulating appeals.¹ Under the rule laid down in analogous cases, the limitation begins to run during the existence of the disability, and it is only the one year after the removal of the disability that is allowed for taking appeals in cases where the period of limitations has fully expired during the existence of the disability.² The well known rule that cumulative disabilities are not allowed to prevent the running of the statute of limitations applies to a statute limiting the time within which appeals shall be taken as fully as to actions in a court of original jurisdiction. Cases deciding that limitations as to time for appealing from justices of the peace, boards of commissioners, and the like, are imperative, as well as cases deciding that the time of filing motions for a new trial, or bills of exceptions, is the fixing of a positive limitation, all enforce the general principle that, except as to persons under disability, the time within

¹ The decisions declare that under these statutes "ability is the rule and disability the exception." *Rosa v. Prather*, 103 Ind. 191; *Arnold v. Engleman*, 103 Ind. 512, 514; *Barnett v. Harshbarger*, 105 Ind. 410; *McLead v. Ætna Ins. Co.*, 107 Ind. 394. In *City of Indianapolis v. Patterson*, 112 Ind. 344, the court, speaking of the statute of limitations contained in section 292 of the revised statutes, said: "And so far as concerns that statute of limitations, married women have been under no common law disabilities which except them from its operation since the code of 1881 went into force." In *Bennett v. Mattingly*, 110 Ind. 197, it was said: "Coverture is no longer a legal disability in this state except in some special cases." *Strong v. Ma-*

keever, 102 Ind. 578; *Lane v. Schlemmer*, 114 Ind. 296, 301; *Phelps v. Smith*, 116 Ind. 387, 402; *Young v. McFadden*, 125 Ind. 254, 256; *Miller v. Shields*, 124 Ind. 166; *Haynes v. Nowlin* (Dec., '91).

² *Wright v. Kleyla*, 104 Ind. 223, 225; *Strong v. Makeever*, 102 Ind. 578; *Breeding v. Shinn*, 8 Ind. 125; *Van Cleave v. Milliken*, 13 Ind. 105; *Frantz v. Harrow*, 13 Ind. 507; *Vail v. Halton*, 14 Ind. 344; *Gray v. Stiver*, 24 Ind. 174; *White v. Clawson*, 79 Ind. 188; *Wright v. Wright*, 97 Ind. 444; *Peele v. State*, 118 Ind. 512, 514; *Sims v. Geay*, 109 Ind. 501; *Davidson v. Bates*, 111 Ind. 391; *Walker v. Hill*, 111 Ind. 223; *City of Indianapolis v. Patterson*, 112 Ind. 344; *Herff v. Griggs*, 121 Ind. 471, 476.

which an appeal must be taken is a limitation upon the right of appeal that can not be disregarded.¹

¹*Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Cal. 207; *Genella v. Rel-lyea*, 32 Cal. 159; *Wetherbee v. Dunn*, 32 Cal. 106; *Brandow v. Whitney*, 54 Cal. 587; *Douglass v. Fulda*, 54 Cal. 588; *Parks v. Barney*, 55 Cal. 239; *Lower v. Knox*, 10 Cal. 480; *Coombs v. Hibberd*, 45 Cal. 174; *Regan v. McMahan*, 43 Cal. 626; *Dooling v. Moore*, 19 Cal. 81; *Young v. Hudson*, 99 Mo. 102, 12 S. W. Rep. 632; *Patterson v. Woodland*, 28 Neb. 250, 44 N. W. Rep. 112; *Miller v. Camp*, 28 Neb. 412, 44 N. W. Rep. 486; *Ibley v. Thompson*, 32 So. Car. 582; *Calo v. Railroad Co.*, 30 So. Car. 608, 10 S. E. Rep. 389. Time is jurisdictional. *Douglass v. Neguelona*, 88 Tenn. 769, 14 S. W. Rep. 283; *International, etc., Co. v. State*, 75 Texas, 356, 12 S. W. Rep. 685; *Coggsell v. Hogan*, 1 Wash. 4, 23 Pac. Rep. 835. See, generally, *Bellegarde v. San Francisco, etc., Co.*, 80 Cal. 61, 22 Pac. Rep. 57; *Baars v. Creary*, 23 Fla. 61, 1 So. Rep. 335; *Tillman v. Averett*, 82 Cal. 576, 23 Pac. Rep. 875; *Romine v. Craelle*, 80 Cal. 626, 22 Pac. Rep. 296.

CHAPTER VII.

PARTIES.

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| § 131. Right of appeal generally. | § 153. Against whom an appeal may be prosecuted. |
| 132. Only parties or privies can appeal—General rule. | 154. Appellees—Who should be—General rules. |
| 133. Appealable interest. | 155. Persons united in interest—Rights of. |
| 134. Cases in which there is no appealable interest. | 156. How persons originally co-parties may become adversaries. |
| 135. Substantial interest requisite. | 157. Termination or change of interest—Effect of. |
| 136. Exceptional cases. | 158. Influence of the chancery element of code procedure. |
| 137. Succession—Substitution. | 159. Relation of parties in trial court generally continues on appeal. |
| 138. Joint parties. | 160. Appealable interest—How shown. |
| 139. Co-parties generally. | 161. Effect of change of the positions of parties. |
| 140. Necessary parties. | 162. Within what time parties must be brought in. |
| 141. Parties to the record not always parties to the judgment. | 163. Effect of the appeal upon co-parties who decline to join. |
| 142. Persons not affected by the appeal not necessary parties. | 164. Effect of notice to one who is a party but not a co-party. |
| 143. Rule requiring necessary parties not technical. | 165. Death of party before appeal—Effect of. |
| 144. Notice to co-parties jurisdictional. | 166. Death of party after the appeal. |
| 145. Failure to give notice to co-parties—Waiver of objection. | 167. Death of one of several appellants—Effect of. |
| 146. Waiver of notice. | 168. Appeals by and against representatives and privies. |
| 147. Successful party can not prosecute an appeal. | 169. Abatement by death. |
| 148. Actual controversy must exist. | |
| 149. Suit for review cuts off appeal. | |
| 150. Waiver and estoppel by accepting benefit of judgment appealed from. | |
| 151. Exceptions to the general rule. | |
| 152. Payment by defendant not a waiver nor an estoppel. | |

§ 131. **Right of Appeal generally**—The question as to who may appeal is sometimes answered in a general way by saying that parties and privies who would be benefited by a reversal or

modification of the judgment may appeal,¹ but this answer, while it is correct in the main, is not strictly accurate. It may be that there is a *prima facie* right to appeal although the appeal can not be made successful. Where there is a *prima facie* right of appeal the question is presented as to whether there is available error in the record and such a question can only be decided by an examination of the record, but where it appears that there is no right of appeal at all, the appellate court will dispose of the appeal on motion without examining the record further than it is necessary to do so in order to enable it to determine whether a right of appeal exists. If the case is one of which jurisdiction can not be entertained, then the court will, of its own motion, dismiss the appeal.² The distinction between cases where there is a right of appeal, but no available error, and cases where there is no right of appeal, or no well taken appeal, is sometimes important as affecting the mode of procedure, as it is obvious that the one class of cases may often be more summarily disposed of than the other, and that the different classes always require different treatment.

§ 132. **Only Parties or Privies can Appeal—General rule—**The right to prosecute an appeal is in terms given by our statute to parties to the judgment or order,³ and it is in general true that it is only the parties or their privies that can prosecute an appeal, but it may be said in passing that parties can not always appeal. The rule is that the person who assumes to prosecute an appeal must make it appear that he is a party or privy⁴ and that

¹ Dupree v. Perry, 18 Ala. 34; Hill v. Hill, 6 Ala. 166; Roberts v. Taylor, 4 Porter (Ala.), 421; Trammel v. Simmons, 8 Ala. 271.

² Segler v. Coward, 24 So. Car. 119, 122; Stark v. Jenkins, 1 Wash. Ty. 421; Crane v. Farmer, 14 Col. 294, 23 Pac. Rep. 455.

³ 1 R. S., § 632. We say that the right of appeal is given from orders because of the provisions of § 655, relating to interlocutory orders, which we have heretofore discussed.

⁴ Davis County v. Horn, 4 Greene (Iowa), 94; Montgomery v. Leavenworth, 2 Cal. 57; Senter v. De Bernal, 38 Cal. 637, 640; Jaqueth v. Jackson, 17 Wend. 434; Bayard v. Lombard, 9 How. (U. S.) 530; Payne v. Niles, 20 How. (U. S.) 219; Robinson v. Board, 37 Ind. 332; Hall v. Brooks, 89 N. Y. 33; *In re* Hardy, 35 Minn. 193. In Fleming v. Mershon, 36 Iowa, 413, it was held that a person for whose benefit an action is prosecuted can not appeal.

he has an appealable interest.¹ If there is no appealable interest the person who assumes to appeal will fail.² If, however, it appears that there is a substantial interest in the controversy, and its character or extent is such as to bring the case within the jurisdiction of the appellate tribunal an appeal will lie.³

§ 133. **Appealable Interest**—The appealable interest should, as a rule, appear from the record. This interest as usually exhibited by the record exists only in those who were parties in the trial court; it has, indeed, been said that only those who were parties below can appeal. Thus it has been held, pursuant to this general rule, that after judgment a party can not come in so as to secure a right of appeal.⁴ What we have stated may be regarded as the general rules, but they are, as we suppose, subject to exceptions. If it should be appropriately made to appear that by legal succession persons had acquired an interest in the subject of the controversy, the court would certainly allow them to prosecute the appeal.⁵ This is the doctrine applied to cases where a litigant dies and an administrator is appointed,⁶ and there is no reason why the prin-

¹ *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207; *Stuart v. Gay*, 127 U. S. 518; *Swann v. Wright Eq.*, 110 U. S. 590, 601.

² *Pierse v. West*, 29 Ind. 266; *Terrill v. Jennings*, 1 Metc. (Ky.) 450; *McGregor v. Pearson*, 51 Wis. 122; *Hemenway v. Corey*, 16 Vt. 225; *People v. Wilson*, 26 Cal. 127; *Mann v. Thayer*, 18 Wis. 479; *Griggs v. Detroit, etc., Co.*, 10 Mich. 117; *Idley v. Bowen*, 11 Wend. 227; *Arrowsmith v. Rappelge*, 19 La. Ann. 327.

³ *Kiefer v. Winkens*, 39 How. Pr. Rep. 176; *Sandford v. Sandford*, 58 N. Y. 67; *Burk v. Ayers*, 19 Hun. 17. See, generally, *Dexter v. Codman*, 148 Mass. 421; *In re Buckingham*, 57 Conn. 544, 18 Atl. Rep. 256; *State v. Fowler*, 41 La. Ann. 380, 6 So. Rep. 602; *United States v. Armijo*, 5 Wall. 444.

⁴ *Johnson v. Williams*, 28 Ark. 478; *Austin v. Crawford Co.*, 30 Ark. 578; *Borgalhouse v. Farmers Ins., etc., Co.*, 36 Iowa, 250; *Ferguson v. Board*, 44 Iowa, 701; *State v. Jones*, 11 Iowa, 11.

⁵ *Phillips v. Shelton*, 6 Iowa, 545.

⁶ *Arnold v. Waldo*, 36 Vt. 204; *Hilliard v. McDaniels*, 48 Vt. 122; *Dick v. Kendall*, 6 Ore. 166; *Mortimer v. Nash*, 17 Abbott Pr. R. 229; *Vail v. Lindsay*, 67 Ind. 528; *Benoit v. Schneider*, 39 Ind. 591. In the case of *Peterman v. Ott*, 45 Ind. 224, it was held that where a claim is assigned after judgment before a justice of the peace, the assignee may be substituted on appeal to the circuit court; and we can see no reason why the same doctrine may not apply to appeals to a higher appellate tribunal. See *Benoit v. Schneider*, 39 Ind. 591; *Lozey v. Bond*, 81 Ind. 510.

ciple on which the doctrine is founded should not be extended to cases of a similar nature. It is, of course, essential that the person who seeks to prosecute an appeal should show that he is interested in the subject-matter of the controversy and that his rights will be materially affected by the judgment, for he can not be allowed to come in if the judgment will not affect his rights. This would ordinarily shut out persons who were not made parties to the action, for their rights could not ordinarily be impaired by a judgment rendered in an action to which they were not parties. There may, however, be cases where one who was not a party may have a right to appeal, as for instance, the assignee of an insolvent debtor, a receiver, or the purchaser of land from a mortgagor after foreclosure.

§ 134. **Cases in which there is no Appealable Interest**—In accordance with the general doctrine that only parties to the record can prosecute an appeal it is held that a party erroneously permitted to come in by the trial court can not maintain an appeal.¹ Where a judgment is rendered against a township, an appeal by the township trustee individually will be unavailing.² A person of unsound mind may appeal from a judgment providing for the appointment of a guardian,³ but a stranger can not. There may be a right of appeal where a person is directly and materially affected by a judgment, although he may not be named as a party therein, as, for instance, in the case of one who files a bill of interpleader,⁴ but the interest shown must be more than a nominal one.

§ 135. **Substantial Interest requisite**—The decisions referred to in the preceding paragraph show that the appeal must be prosecuted by one having a substantial interest in the controversy which will be affected by the judgment on appeal, and the principle they declare is in harmony with the general rule of code practice, which requires that actions shall be prosecuted by the

¹ *Jager v. Doherty*, 61 Ind. 528. This doctrine can not, however, be extended without a violation of principle.

² *McIlwaine v. Adams*, 46 Ind. 580.

³ *Cuneo v. Bessoni*, 63 Ind. 524.

⁴ *Brooks v. Doxey*, 72 Ind. 327.

real party in interest. There are authorities declaring that a possible remote contingent interest is not sufficient to authorize an appeal, as, for instance, in the case of the objection by a railroad company to the appointment of an administrator to bring an action against it for causing the death of the intestate, or in the case of the objection to the appointment of an administrator interposed by a debtor.¹ As a further illustration of the general doctrine that the party who prosecutes an appeal must show a substantial interest in the controversy, may be adduced the cases which hold that a trustee of an insolvent's estate who has been allowed his commissions can not appeal from an order allowing the claim of a creditor if the interested parties all acquiesce in the order.²

§ 136. **Exceptional Cases**—There may be cases where a person may appeal, although he can not be said, in strict accuracy, to be a party to the judgment or decree. A person may, for instance, apply for leave to intervene and file a cross-complaint, or counter-claim, and in this method acquire a right to appeal, although his application to be made a party may be denied.³ In such cases, the person who seeks to intervene must have an appealable interest or his attempt to appeal will be unavailing. Where a plaintiff makes a person a party to his complaint, he can not successfully urge in the appellate court that the person thus brought in can not assail the complaint.⁴ If the plaintiff makes persons parties to his complaint, he is not in a situation to assert that they were not proper parties, for he can not be allowed to occupy inconsistent positions.⁵

¹ *In re Hardy*, 35 Minn. 193, 28 N. W. Rep. 219; *Hyatt v. Dusenbury*, 106 N. Y. 663; *Rankin v. Central, etc., Co.*, 73 Cal. 96, 15 Pac. Rep. 57.

² *Stewart v. Codd*, 58 Md. 86; *Salmon v. Pierson*, 8 Md. 297, 299. It is evident that this doctrine is one that should be applied with scrupulous care; for a receiver, trustee, or the like, of an insolvent's estate, represents all the creditors, and it is only where all the creditors acquiesce in an allowance that it can justly be said that a creditor has no appealable interest.

³ *Coburn v. Smart*, 53 Cal. 742, 745. The principle is essentially the same as that asserted in *Brooks v. Doxey*, 72 Ind. 327, in which it was held that one who attempted to interplead might appeal. *Krippendorf v. Hyde*, 110 U. S. 276; *Ex parte Jordan*, 94 U. S. 248; *Savannah v. Jesup*, 106 U. S. 563.

⁴ *Renner v. Ross*, 111 Ind. 269.

⁵ *Jones v. Thompson*, 12 Cal. 191, 198; *Renner v. Ross*, *supra*; *Ricketson v. Compton*, 23 Cal. 636, 649.

§ 137. **Succession—Substitution**—We have incidentally spoken of the right of one who becomes the successor in interest of a party to prosecute an appeal,¹ but the subject merits more than an incidental notice. The familiar case of the substitution of heirs or administrators where one of the parties dies, requires little discussion. It may be here incidentally noted that where a party dies before appeal the appeal can only be taken by his heirs or personal representatives.² Where the party dies after the appeal and before submission, his legal representatives may be substituted.³ If he dies after the case is submitted, the decision may be entered as of the date on which the cause was submitted, without any change of parties.⁴ Where leave is given to substitute, the order must be complied with, or the appeal will abate in cases where substitution is necessary.⁵ Passing from the familiar class of cases just mentioned to cases where original parties are supplanted by representatives of a special character, we find illustrations of the doctrine of succession in the successorship of an assignee in bankruptcy,⁶ of a receiver,⁷ and of the assignee of an insolvent's estate.⁸ Of a somewhat different type, but illustrating the general doctrine of succession, are such cases as that of a purchaser at a sale made on a decree of foreclosure,⁹ that of persons interested in the confirmation or non-confirmation of a judicial sale made by

¹ *Ante*, § 133.

² *Branham v. Johnson*, 62 Ind. 259; *Taylor v. Elliott*, 52 Ind. 588, and authorities cited. *Judson v. Love*, 35 Cal. 463; *Schartzer v. Love*, 40 Cal. 93; *Sheldon v. Dalton*, 57 Cal. 19; *Sanchez v. Roach*, 5 Cal. 248; *Coffin v. Edgington* (Idaho), 23 Pac. Rep. 80; *In re Beckwith*, 87 N. Y. 503.

³ R. S., § 637; *Hahn v. Behrman*, 73 Ind. 120, 129.

⁴ R. S., § 663; *Jeffries v. Lamb*, 73 Ind. 202, 207; *Walpole v. Smith*, 4 Blackf. 151. This topic is hereafter considered. We here refer to it in illustration of the general doctrine we are considering.

⁵ *Ruckman v. Demarest*, 110 U. S. 400; *Hook v. Linton*, 10 Peters, 107; *Philips v. Preston*, 11 How. (U. S.) 294; *Barribeau v. Brant*, 17 How. (U. S.) 43.

⁶ *Herndon v. Howard*, 9 Wall. 664.

⁷ *Hinckley v. Gilman, etc., Co.*, 94 U. S. 467; *Clafin v. Farmers' Bank*, 54 Barb. 228.

⁸ *Johnson v. Thatcher*, 7 Gray, 242; *Johnson v. Thatcher*, 12 Gray, 198.

⁹ *Blossom v. Milwaukee, etc., Co.*, 1 Wall. 655; *Minnesota, etc., Co. v. St. Paul Co.*, 2 Wall. 609, 634; *Williams v. Morgan*, 111 U. S. 684, 699; *Dela-plaine v. Lawrence*, 10 Paige, 602; *Murphrey v. Wood*, 2 Jones (N. C.), L. 63.

an officer of court,¹ or that of persons interested in defeating the claim of a receiver or assignee to compensation.²

§ 138. **Joint Parties**—It is essential that all persons whose interests may be substantially affected by the judgment on appeal should be made parties to the appeal in some appropriate mode, but it is not always true that all who were parties to the action or to the record in the trial court must be brought before the appellate court. Where the judgment is joint there is no difficulty in making practical application of the general principle stated, for all who are parties to the judgment must be made parties on appeal. Only one appeal can be prosecuted from a joint judgment by those who are parties to it, and yet all must be before the court to which the case is carried.³ But, while all the parties to a joint judgment must be brought in on appeal they need not be brought in as consenting parties but they may be notified, and if notified, they are before the court whether they expressly join or refuse to join in the appeal.⁴ The effect of the provision in our statute authorizing one of the parties to appeal prevents one of several from controlling the action of those with whom he is united in interest, and yet requires that steps shall be taken which will bring all before the appellate tribunal whose rights may be involved in the controversy upon which a decision must be given. As this is the chief object of the statute the proceedings under it must be such as to give it

¹ *Sage v. Railroad Co.*, 96 U. S. 712; *Trustees v. Greenough*, 105 U. S. 527.

² *Hovey v. McDonald*, 109 U. S. 150. See, generally, *Hobart v. Hobart*, 86 N. Y. 636; *McKenzie v. Rhodes*, 13 Abb. Pr. R. 337; *Louden v. Louden*, 65 How. Pr. R. 411; *Hotchkiss v. Platt*, 7 Hun. 56, affirmed, 66 N. Y. 620.

³ *Masterson v. Herndon*, 10 Wall. 416; *Miller v. McKenzie*, 10 Wall. 582; *Simpson v. Greeley*, 20 Wall. 152; *Williams v. Bank of the U. S.*, 11 Wheat. 414; *Mussina v. Cavazos*, 20 How. (U. S.) 280; *Hampton v. Rouse*, 13 Wall. 187; *Feibelman v. Packard*, 108 U. S. 14; *Estis v. Trabue*, 128 U. S. 225;

Mason v. United States, 136 U. S. 581; *Curten v. Atkinson*, 29 Neb. 612, 46 N. W. Rep. 91; *Hunderlock v. The Dundee, etc., Co.*, 88 Ind. 139; *State v. East et al.*, 88 Ind. 602; *Concannon v. Noble*, 96 Ind. 326; *Burns v. Singer, etc., Co.*, 87 Ind. 541; *Douglay v. Davis*, 45 Ind. 493; *Sloan v. Whiteman*, 6 Ind. 494.

⁴ R. S. 1881, § 635; *Kain v. Gradon*, 6 Blackf. 138; *Kirby v. Holmes*, 6 Ind. 133; *Conaway v. Ascherman*, 94 Ind. 187; *Emmert v. Darnall*, 58 Ind. 141; *Indianapolis, etc., Co. v. Caven*, 58 Ind. 328; *Barger v. Manning*, 43 Ind. 472; *Moore v. McGuire*, 26 Ala. 461; *Delonde v. Carter*, 28 Ala. 541.

fair and reasonable effect.¹ The object intended to be accomplished by the legislature and the common law practice respecting the general subject are matters proper for consideration in construing the statute, and these considerations forbid that the statute should be so construed as to require that all who were before the court of original jurisdiction as parties shall be brought in as parties on appeal irrespective of the question whether the judgment that may be rendered on appeal can or can not affect their rights.

§ 139. **Co-Parties—Generally**—The language of the statute providing for notice in cases where some of the parties decline to appeal does not imply that all who were parties to the record shall be notified.² The term “co-parties”³ does not mean that all shall be notified irrespective of the effect of the appeal upon their interests, but it does mean that where their interests may be materially affected by the judgment on appeal, they shall be brought before the appellate tribunal in some appropriate method. The practice established by our statute is borrowed from chancery, but is much amplified. The rule declared by the statute requires that all parties having a common interest in the subject, who may be affected by the judgment of affirmance or reversal, shall be before the court on appeal, since no person’s rights can be impaired, much less destroyed, unless he has an opportunity to be heard. If the judgment on appeal may affect the right of a person who was a party to the suit or action in the trial court he ought to be brought before the appellate

¹ The notice to co-parties required by the statute effects what is called “a summons and a severance,” and the practice has long been recognized by the courts so that the statutory provision is little more than a declaration of a long established rule. *Bradshaw v. Callaghan*, 8 Johns. 558; *Fenner v. Bettner*, 22 Wend. 621; *Smetters v. Rainey*, 14 Ohio St. 287; *Todd v. Daniel*, 16 Peters, 521; *Osborne v. Poe*, 6 Humph. (Tenn.) 111; *Smith v. Cunningham*, 2 Tenn. Ch. 565.

² R. S., § 635; *People’s Savings Bank*

v. Finney, 63 Ind. 460; *Hadley v. Hill*, 73 Ind. 442.

³ The prefix “co” implies a conjunction, not a diversity of interest, and signifies “with,” “together,” or “the like.” Where there is a divisible interest and the judgment completely and effectually severs that interest, it can not be justly said that persons, although parties to the record, are “co-parties,” for “co-parties” they can not be where the interest is a severable one, and is severed by the judgment.

court in the character of a party,¹ but it does not follow from this that all who are parties below are necessary parties on appeal, for it may well be that their rights may not be affected by any judgment that can be rendered by the appellate tribunal.

§ 140. **Necessary parties**—While it is safe to affirm that all persons included in a joint judgment must be parties to the appeal, it is not safe to say that only such persons must be parties to the appeal, for there may be cases where the decree or judgment is not strictly a joint one in which all the parties are so affected by it as to be necessary parties to the case on appeal. Thus, a decree in partition may affect all so materially as to require that they should be brought before the appellate tribunal.² So, where a fund is in court for distribution the claimants of the fund may, in some instances, be affected by a judgment awarding part of it to some one of their number, and if so, all affected should be parties, for their rights can not be justly adjudicated without their presence as parties.³ A further illustration is supplied by the case wherein it was held that where a judgment affected one of several legatees all must be made parties.⁴ The authorities referred to warrant the conclusion that those whose rights are involved are necessary parties although their rights may be several in their nature. Whether the persons who were parties below shall be made parties on appeal depends, it is safe to say, upon the effect that the judgment of the appellate tribunal may have upon their rights; if it will affect their rights materially they should be made parties and notified. But because they were in the court below as parties to the record is not always decisive of the question whether they should be made parties on appeal.⁵

¹ *Hendricks v. State*, 73 Ind. 482; *Pierson v. Hart*, 64 Ind. 254; *Barger v. Manning*, 43 Ind. 472; *Henry v. Hunt*, 52 Ind. 114; *Reeder v. Maranda*, 55 Ind. 239; *McKeen v. Boord*, 60 Ind. 280; *Herzog v. Chambers*, 61 Ind. 333; *Hammon v. Sexton*, 69 Ind. 37.

² *Hunt v. Hawley*, 70 Iowa, 183. See, generally, *Indianapolis, etc., Co. v. Caven*, 58 Ind. 328.

³ *Pearson v. Darrington*, 32 Ala. 227; *Barker v. Barker*, 39 N. H. 408; *Anon.* 18 Abbott's Pr. R. 87. But, see, *Beer v. Creditors*, 12 La. Ann. 774.

⁴ *Washburn v. Kline*, 47 Ind. 128.

⁵ New parties who ought to have been brought into the case while pending in the court of original jurisdiction can not, as we have elsewhere shown, be brought in for the first time on appeal.

§ 141. **Parties to the record not always parties to the Judgment**—Where the judgment is distinct and complete in itself, affecting only the party who seeks its overthrow, there is no reason for compelling him to augment the expense of litigation by making parties to his appeal persons who were parties to the record but not to the judgment. Where no substantial good can be accomplished by bringing parties before the appellate tribunal, it is worse than a waste of time and money to give them notice, for it is, to some extent at least, a hindrance and obstruction of justice. Thus, where two persons are sued as wrong-doers in a case where the wrong is several, and judgment goes against one of them and in favor of the other, there is ordinarily no conceivable reason why the unsuccessful defendant should give notice to the fortunate one, since it is very clear that the latter can in no wise be affected by the appeal. If the plaintiff is dissatisfied and desires a judgment against the successful defendant, the case may be different. In such a case the plaintiff must take proper steps in the trial court to bring in question the correctness of the judgment in favor of the successful defendant. If he takes no such steps there is no valid reason why the successful defendant should be brought in on an appeal taken by the other defendant, inasmuch as no good can be accomplished by bringing him in. The better considered cases sustain us in asserting that where the right of action is clearly divisible and the judgment is against one of the defendants and in favor of the other, the unsuccessful defendant need not make the other a party to the appeal, unless such action is taken in the trial court as makes both of the defendants necessary parties to the appeal.¹ Some of the decisions have pushed the

Questions as to who are and who are not necessary parties in the original suit or action must be appropriately presented to the *nisi prius* court, and the ruling reserved in due form, for the appellate tribunal will not decide an original question as to parties, but will simply review the decision of the trial court. *Golden, etc., Co. v. Smith*, 2 Dak. Ter. 374.

¹ *Forgay v. Conrad*, 6 How. (U. S.)

201; *Hanrick v. Patrick*, 119 U. S. 156; *Marsh v. Nichols*, 120 U. S. 598; *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Cox v. United States*, 6 Peters, 172; *Germain v. Mason*, 12 Wall. 259; *Farrell v. Patteson*, 43 Ill. 52; *Emerick v. Armstrong*, 1 Ohio, 513; *Sharpe v. Jones*, 3 Murphy (N. C.), 306; *Howie v. State*, 1 Ala. 113; *Turner v. State*, 40 Ala. 21. The doctrine of the text is forcibly illustrated by the cases which hold that

doctrine of notifying parties to the record to an unreasonable and indefensible extent, and they require limitation, but the very decided weight of authority is that where a party can not be affected by a judgment that may be rendered on appeal, it is not necessary to bring him before the appellate tribunal.¹

§ 142. **Persons not affected by the Appeal not necessary parties**—Where a judgment may be rendered on appeal without affecting the rights of others than those who are parties to the appeal, there is, it is evident, jurisdiction of the person, and, if there is also jurisdiction of the subject, there is power to do justice. A party, as we have seen, who has no interest can not appeal, and if he can not appeal, certainly there is no reason for making him a party to the appeal, since, if he has no interest he can not be heard either for or against the appeal.² It is a cardinal rule of appellate procedure, prevailing in criminal cases,³ as well as in civil,⁴ that a party can not complain of errors in his own favor. It must logically result from these familiar and well established principles that a party need not be brought in on appeal if he has no interest that can be prejudiced, benefited, advanced, or put in jeopardy, for, without such an interest, there are no rights to be adjudicated, and hence nothing entitling such a person to be heard.

§ 143. **Rule requiring necessary Parties not technical**—The rule

one of several parties against whom damages are separately assessed in condemnation proceedings are allowed to prosecute separate and distinct appeals. *Larsh v. Test*, 48 Ind. 130; *Washburn v. Milwaukee, etc., Co.*, 59 Wis. 379.

¹ *Koons v. Mellett*, 121 Ind. 585, 587; *Logan v. Logan*, 77 Ind. 558; *Easter v. Severin*, 78 Ind. 540; *Hammon v. Sexton*, 69 Ind. 37; *Hogan v. Robinson*, 94 Ind. 138; *Berghoff v. McDonald*, 87 Ind. 549; *McAllister v. State*, 81 Ind. 256; *Wilson v. Stewart*, 63 Ind. 294; *Kennedy v. Divine*, 77 Ind. 490.

² *Gage v. Du Puy*, 127 Ill. 216, 24 N. E. Rep. 866; *Case v. Kelly*, 133 U. S. 21; *Alling v. Ward (Ill.)*, 24 N. E. Rep. 551.

³ *Allen v. Commonwealth*, 86 Ky. 642, 12 S. W. Rep. 582; *Bishop v. State (Ark.)*, 14 S. W. Rep. 88; *State v. Bruder*, 35 Mo. App. 475; *Hawthorne v. State*, 28 Texas App. 212; *State v. Jacobs*, 28 So. Car. 29, 4 S. E. Rep. 799; *State v. Wilson*, 104 N. C. 868, 10 S. E. Rep. 315.

⁴ *Fischer v. Holmes*, 123 Ind. 525, 24 N. E. Rep. 377; *Bell v. Anderson*, 74 Wis. 638, 43 N. W. Rep. 666; *Michigan, etc., Co. v. Doherty*, 77 Mich. 350, 43 N. W. Rep. 988; *Wilson v. Atlanta, etc., Co.*, 82 Ga. 386, 9 S. E. Rep. 1076; *Schiffer v. Adams*, 13 Col. 572, 22 Pac. Rep. 964; *Golden Gate, etc., Co. v. Hendy Co.*, 82 Cal. 184, 23 Pac. Rep. 45.

requiring parties having an interest that may be materially affected by the judgment to be brought before the appellate tribunal is in no sense a technical one; on the contrary, it is a rule of great importance and is required in order to secure a litigant "his day in court." It is, when justly understood, a salutary rule, and one required by the constitutional principle that the rights of a party can not be adjudicated without notice. The right of a party to notice is, indeed, fundamental, for without notice it can not be truly said that there is due process of law.¹ It can not be doubted that a statutory provision requiring notice is an imperative one, but it may well be doubted whether an attempt to confer a right of appeal in cases where substantial rights are involved would be valid, except, of course, in cases where the appeal is taken in term or at a time when the fact of appealing itself conveys notice.

§ 144. **Notice to co-parties Jurisdictional**—Confusion has been introduced into our cases by statements, loosely and generally made, that the rule requiring notice to co-parties is, in a sense, a technical one.² There are, however, cases which speak of the requirement as jurisdictional.³ It certainly is jurisdictional wherever the nature of the case is such as to render it necessary to have all the parties before the court in order to fully determine their rights. It can not, we think it quite safe to say, be justly held that the question whether parties having a substantial interest that must necessarily be involved in the decision given on appeal should have notice, is a merely formal or technical one; it is, on the contrary, a material question inasmuch as it is es-

¹ *State v. Robbins*, 124 Ind. 308, 24 N. E. Rep. 978, 8 Lawyers' Rep. Ann. 438; *Kuntz v. Sumption*, 117 Ind. 1; *Stuart v. Palmer*, 74 N. Y. 183; *Gabriel v. Mullen*, 30 Mo. App. 464; *Ulman v. Baltimore, etc., Co.*, 72 Md. 587, 20 Atl. Rep. 141; *Murdock v. Cincinnati*, 39 Fed. Rep. 891.

² *Field v. Burton*, 71 Ind. 380.

³ *Hunderlock v. Dundee, etc., Co.*, 88 Ind. 139; *State v. East*, 88 Ind. 602; *Shulties v. Kelsner*, 95 Ind. 159. In the case last named it was said, in speaking of notice to co-parties, that: "Without notice to such parties this court has no jurisdiction, and the appeal should be dismissed." See, also, *Knarr v. Conway*, 37 Ind. 257; *Wickham v. Hess*, 38 Ind. 183; *Aylesworth v. Milford*, 38 Ind. 226; *Erwin v. Scotten*, 38 Ind. 289. The requirement that notice shall be given to co-parties is statutory, and hence can not be disregarded. *R. S.* 1881, § 635.

entially jurisdictional. It is jurisdictional because it involves the right of the appellate tribunal to exercise authority over the person, and jurisdiction of the person is always essential,¹ on appeal as well as at *nisi prius*. Some of the courts hold that the question is essentially jurisdictional,² while others, taking a sort of middle ground, hold that a decision may be given affecting the rights of the parties before the court but not the rights of others.³ The objection to the decisions which take what we have called the middle ground is, that they trench upon the fundamental rule forbidding the decision of cases in fragments, and recognize authority to make partial decisions in what should be regarded as an entire and indivisible cause. Of course, where there is a separate and distinct judgment affecting only the parties who appeal, the objection suggested is without force. It seems to us that the only conclusion that can be supported on principle is that wherever the presence of parties is essential in order to a complete adjudication, the question is jurisdictional and the appeal can not be entertained unless the parties interested are notified as the statute requires.

§ 145. **Failure to give notice to Co-parties—Waiver of objection—**As far as a question can be settled by decisions, the question as to a waiver by a failure to object because the necessary co-parties were not notified, is settled by our cases. It has been held in very many cases that if a case is submitted by agreement the appellee waives the objection that co-parties were not notified.⁴ We venture to suggest, notwithstanding the formid-

¹ *Robertson v. State*, 109 Ind. 79.

² *In re Castle Dome, etc.*, Mining Co., 79 Cal. 246, 21 Pac. Rep. 746; *Senter v. DeBernal*, 38 Cal. 637, 641; *Williams v. Santa Clara Mining Association*, 66 Cal. 193; *O'Kane v. Daly*, 63 Cal. 317; *Randall v. Hunter*, 69 Cal. 80; *Miller v. Thomas*, 71 Cal. 406; *Millikin v. Houghton*, 75 Cal. 539; *Moyle v. Landers*, 78 Cal. 99; *Curten v. Atkinson*, 29 Neb. 612, 46 N. W. Rep. 91; *Guarantee, etc., Co. v. Buddington*, 23 Fla. 514; *Downing v. McCartney*,

19 U. S. Sup. Ct. Rep. Co-op. ed. 757; *Barton v. Long*, 45 N. J. Eq. 160, 16 Atl. Rep. 683.

³ *Wright v. McHaffey*, 76 Iowa, 96; *Moore v. Held*, 73 Iowa, 538, 35 N. W. Rep. 623.

⁴ *Talbut v. Berkshire Life Ins. Co.*, 80 Ind. 434; *Easter v. Severen*, 78 Ind. 540; *Burk v. Simonson*, 104 Ind. 173; *Etter v. Anderson*, 84 Ind. 333; *First National Bank v. Essex*, 84 Ind. 144; *Hendricks v. Frank*, 86 Ind. 278; *Bolling v. Howell*, 93 Ind. 329; *Martin v.*

able array of cases, that the doctrine that an agreement to submit operates as a waiver is not sound, and we offer as a reason for our conclusion that one party can not by consent, actual or implied, confer jurisdiction over some other person. A person may, of course, confer authority over himself and his own rights, but he can not confer authority over another person or his rights. The effect of the decisions referred to is to permit one who appeals to confer jurisdiction over others who neither appeal nor are given notice,¹ and this result is at variance with sound authority, as well as with the principles of natural justice.

§ 146. **Waiver of Notice**—Parties entitled to notice as co-parties may waive notice either expressly or impliedly. Form is not a matter of much importance, for if the parties entitled to be heard are before the court so that they can protect their interests, there is no reason why the court should not pronounce judgment;² and hence waiver will often be inferred from conduct, and so especially where the parties have an opportunity to be heard, although not regularly served with notice. This does

Orr, 96 Ind. 491; *Dobbins v. Baker*, 80 Ind. 52; *Easter v. Acklemire*, 81 Ind. 163; *Munson v. Blake*, 101 Ind. 78; *Brooks v. Dozey*, 72 Ind. 327.

¹ It may be added that the confusion and error which have crept into our decisions are due, in some measure at least, to the failure to clearly keep in mind the rule for determining who are and who are not necessary parties to an appeal. If parties are necessary, the question takes the form of a jurisdictional one, and only the party whose rights are affected can give jurisdiction of his person. Surely no other can do it. If the omitted persons were not necessary parties to the appeal, then jurisdiction exists, whether they are present or absent. The question must, as it seems to us, always be solved by determining whether the omitted persons were necessary parties. Whether there was, or

was not, a waiver by other persons is entirely foreign to the dispute. It certainly would be unjust to compel a co-party who had no notice of an appeal to pay the costs, and it would be still more unjust to compel him to yield rights secured to him by the judgment, and yet these results must follow if the doctrine of the cases is carried to its necessary and logical conclusion.

² This general doctrine is illustrated and enforced by many cases. *State v. Hattabough*, 66 Ind. 223; *Truman v. Scott*, 72 Ind. 258; *Burnett v. Abbott*, 51 Ind. 254; *Wangerien v. Aspell*, 47 Ohio St. 250, 24 N. E. Rep. 405; *Moore v. Lewis*, 76 Mich. 300, 43 N. W. Rep. 11; *Mickley v. Tomlinson*, 79 Iowa, 383, 41 N. W. Rep. 311; *McAlle v. The Latona*, 3 Wash. Ty. 332, 19 Pac. Rep. 131; *Ware v. Morris*, 42 La. Ann. 760, 7 So. Rep. 712; *Waddingham v. Waddingham*, 27 Mo. App. 596.

not imply, however, that other parties may waive their rights. Mere irregularities in the notice are waived by a submission without objection.¹ When there is no notice in a case where one is required, the submission will not operate as a waiver.² A submission by agreement waives a pending motion to dismiss the appeal.³

§ 147. **Successful party can not prosecute an Appeal**—The general rule is that a party who fully succeeds has no right to an appeal.⁴ A party may, however, obtain some relief, but not all to which he is entitled, and in such a case an appeal will lie. If a party is awarded full relief there can be no reason for an appeal, since there is no wrong to redress, and if no wrong, no remedy exists. So, too, a party who fully succeeds can not be injured by any ruling of the trial court, and only prejudicial errors call into exercise the appellate jurisdiction. Where partial relief only is adjudged there may be prejudicial error, but where full relief is decreed there can be none, and to permit an appeal by the successful party in such a case would violate fundamental principles and lead to injustice both to the community and to parties.

§ 148. **Actual Controversy must exist**—Where there is no actual controversy there can be no appeal.⁵ Courts are created for

¹ *State v. Walters*, 64 Ind. 226; *Beck v. State*, 72 Ind. 250; *Critchell v. Brown*, 72 Ind. 539; *State v. Kutter*, 59 Ind. 572; *Walker v. Hill*, 111 Ind. 223; *Deatly v. Potter*, 29 Mo. App. 222; *Benson v. Carrier*, 28 So. Car. 119, 5 S. E. Rep. 272; *Guarantee, etc., Co. v. Buddington*, 23 Fla. 514, 2 So. Rep. 885; *Bates v. Scott*, 26 Mo. App. 428; *In re Joseph Uhrig Brewing Co.*, 11 Mo. App. 387; *Mackey v. Commonwealth*, 80 Ky. 345; *Chicago, etc., Co. v. Abilene, etc., Co.*, 42 Kan. 104, 107, 21 Pac. Rep. 1112; *Richardson v. Green*, 130 U. S. 104; *Roy v. Rowe*, 90 Ind. 54; *Cain v. Goda*, 94 Ind. 555; *First Nat. Bank v. Essex*, 84 Ind. 144.

² *Burkam v. McEfresh*, 88 Ind. 223.

³ *Bender v. Wampler*, 84 Ind. 172.

⁴ *Green v. Blackwell*, 5 Stew. (N. J.) 768; *Com. Ins. Co. v. Pierro*, 6 Minn. 569; *St. Louis, etc., Co. v. Evens, etc., Co.*, 15 Mo. App. 590; *Hooper v. Beecher*, 109 N. Y. 609; *Fairbanks v. Corliss*, 1 Abbott (N. Y.), 150, 155. In the case of *Hall v. Pay Rock, etc., Co.*, 6 Col. 81, it was held that consent will not confer jurisdiction.

⁵ *Lord v. Veazie*, 8 How. (U. S.) 251; *Little v. Bowers*, 134 U. S. 547; *Elwell v. Fosdick*, 134 U. S. 500; *Nunan v. Valentine*, 83 Cal. 588, 23 Pac. Rep. 713; *Hintrager v. Mahoney*, 78 Iowa, 537; 43 N. W. Rep. 522, 5 Law Ann. Rep. 50; *State v. Westmoreland*, 29 So. Car. 1, 6 S. E. Rep. 847; *Chicago, etc., Co. v.*

the purpose of deciding real controversies and not for the purpose of determining abstract or speculative questions. It must, therefore, appear that there is an actual controversy between the parties. Where the record shows that an action was regularly begun and that it was contested in the ordinary manner, the presumption is that there is an actual controversy, but this presumption may be overthrown by extrinsic evidence.¹ The fundamental principle of appellate procedure that there must be an actual controversy sustains the rule stated in the preceding paragraph and leads to other important conclusions. Among the conclusions to which it leads is this: Where the controversy is ended by the acts of the parties themselves or by operation of law there is no right of appeal.² Thus, where a *nolle prosequi* was entered to an indictment by order of the President of the United States it was held that the appeal must be dismissed.³ So, where it appeared that the controversy had been settled, a dismissal was ordered.⁴ The same principle underlies the case which holds that where the term of office in dispute has expired an appeal will not lie.⁵

§ 149. Suit for review cuts off Appeal—A party may have an

Dey, 76 Iowa, 278, 41 N. W. Rep. 17; *People v. Burns*, 78 Cal. 645, 21 Pac. Rep. 540; *Treat v. Hiles*, 77 Wis. 475, 44 N. W. Rep. 1088.

¹ *Witz v. Dale* (Ind.), 27 N. E. Rep. 498; *Elwell v. Fosdick*, 134 U. S. 500; *The Board, etc., v. Louisville, etc., Co.*, 109 U. S. 221; *Dakota County v. Glidden*, 113 U. S. 222. In the last case cited it was said: "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting the case before them on error or appeal." See, *post*, "Agreed Case."

² *County of San Mateo v. Southern Pacific R. Co.*, 116 U. S. 138; *State v. Kansas City, etc.*, 97 Mo. 331, 10 S. W. Rep. 855.

³ *United States v. Phillips*, 6 Peters, 776. See, also, *Chicago, etc., Co. v. Dey*, 76 Iowa, 278, 41 N. W. Rep. 17.

⁴ *Peck v. Young*, 1 How. (U. S.) 250; *Cartwright v. Howe*, 1 How. (U. S.) 188; *Monnett v. Hemphill*, 110 Ind. 299; *State v. Kamp*, 111 Ind. 56. See, generally, *Williams v. Nottawa*, 104 U. S. 209; *Wood Paper Co. v. Hest*, 8 Wall. 333; *Cleveland v. Chamberlain*, 1 Black, 419; *People v. Burns*, 78 Cal. 645, 21 Pac. Rep. 540; *Numan v. Valentine*, 83 Cal. 588; *Hintrager v. Mohoney*, 78 Iowa, 537. 6 Lawyer's Rep. Ann. 50, 43 N. W. Rep. 522. An attorney can not settle a case over the known objection of his client. *Lee v. Lord*, 75 Wis. 35, 43 N. W. Rep. 799. See as to agreement of parties without knowledge of the attorneys, *Jackson v. Cole*, 81 Mich. 440, 45 N. W. Rep. 826.

⁵ *State v. Westmoreland*, 28 So. Car. 625, 6 S. E. Rep. 847.

appealable interest and yet not be entitled to prosecute an appeal. He may preclude himself from appealing by an election of remedies. Thus, a party may elect to prosecute a suit to review a judgment, and if he does make such an election he can not appeal from the same judgment.¹ This doctrine is an extension of the principle that an election of remedies binds the party and precludes him from pursuing different remedies after having once elected.² The principle is a salutary one because it prevents parties from being vexed with litigation, and because it secures one decision finally terminating the controversy. If parties were permitted to exhaust one remedy and then take advantage of another, confusion would result and litigation be unjustly prolonged.

§ 150. Waiver and Estoppel by accepting benefit of judgment appealed from—It is a general rule that a party who accepts the benefit of a judgment waives a right to prosecute an appeal from it.³ This doctrine is asserted in the numerous cases which adjudge that a party who accepts payment of a judgment can not afterwards appeal from the judgment thus satisfied.⁴ The same general principle is declared and enforced in

¹ *Harvey v. Fink*, 111 Ind. 249; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Dunkle v. Elston*, 71 Ind. 585; *Davis v. Binford*, 70 Ind. 44; *Searle v. Whipperman*, 79 Ind. 424; *Indiana, etc., Co. v. Routledge*, 7 Ind. 25; *Klebar v. Town of Corydon*, 80 Ind. 95; *Buscher v. Knapp*, 107 Ind. 340. See *Masonic Temple Co. v. Commonwealth*, 87 Ky. 349, 12 S. W. Rep. 143; *Schweickhart v. Stuewe*, 75 Wis. 157, 43 N. W. Rep. 722; *New Orleans, etc., Co. v. Crescent City Co.*, 33 La. Ann. 934.

² *Goodman v. Pocock*, 15 Q. B. 576, 583; *Scholey v. Rew*, 23 Wall. 331; *Lyon v. Travelers Ins. Co.*, 55 Mich. 141; *Long v. Fox*, 100 Ill. 43; *Elliott v. Dycke*, 78 Ala. 150; *Bradley v. Rogers*, 33 Kan. 120; *Finlay v. Bryson*, 84 Mo. 664; *Thornton v. Baker*, 15 R. I. 553; *State v. McGuire*, 40 La. Ann. 378; *Witters v. Sowles*, 38 Fed. Rep. 700.

³ *Clark v. Wright*, 67 Ind. 224; *Sterne*

v. Vert, 111 Ind. 408; *Sterne v. Vert*, 108 Ind. 232; *Test v. Larsh*, 76 Ind. 452. See, *ante*, p. 461, 462; *Kile v. Yellowhead*, 80 Ill. 208; *Sherman v. McKeon*, 38 N. Y. 266; *Glover v. Benjamin*, 73 Ill. 42; *Bates v. Ball*, 72 Ill. 108; *Stinson v. O'Neal*, 32 La. Ann. 947; *Board of Church Wardens v. Perche*, 40 La. Ann. 201.

⁴ *Newman v. Kizer* (Ind.), 26 N. E. Rep. 1006; *McCracken v. Cabell*, 120 Ind. 266, 22 N. E. Rep. 136; *State v. Kamp*, 111 Ind. 56, 11 N. E. Rep. 960; *Baltimore, etc., Co. v. Johnson*, 84 Ind. 420; *Patterson v. Rowly*, 65 Ind. 108; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. Rep. 664; *Moore v. Floyd*, 4 Ore. 260; *Lyons v. Bain*, 1 Wash. Ty. 482; *Borgalthous v. Farmers', etc., Co.*, 36 Iowa, 250; *Alexander v. Alexander*, 104 N. Y. 643; *Chapman v. Sutton*, 68 Wis. 657; *Edwards v. Perkins*, 7 Ore. 149.

the cases which hold that where benefits are awarded to a land owner in condemnation proceedings, an acceptance of the sum awarded will preclude him from prosecuting an appeal.¹ The principle is closely akin to that which precludes an appeal where the controversy is terminated by a satisfaction of the judgment recovered in the trial court, and it is, therefore, correctly held that a voluntary release will estop a party from prosecuting an appeal from the judgment released.² If there is fraud in procuring the release or entry of satisfaction, that may be shown on appeal, and, if shown, will destroy the affect of the release or entry. Where a party successfully interposes a judgment to defeat proceedings in bankruptcy, he can not question its validity.³

§ 151. **Exceptions to the general rule**—The rule that a party who accepts benefit from a judgment can not appeal is not without exceptions. If a party does what he has a right to do without affirming, in the act he performs, the validity of the judgment, he does not estop himself from prosecuting an appeal. It will be observed that in the cases in which it has been held

¹ *People v. Mills*, 109 N. Y. 69, 15 N. E. Rep. 886; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrell*, 19 Conn. 142. See, *ante*, notes 1 and 3; Elliott on Roads and Streets, 277; *ibid*, p. 286, n. 4.

² *Trickey v. Schlader*, 52 Ill. 78; *Guernsey v. Edwards*, 26 N. H. 224; *Freeman v. Weeks*, 45 Mich. 335. Collecting by execution operates as an estoppel. *Paine v. Woolley*, 80 Ky. 568. The doctrine that the acceptance of a benefit precludes the party from questioning the validity of that which secures him the benefit is far-reaching. Thus, part acceptance will ordinarily operate as an estoppel. *Neal v. Field*, 68 Ga. 534; *Murphy v. United States*, 104 U. S. 464; *Andrews v. United States*, 16 Ct. of Cl. 265. See, generally, *Jessup v. Spears*, 38 Ark. 457; *Gibson v. Hall*, 57 Texas, 405. So, an ac-

ceptance of benefits under an unconstitutional statute may preclude the party from challenging its validity. *Daniels v. Tearney*, 102 U. S. 415; *Robinson v. Bank*, 18 Ga. 65; *Ferguson v. Landram*, 1 Bush. (Ky.), 548; *Cary v. Whitney*, 48 Me. 516; *State v. Mitchell*, 31 Ohio St. 592; *Lee v. Tillotson*, 24 Wend. 337; *Burlington, etc., Co. v. Stewart*, 39 Iowa, 267; *Perryman v. Greenville*, 51 Ala. 507; *People v. Murray*, 5 Hill, 468; *Coleman v. Morrison*, 1 A. K. Marsh, 406.

³ *Cornwall v. Davis*, 38 Fed. Rep. 878. See, generally, *State v. Harland*, 74 Wis. 11, 41 N. W. Rep. 1060; *Massie v. Brady*, 41 La. Ann. 553. A party who once repudiates an award can not subsequently make it available. *Hamilton v. Hart*, 125 Pa. St. 142, 17 Atl. Rep. 226.

that an estoppel exists, the act necessarily affirmed the validity of the judgment. Thus, where a party accepts money or property awarded him by a judgment, he concedes the validity of the judgment, since it is by virtue of the judgment that he obtains the money or property. But there are cases where a remote and incidental benefit is derived, and yet the right of appeal exists. Thus, where a plaintiff prosecutes two actions for the same cause the defendant, by moving to be released from one of them, does not preclude himself from prosecuting an appeal.¹ In such a case the moving party does no wrong to the court or to the adverse party, but stands simply upon a clear legal right.² Where the action of the appealing party appears to have resulted from an excusable mistake, then he should be allowed to appeal unless to grant him the right of appeal would unjustly prejudice the adverse party.³

§ 152. Payment by defendant not a Waiver nor an Estoppel—It is obvious that there is an essential difference between one who pays a judgment against him and one who accepts payment of a sum awarded him by a judgment. Payment by a party against whom a judgment is rendered may often be necessary to protect his property from sacrifice, and what a party does to prevent the sacrifice of his property can not with any tinge of

¹ Pittsburgh, etc., Co. v. Swinney, 91 Ind. 399; Green Bay, etc., Co. v. Hewitt, 62 Wis. 316.

² The rule which precludes an appeal is designed to prevent a party from taking inconsistent positions to the harm or prejudice of his adversary. It is illustrated in a great variety of cases and is often given effect. Nitcher v. Earle, 117 Ind. 270; Dinwiddie v. State, 103 Ind. 101; Hinton v. Whittaker, 101 Ind. 344. The case of Harbaugh v. Albertson, 102 Ind. 69, supplies a strong illustration of the rule. See, generally, Wood v. Rawlings, 76 Ill. 206; Iron Mountain Bank v. Armstrong, 92 Mo. 265; Railway Co. v. McCarthy, 96 U. S. 258; Garber v. Doersom, 117 Pa. St. 162; Bonham v. Bishop, 23 So. Car. 96;

Lawrence v. Ballou, 50 Cal. 258; Sargent v. Flaid, 90 Ind. 501. But the rule can not be pressed too far without injustice. Mr. Bigelow justly sums up when he says: "Where, then, no wrong would be done to the court or to other parties to a cause by permitting a change of position, a change should, in principle, and will be in fact, allowed." Bigelow Estoppel (5th Ed.). 722.

³ Queen v. Liverpool, 15 Q. B. (N. S.) 1070; Queen v. Buckinghamshire, 4 El. & B. 260; Yeaton v. Lenox, 8 Peters, 123; United States v. Curry, 6 How. (U. S.) 106. We suppose that it must appear that the mistake was an excusable one and that in permitting its correction no legal harm is done the opposite party.

justice, be held to preclude him from assailing the judgment.¹ Our cases holding that payment by the defendant does not estop him² from prosecuting an appeal rest on solid ground and are sustained by the decisions of other courts.³ The principle that a party may protect his property from sacrifice by a forced sale upon an execution sustains the decision that a defendant does not preclude himself from prosecuting an appeal by securing an entry of replevin bail. If the defendant should agree not to prosecute the appeal and in consideration of such an agreement the creditor should abate part of the recovery, extend the time of payment, or do some other act of a similar character, then, the right of appeal would be waived since the controversy would be terminated.⁴

§ 153. **Against Whom an Appeal may be prosecuted—Generally—** In the preceding paragraphs of this chapter we have discussed the question of parties with especial reference to the rights of parties who prosecute appeals, but we have, as a necessary incident of the main topic, referred in a general way to the necessity of prosecuting the appeal against the necessary parties. In the succeeding paragraphs of the present chapter we shall treat more especially of the parties against whom an appeal may be prosecuted. As we have said, the parties to the record are not always necessary parties to the appeal, nor are those who were not parties to the record as originally made always to be overlooked in prosecuting an appeal. A succession in estate or in right may sometimes require parties to be notified on appeal who were not parties in the trial court, but the gen-

¹ *Factors, etc., Co. v. New Harbor*, etc., Co., 37 La. Ann. 233.

² *Armes v. Chappel*, 28 Ind. 469; *Dickensheets v. Kaufman*, 29 Ind. 154; *Hill v. Starkweather*, 30 Ind. 434; *Hyer v. Norton*, 26 Ind. 269; *Belton v. Smith*, 45 Ind. 291; *Bruce v. Smith*, 44 Ind. 1.

³ *Edwards v. Perkins*, 7 Oregon, 149; *Hayes v. Nourse*, 107 N. Y. 577; *Chapman v. Sutton*, 68 Wis. 657; *Burrows v. Mickler*, 22 Fla. 577. A conveyance

pursuant to a decree was held not to waive the right of appeal. *O'Hara v. MacConnell*, 93 U. S. 150.

⁴ This conclusion results from the settled doctrine that where there is no actual controversy there can be no appeal. *Cleveland v. Chamberlain*, 1 Black, 419; *Terry v. Abraham*, 93 U. S. 38; *Steele v. White*, 2 Paige, 478; *Kelly v. Israel*, 11 Paige, 147; *Bush v. Rochester Bank*, 48 N. Y. 659.

eral rule is that only parties to the judgment or decree are necessary parties on appeal.

§ 154. **Appellees—Who should be—General Rules**—In determining against whom an appeal may be prosecuted it is important to keep in mind the cardinal rule that it is essential to an effective judgment that all of the interested parties should be in court. Parties are necessary to the effectiveness of the judgments of appellate tribunals as well as to the judgments of trial courts.¹ But, for obvious reasons, the specific rules which govern the procedure in the trial court can not, as will appear as we proceed, be always rightfully or justly enforced on appeal. The positions of parties and their interests are often so shifted and changed by the judgment or decree of the trial court that those who appeared below as adversary parties become, on appeal, parties on the same side in so far as the question of interest is ruled by mutuality. While it is probably true, as a general rule, that adverse parties in the trial court remain adverse parties on appeal, yet the exceptions are so numerous and so important that it will not do to blindly accept as a guide on appeal the rules which govern the procedure in courts of original jurisdiction.

§ 155. **Persons united in Interest—Rights of**—It is true, in most instances, that all who were united in interest by the judgment in the trial court and who would be benefited by its reversal remain united on appeal, nor is this result changed by the fact that part only of such parties appeal. Those united in interest with the appellants can not become appellees. Theoretically, at least, there is no right to prosecute an appeal against a party united in interest with the party who seeks a reversal of the judgment.² The rule that one of several co-parties may appeal does not, by its practical operation, make the parties united in interest by the judgment below adversary parties on appeal. The rule as interpreted by our court is this: Where the parties

¹ Shirley v. Lunenbergh, 11 Mass. 379; State v. Baldwin, 70 Iowa, 180; Harper v. Bibb, 45 Ala. 670; England v. McLaughlin, 35 Ala. 590. See, also, *ante*, §§ 120, 121, 123, and notes.

² In such a case there would usually be no actual controversy and hence no right of appeal.

are united in interest by the judgment rendered below they are appellants on appeal, if parties at all. If one of several parties so united in interest appeals it is his duty, as we have seen,¹ to give notice to his co-parties; if, after notice, they refuse to join in the appeal, the case should be dismissed as to them, but if they do not refuse to join they remain in court as appellants.² They do not, in any event, occupy the position of appellees. It is evident, therefore, that the doctrine respecting appeals by one of several co-parties does not infringe upon the rule that those who were adverse parties below continue to be adverse parties on appeal. From this results the general rule that those who were adverse to the parties who appeal are the parties against whom the appeal must be prosecuted and who become the appellees in the appellate tribunal.

§ 156. How persons originally Co-parties may become Adversaries—Parties brought before the trial court as adverse to the plaintiff and as having a common interest may become, as between themselves, adversary parties, and when this occurs it must be true, upon principle, that on appeal by one of such parties he must treat the party whose judgment he assails as an adversary and not as a co-party. Thus, if two persons are brought in to answer as to their interests and one files a cross-complaint or counter-claim against the other, presenting a distinct and independent issue affecting only the party against whom the cross-complaint or counter-claim is filed, an appeal from a judgment on such an issue must be taken against the defendant to the cross-complaint or counter-claim as an adverse party and not as a co-party. If, to further illustrate, three per-

¹ *Ante*, §§ 138, 140, 141, 142, 143, 144.

² "It is the correct practice," said the court, in *Rabb v. Graham*, 43 Ind. 1, "to unite with those who do not appeal, those who appeal, in taking the appeal and assigning the errors; those who appeal must then serve notice on those who do not, and file the proof thereof with the clerk of this court. Then, unless the parties thus notified appear and decline to join in the appeal they shall

be regarded as having joined and shall be liable for their due proportion of the costs. If they decline to join, their names may be stricken out on motion, and they shall not take an appeal afterwards, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under legal disabilities." See, also, *Millsap v. Stanley*, 50 Ala. 319.

sons are jointly sued and one of the defendants asserts, by the appropriate pleading, that he is the surety of the other two but makes no issue as to the plaintiff's right to recover against him as principal, the judgment on the issue tendered is, as against the other defendants, independent and distinct,¹ so that on an appeal from that judgment the party who tenders the issue upon which it is pronounced is an adversary of the other defendants. The unity of interest is completely severed and the severance creates hostile relations. So, where a personal judgment was rendered in favor of a material man against a sub-contractor employed to erect a building, and this judgment was not questioned, but a contest was waged between the owner and the material man as to the right to enforce a lien, it was held that the sub-contractor was not a necessary party to the controversy on appeal between the material man and the owner.² Again, where an order is made directing the payment of money to one of two defendants, and the one who is defeated in his effort to secure the money appeals from the judgment, his co-defendant becomes his adversary on appeal.³

§ 157. **Termination or change of interest—Effect of—**Where a party ceases to have an interest in the controversy his presence on appeal is unnecessary; it is, indeed, according to some of the courts, improper to join him in the appeal.⁴ It is only those who are injured that can properly be appellants.⁵ If, therefore, the injury is by one party to another they are the hostile parties, and if the judgment be independent, affecting them alone, the injured person must be the appellant and his opponent the appellee; otherwise it would result that the injured and the injurer are on the same side and are theoretically bound together as allies,

¹ *De Sylva v. Henry*, 3 Porter (Ala.), 598; *Shirley v. Burch*, 16 Ore. 1, 18 Pac. 132; *Jones v. Etheridge*, 6 Port (Ala.), Rep. 344; *Railroad Co. v. Johnson*, 15 208. See, generally, *Bumpass v. Webb*, 4 Wall. 8; *Keller v. Boatman*, 49 Ind. 101. Porter (Ala.), 65.

² *Rose v. Baker*, 99 N. C. 323.

³ *Davis Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641; *Germain v. v. Hoag*, 7 Paige, 18.

⁴ *Kelly v. Israel*, 11 Paige, 147; *Mills v. Hoag*, 7 Paige, 18. ⁵ *Porter v. Rummary*, 10 Mass. 64; *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Marsh v. Nichols*, 120 U. S. Jackson v. Hosmer, 14 Mich. 88.

whereas they are, in fact, adversaries. A severance does not always create hostile relations, but parties brought before the trial court on the same side may sometimes sever and so sever as to become adversaries.¹ The principal reasons why all who were united in interest in the court of original jurisdiction must be appellants in the appellate tribunal are, (1) that cases can not be carried up piecemeal, and (2) one cause of action, or defense, can not be split into fragments,² but both of these reasons fail where there is such a diversity of interest as makes the parties hostile. Where the parties do become antagonists upon an independent issue and become such because of the nature of their respective interests, the party injured by the judgment of the trial court has an interest in overthrowing it, and hence may appeal; on the other hand, the person benefited by the judgment has an interest in maintaining it and is naturally and logically an appellee and not a co-appellant with the person to whom the judgment causes loss or injury.

§ 158. **Influence of the Chancery element of Code procedure**—An appeal under the code system, as has been elsewhere shown,³ is composite, blending in one proceeding the common law elements of the procedure in cases of writs of error and the elements of chancery practice as embodied in the system of appeals, so that regard must be had to the chancery practice in all cases of equitable cognizance. Under the chancery system, now so generally woven into remedial justice by the codes, parties might change relations in the court of original jurisdiction, and so change as to become in reality hostile although nominally on the same side. If the case is one where, by the rules of equity or by the provisions of the statute, interests may be severed and positions changed, the decree may affect such

¹ *Prince v. Bates*, 19 Ala. 105; *Thompson v. Campbell*, 52 Ala. 583; *Glover v. Lyon*, 57 Ala. 365; *Ellis v. Bullard*, 11 Cush. 496; *Andrews v. Steele*, 7 C. E. Green (N. J.), 478.

² *Huckabee v. Nelson*, 54 Ala. 12.

³ "Appellate Jurisdiction," Chapter II. The chancery element is the domi-

nating one so far as matters of procedure are concerned, but still it has not entirely supplanted the law element. It has, however, driven out many merely technical rules and many merely formal requirements of the common law procedure.

a change as will create antagonistic relations and independent issues. Where the decree severs the interests upon issues framed by the parties and places two persons who came in as defendants in hostile attitudes, then one of the two must be injured by the decree and the other benefited by it, so that the injured party may prosecute an appeal as the appellant against the party whom the decree benefits.¹ One has an interest in reversing the decree, the other in sustaining it.

§ 159. Relation of Parties in Trial Court generally continues on Appeal—That the attitude of the parties rendered hostile by the decree of the lower court generally remains hostile on appeal is proved by the fact that as to such matters the appeal is, in effect, a continuation of the original litigation.² As the litigation is con-

¹ This principle is illustrated by the decision in the case of *Vandever v. Holcomb*, 2 C. E. Green (17 N. J. Eq.), 547. In that case the complainant brought suit to foreclose a senior mortgage, making the mortgagor and two junior mortgagees parties defendant. One of the junior mortgagees filed a cross-bill assailing the mortgage of the other defendant, and it was held that an appeal could be maintained by the unsuccessful defendant as the appellant. In the course of the opinion it was said: "In a court of equity, a decree may be made determining the rights of co-defendants in a controversy among themselves in which the complainant has no interest, when the question is brought before the court by the pleadings and the proofs." The court cited *Shannon v. Marselis*, Saxt. (N. J.) 413; *Ames v. New Jersey Franklinite Co.*, 1 Beasley (N. J.), 66; *Harris v. Ingledew*, 3 P. W. 98; *Chamley v. Lord Dunsany*, 2 Schf. & Lef. 690, 710; *Conry v. Caulfield*, 2 Ball & Beatty, 255; *Elliott v. Pell*, 1 Paige, 263; *Hudnit v. Nash*, 1 C. E. Green (N. J.), 550.

² *Nations v. Johnson*, 24 How. 195, 205, *Colorado, etc., v. Cowell*, 6 Col. 73; *Connor v. Connor*, 4 Col. 74; *Eic-*

holtz v. Wilbur, 4 Col. 434. See, generally, *Wiscart v. D'Auchy*, 3 Dall. 321, 327; *Rawson v. Adams*, 17 Johns. 130; *Leach v. Blakely*, 34 Vt. 134, 136; *Robinson v. Magarity*, 28 Ill. 423. In *Johnson v. Nation*, *supra*, it was said, in speaking of an appeal: "According to the practice in this court it is rather a continuation of the original litigation than the commencement of a new action, and such, it is believed, is the general understanding of the profession in the United States. *Cohens v. Virginia*, 6 Wheat, 264; *Clarke v. Matthewson*, 12 Peters, 164, 170." It is no doubt true that the appeal is a continuation of the litigation but not in the court of original jurisdiction. The appeal, if so taken as to be effectual, completely transfers the cause to a new forum. To have the effect of transferring the cause the law authorizing the transfer must be fully complied with by the appellant. *Bondurant v. Watson*, 103 U. S. 281; *Ray v. Law*, 3 Cranch, 179. Even consent can not change the mode of appeal. *The Nonesuch*, 9 Wall. 504; *Ballance v. Forsyth*, 21 How. 389; *Sampson v. Welsh*, 24 How. 207; *Mills v. Brown*, 16 Peters, 525; *Webster v. Buffalo Ins. Co.*, 110 U. S. 386.

tinued by the appeal and not originated by it, the conclusion that the *status* of the parties as fixed by the issues and decree in the trial court must ordinarily remain unchanged is unavoidable. If hostile below they are hostile on appeal. This conclusion harmonizes with the general principles of procedure and is in accordance with the decision that co-parties remain appellants, if parties at all, in the appellate tribunal, although one only of several actually prosecutes the appeal.

§ 160. **Appealable interest—How shown**—It has been said by an able court that, "The true test of the necessary parties to an appeal is this: Has the party an interest that the judgment appealed from be maintained?"¹ This is, in a general sense, correct, but it really presents one side, only, of the question, for a party may have an interest in overthrowing the judgment. It must be true that one who has such an interest is a necessary party, since, upon the fundamental principle elsewhere discussed, all parties having a substantial interest in maintaining or in overthrowing a judgment respecting the particular controversy determined by it are necessary parties. In the one case they are properly appellants; in the other, they are properly appellees. But the question we are here especially concerned with is, how shall this interest be shown? That it must always be shown by the record may be safely affirmed. It is safe to affirm this for the reason that appellate tribunals investigate and determine questions by and from the record. Questions of fact concerning the particular interests of parties and their relations to each other are to be determined upon the record before the tribunal, as it does not look beyond the record. It is not, however, invariably true that the appellate tribunal considers only the record made by the trial court, for, after the cause comes fully within the jurisdiction of the higher court,² parties may be changed where changes are required by events occurring after the case leaves the jurisdiction of the trial court. The appellate tribunal undoubtedly has power to make all needful and

¹ *Ivy v. Lusk*, 11 La. Ann. 486.

effective appeal completely removes a

² In the chapter treating of the effect of an appeal we have shown that an case from the jurisdiction of the trial court.

proper changes of parties in furtherance of justice. It has not, of course, power¹ to so change parties as to alter the nature or scope of the original controversy, since that would violate the fundamental principle that appellate jurisdiction is essentially one of review, but it has power to make such orders as will make its judgments effective, and to accomplish this it is sometimes necessary to take steps to bring before it parties who have become necessary and proper parties because of changes in positions and interests. It does not imply a violation of the rule that the record must show an appealable interest to say that parties may be changed on appeal; this is true for the reason that what the appellate tribunal orders or adjudges is, in the strict sense, part of the record. So where petitions or motions respecting parties are filed in the appellate tribunal after its jurisdiction attaches, they become part of the record of that tribunal. Such petitions or motions are none the less parts of the record on appeal, because they may bring in matters that do not appear in the record of the trial court,² for they could not there appear, inasmuch as such matters are subsequent to the cessation of the trial court's jurisdiction. But persons who were not parties in the trial court, or are not the successors or representatives of such parties, can not be brought in for the first time on appeal, for the reason, among others, that the record can not be made to show an appealable interest.³ Parties necessary to the action must, it is not much aside from our discussion to say, be made in the court of original jurisdiction, for a failure to bring in necessary parties in the first instance can not be remedied on appeal. It is, in general, true that the record as made in the trial court must show the appealable interest, and in the great majority of instances it is shown by that record.

¹ Power implies right. *Carr v. State*, 664; *Knox v. Exchange Bank*, 12 Wall. 127 Ind. 204, 11 Lawyers' Rep. Ann. 379; *Taylor v. Savage*, 1 How. (U. S.) 370, 371. We use the word not as meaning arbitrary might, but as meaning rightful authority.

² This is necessarily true in cases where receivers, assignees in bankruptcy, or like special representatives, succeed to the rights of the original parties. *Herndon v. Howard*, 9 Wall.

S. 150.
³ *Payne v. Niles*, 20 How. (U. S.) 219; *Taylor v. Savage*, 2 How. (U. S.) 394.

Where it is shown by the transcript filed on appeal that there is an appealable interest, nothing further need be shown, but it is necessary to so describe the parties as that their respective positions and relations as parties to the appeal may appear.¹ It may be further remarked that the record should show the adverse relations of the parties, inasmuch as where there is no hostile relation there can be no actual controversy, and if no actual controversy, no appealable interest can exist in any of the parties.² The test for ascertaining who are necessary parties to the appeal mentioned in the first sentence of this paragraph applies to cases where the record shows that parties nominally on the same side are, in reality, on opposite sides, for where the real nature of the controversy and the relations of the respective parties are disclosed, the appellate tribunal can determine whether the case is one in which the adverse relations are such as create appealable interests. But where the record shows that the parties were on the same side originally, it will be presumed, in the absence of a countervailing showing, that there was no change in position, and hence were no adverse interests, so that where one of several original plaintiffs or defendants desires to prosecute an appeal against the other, so much of the record as shows the nature of the controversy, and the real relation of the parties, must be before the court on appeal.³

§ 161. Effect of change of the Positions of Parties—It is important to determine when those who were originally co-parties became adverse, for the reason that notice to adverse parties is not the same as notice to co-parties, and for the further reason

¹ The parties must be appropriately described on appeal so that a reference to the transcript will disclose their appealable interest and the nature of that interest. *Smyth v. Strader*, 12 How. (U. S.) 327; *Davenport v. Fletcher*, 16 How. (U. S.) 142; *The Protector*, 11 Wall. 82; *Deneale v. Archer*, 8 Pet. 526; *Miller v. McKenzie*, 10 Wall. 482; *Wilson v. Life and Fire Ins. Co.*, 21 Pet. 140. If parties are described so that an inspection of the transcript shows their identity and interest, it is sufficient. *Gumbel v. Pitken*, 113 U. S. 545; *Miltenberger v. Logansport, etc., Co.*, 106 U. S. 286; *Mussina v. Cavazos*, 6 Wall. 355.

² As elsewhere said, where the relations appear to be adversary and the action an ordinary one, the presumption is that there is an actual and not a feigned controversy. *Ante*, § 148.

³ *Milner v. Meek*, 95 U. S. 252.

that co-parties become appellants while adverse parties become appellees. As parties must be appropriately and fully named and described in the assignment of errors,¹ it is essential that their true relations should be ascertained. It is probably true that those who were co-parties below will so remain in the very great majority of cases, but there are cases in which their interests are not simply severed, for they are antagonistic. Where they are antagonistic and the issue is clearly independent and distinct, then they must be adverse parties on appeal as to that issue, since it can not be legally possible that one of two hostile parties can prosecute an appeal for the other where it affects only the matter over which they are fighting.

§ 162. Within what time Parties must be brought in—It is not consistent with principle, nor with the rules essential to the orderly and effective administration of justice, that one who prosecutes an appeal should be permitted to negligently delay the bringing in of necessary parties until after the expiration of the time designated by law as that within which the right to appeal exists. A negligent party who sleeps upon his rights meets with little favor in any court either of equity or law. Where a right is given a party upon the condition that he exercise it within a fixed time he must exercise it within that time or it will be lost. It is, therefore, correctly held that all necessary parties must be brought in within the time fixed by law or the appeal will be dismissed.² The general rule is, doubtless, not without exceptions, but it nevertheless governs where no cause is shown excusing the delay.

§ 163. Effect of the Appeal upon Co-parties who decline to join—The class created by the statutory provisions which declare that parties who decline to join in the appeal after notice is a peculiar one, and one to which it is difficult to assign a place in logical sequence or method; but, as it is anomalous, it must

¹ *Post*, § 332.

² *Holloran v. The Midland Railway Co. (Ind.)*, 28 N. E. Rep. 549. A doctrine very similar to that of the case cited is asserted in *Patterson v. Ham-*

ilton, 26 Hun. 665; *Cotes v. Carroll*, 28 How. Pr. 436; *Curten v. Atkinson*, 29 Neb. 612, 46 N. W. Rep. 91. See, also, *ante*, §§ 111 to 120.

be arbitrarily given a place and hence may as well be considered here as elsewhere. The persons who refuse to join are not parties in the strict sense, yet they may, nevertheless, be affected¹ by the appeal. They may be affected in two ways, by being deprived of a right to themselves subsequently prosecute an appeal; by being deprived of the benefit of the appeal in the event that it is successful.² Their interests are involved but they are not parties, and the principal reason for requiring notice to them is to obviate the effect of the rule of the common law³ (which often operated harshly), denying an appeal where several persons were jointly interested unless all joined, but while this is the principal object it is not the only one. Another, and not much less important object, is to prevent a person who will not appeal from securing any benefit in the event of success. This object is accomplished, as far, probably, as it is possible to accomplish it, by the provision which declares, that, "they shall not receive any benefit from the appeal, unless from the necessity of the case." What necessity will require the award of a benefit to them it is difficult to conceive, but if there be no necessity entitling them to a benefit none can be given them. If they decline to join, the judgment appealed from must, in the great majority of cases, stand against them in undiminished force.

§ 164. **Effect of notice to one who is a Party but not a Co-party—**
A singular and difficult question may arise where an appellant gives notice to a party to the record assuming that he to whom the notice is given is a co-party, and giving him notice in that capacity, when, in reality, he is not.⁴ We incline

¹ If they do not appear and decline to join they are regarded as joining; if they do join they become appellants, and will reap the benefit of the appeal in the event of success, but in the event of an unfavorable judgment they may be compelled to bear the burden. *Ante*, §§ 119, 120, 121, 124.

² R. S. 1881, § 635.

³ *Todd v. Daniel*, 16 Pet. 521; *Masterson v. Herndon*, 10 Wall. 416; *Will-*

iams v. Bank of United States, 11 Wheat. 414; *Owings v. Kincannon*, 7 Pet. 399; *Wilson v. Life & Fire Ins. Co.*, 12 Pet. 140; *O'Dowd v. Russell*, 14 Wall. 402.

⁴ We are, of course, referring to a case where the notice is given to a person as a co-party, and is of such a character as to assume to bring him in on appeal in that capacity and not in the capacity of an adverse party.

to think that where the party so notified appears, and, without stating any reasons for his refusal, declines to join, he will be concluded from taking a subsequent appeal, although he may have an independent right of appeal, but a right in some measure connected with the controversy involved in the appeal. This conclusion is correct, as we believe, because by appearing and declining to join he elects to assume the position of a co-party. This conclusion would not necessarily result if the party should appropriately place his refusal upon the ground that he was not a co-party, nor would it result if the appeal in which the notice was given involved an entirely and radically different matter from that embraced in an appeal subsequently taken by him. If one who is a party, but not a co-party, should not appear there would be little, if any, difficulty presented, since his inaction would be construed as an acquiescence in the assumption that he was a co-party.

§ 165. Death of Party before Appeal—Effect of—It is evident that an appeal can not be taken by a dead person. The decisions go to the extent of declaring that no jurisdiction exists in cases where an appeal is attempted to be taken after the death of the party whose name appears as appellant, and that a judgment upon such an appeal is void.¹ The general rule indicated is directly asserted in other cases, and has for years been asserted in closely analogous decisions.²

§ 166. Death of Party after the Appeal is taken—Where a party dies after an appeal is taken an essentially different rule pre-

¹ *Taylor v. Elliott*, 52 Ind. 588; *Taylor v. Elliott*, 53 Ind. 441; *Branham v. Johnson*, 62 Ind. 259. In the case last cited it was said: "But the appeal to this court having been taken after the death of Branham, as to him, is a nullity. No act can be done to bind the dead, except such as they knew and had an opportunity to meet and answer during their lives." *Spalding v. Wathen*, 7 Bush. 659; *Case v. Ribelin*, 1 J.J. Marsh. 29.

² *Collins v. Mitchell*, 5 Fla. 364; *Car-*

ter v. Carriger, 3 Yerg. 411; *Ewald v. Corbett*, 32 Cal. 493; *Coleman v. McNulty*, 16 Mo. 173; *Yaple v. Titus*, 41 Pa. St. 195; *Carr v. Townsend*, 63 Pa. St. 202; *Parker v. Horne*, 38 Miss. 215; *Young v. Pickens*, 45 Miss. 553; *New Orleans, etc., Co. v. Bosworth*, 8 La. Ann. 80; *Loring v. Folger*, 7 Gray, 505; *McCreery v. Everding*, 44 Cal. 284, 286; *Sanchez v. Roach*, 5 Cal. 248; *Judson v. Love*, 35 Cal. 463; *Schartzer v. Love*, 40 Cal. 93, 96.

vails from that which governs where the appeal is taken after a party's death. The statute expressly and clearly provides that the death of any or all of the parties after an appeal is taken shall not cause it to abate, but the names of the proper persons may be substituted, by agreement or upon notice, and when the substitution is made the appeal proceeds as in ordinary cases;¹ but we suppose, however, that the statute was not intended to so operate as to permit the prosecution of an appeal where death terminates all right of action. If the death of any or all of the parties occurs after the submission of a cause, judgment is required to be rendered as of the term at which the submission was made without "any change of parties."² It seems clear that, under the provisions of the statute, in case of the death of a party after submission the judgment shall be rendered without any change of parties; the fact that death has occurred does not require that new parties should be made, although that has been done in many cases. But whether new parties are or are not made would seem to be immaterial if the case is duly submitted before the death of a party.³

§ 167. Death of one of Several Appellants—Effect of—An appeal does not, as a general rule, abate where one of several appellants dies. In the event of the death of one of several parties the survivors may prosecute the appeal.⁴ It is possible that there may be cases, as, for instance, where the only appellant having an actual appealable interest dies, in which the surviv-

¹ R. S. 1881, § 637. We have elsewhere undertaken to show that the statute does not apply to cases where the right of action which the appeal seeks to enforce dies with the person. *Post*, § 169.

² R. S. 1881, § 663. Upon suggestion of the party's death the judgment will be entered as of the term at which the cause was submitted. *Hahn v. Behrman*, 73 Ind. 120, 126; *Jeffries v. Lamb*, 73 Ind. 202, 207.

³ *Walpole v. Smith*, 4 Blackf. 151. The doctrine of the text is asserted by many cases decided in jurisdictions where the statute is less liberal than

ours. *Green v. Watkins*, 6 Wheat. 260; *Turner v. Booker*, 2 Dana, 334; *Torry v. Robertson*, 24 Miss. 192; *Jenney v. Jenney*, 14 Mass. 231; *Carrollton v. Rhomberg*, 78 Mo. 547; *Blake v. Griswold*, 104 N. Y. 613; *Smith v. Kibbe*, 31 Hun. 390; *Long v. Hitchcock*, 3 Ohio, 274; *Gemmill v. Butler*, 4 Pa. St. 252; *Kimbrough v. Mitchell*, 1 Head. (Tenn.) 539; *Harrison v. Mosely*, 31 Tex. 608; *Galveston, etc., Co. v. Nolan*, 53 Tex. 139; *Holloway v. Galliac*, 49 Cal. 149; *Black v. Shaw*, 20 Cal. 68.

⁴ *Moses v. Wooster*, 115 U. S. 285.

ors would have no right to effectively prosecute the appeal against a due and opportune objection. We are, of course, here referring generally to cases where the party who dies is not the only one in whom the right of appeal exists. It seems necessary to suggest this, since there may be cases where all right dies with one party.

§ 168. **Appeals by and against Representatives and Privies**—Where the cause of action survives, the legal representative of the decedent may, of course, prosecute an appeal. There can be little or no difficulty in determining who may prosecute an appeal where the controversy concerns only the personal estate, but there is some difficulty where the controversy affects real property, or affects both real and personal property. It has been held that where both the personal estate and the real estate are involved, the personal representatives and the heirs should unite in the appeal.¹ The clear implication from the decision in the case referred to is that where the controversy concerns land alone only the heirs need be parties.² It seems clear, on principle, that, where the heirs are directly and not remotely interested, they stand in such privity to the deceased party as entitles them to appeal, although the controversy may not directly involve land.³ Where heirs are directly interested in sustaining or overthrowing a judgment against the ancestor, they have an appealable interest,⁴ and it would seem to follow from this that

¹ *Benoit v. Schneider*, 39 Ind. 591, citing *Slaughter v. Foust*, 4 Blackf. 379; *John v. Hunt*, 1 Blackf. 324. In the case first cited it was said: "We conclude that when, as in this case, there is both a personal judgment and a decree of foreclosure, the personal representative and the heir should unite in the appeal." The case came before the court a second time and the former ruling was tacitly approved. *Benoit v. Schneider*, 47 Ind. 13.

² In *Vail v. Lindsay*, 67 Ind. 528, it is held that an administrator can not prosecute an appeal from a judgment rendered in a case involving the title to

land. An administrator may be admitted as a party in the proper case. *Branham v. Johnson*, 62 Ind. 259.

³ The general principles asserted by the decisions and stated in preceding sections of this chapter support this view. *Adams v. Wood*, 8 Cal. 306, 315; *Bates v. Ryberg*, 40 Cal. 465; *In re Wright*, 49 Cal. 550. A wife having an inchoate interest is so far a privy as to be entitled to appeal. *Kiefer v. Winkens*, 39 How. Pr. R. 176.

⁴ *Gilchrist v. Rea*, 9 Paige, 66; *In re Thompson*, 11 Paige, 453; *Jauncey v. Rutherford*, 9 Paige, 273; *Wilcox v. Smith*, 26 Barb. 316

they are necessary parties on appeal because of privity of relation and estate. We suppose, however, that the interest must be more direct than that which heirs have in matters growing out of ordinary claims against the estate of the deceased ancestor. Where the proceeding is one to subject land to sale for the payment of debts there can, of course, be no doubt that the heirs are necessary parties on appeal.¹

§ 169. **Abatement by Death**—The principle that appellate jurisdiction is one of review requires the conclusion that where the cause of action does not survive, the appeal will abate in cases where the sole possessor of the cause of action who prosecutes the appeal for its enforcement dies pending the appeal. It would be useless for the appellate tribunal to reverse a judgment denying a right of recovery where, if the case should be remanded, the trial court could do nothing more than obey the positive law, and this obedience would inevitably result in a dismissal of the action. We suppose that an appellate tribunal will not proceed when it is made evident that any decision rendered would be barren and fruitless. Whether death will or will not abate an appeal depends, therefore, upon whether the right of action survives.² Broad and comprehensive as the

¹ *Patterson v. Hamilton*, 26 Hun. 665; 161, 7 S. E. Rep. 58; *Reynolds v. Brown v. Evans*, 34 Barb. 594. See, generally, *Gilman v. Gilman*, 35 Barb. 591; *Underhill v. Dennis*, 9 Paige, 202; *Kellinger v. Roe*, 7 Paige, 362.

² Our court adopts, substantially, the equity rule, and that rule is more liberal than that of the common law. Our code does, indeed, enlarge the equity rule. There are, however, actions that do not survive, but die with the person. *Indianapolis, etc., Co. v. Stout*, 53 Ind. 143; *Stout v. Indianapolis, etc., Co.*, 41 Ind. 149; *Boor v. Lowrey*, 103 Ind. 468; *Hess v. Lowrey*, 122 Ind. 225; 23 N. E. Rep. 156; *Clarke v. Matthewson*, 12 Pet. 164; *Evans v. Cleveland*, 72 N. Y. 486, 488; *O'Reilly v. New York, etc., Co.* (R. I.), 17 Atl. Rep. 906; *All v. Barnwell*, 29 So. Car. 161, 7 S. E. Rep. 58; *Hennessy (R. I.)*, 20 Atl. Rep. 307; *Baker v. Braslin (R. I.)*, 18 Atl. Rep. 1039. Judge Buskirk says: "Where a party to a personal action, which survives, dies after judgment and before the taking of an appeal, the appeal may be taken by the personal representative of the decedent if he was the aggrieved party, or it may be taken by the aggrieved party by service of personal notice upon the representative of the party in whose favor the judgment was rendered." Buskirk's Pr. 58. The learned author also says that, "After a careful consideration, we have reached the conclusion that the legislature intended to provide that the death of any or all of the parties to a judgment, after an appeal had been taken and before

language of the statute is, we, nevertheless, are of the opinion that it was not intended to give a right of appeal where the right of action, which it is the object of the appeal to make effective, terminates, by positive law, with the death of the person who asks that his claim be established by the judgment on appeal. In view of the long and well settled principles of law and of the statutory provisions upon the subject, our conclusion is, that a right to prosecute an appeal ceases with the death of the person with whom the right of action dies. We do not believe that the isolated provision was intended to repeal other statutory provisions or abrogate a firmly established rule of law.¹

submission of the cause to the Supreme Court, should not cause the appeal to abate, but that upon the proper names being substituted, upon consent or upon notice, the cause might proceed." *Ibid.* The language employed by the learned author is broad enough to convey the meaning that the appeal would not abate in the case suggested in our text, but in view of the statement first quoted,

we think that was not his meaning. We suppose that in the statement last quoted he intended to be understood, as he well may be, as speaking of a different subject than the right to prosecute an appeal where the right of action dies with the person.

¹ *Downer v. Howard*, 44 Wis. 82; *Barney v. Barney*, 14 Iowa, 189.

CHAPTER VIII.

PROCESS.

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| <p>§ 170. Notice—Object of—Sufficiency.</p> <p>171. Test of sufficiency.</p> <p>172. Written notice required.</p> <p>173. Notice as essential to jurisdiction.</p> <p>174. Time where there is no fixed rule must be reasonable.</p> <p>175. Notice not given in time—When ineffective—Waiver.</p> <p>176. Upon whom process may be served.</p> <p>177. Service on the attorney of record.</p> | <p>§ 178. Service on one of several attorneys.</p> <p>179. Proof of service.</p> <p>180. Filing of notice and proof of service.</p> <p>181. Service of notice on co-parties.</p> <p>182. Objections to process.</p> <p>183. Constructive notice.</p> <p>184. Proof of publication.</p> <p>185. Amendment of the proof of notice.</p> |
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§ 170. **Notice—Object of—Sufficiency**—The object of original legal process,¹ whether it be in the form of a notice or in the form of a writ or summons, is to convey information of the general nature of the proceeding and of the time and place of the hearing or trial. In modern procedure the original process does not serve the same purpose that a formal writ did under the old common law system, and there is no necessity for its being so full and complete under the modern system as it was required to be by the rules of the old system. There is, indeed, less reason for requiring strict accuracy in appellate proceedings than for requiring it in proceedings in courts of original jurisdiction. But, as rules are required for the orderly and systematic conduct of the business of judicial tribunals, it is essential that notices and writs should be framed with regard to the provisions of the statute or the general principles of pro-

¹ We here employ the term "legal process" in the sense of the means of bringing a party into court or before the court, and this meaning is warranted by the judicial definitions that have been given the term. *People v. Nash*,

1 Idaho, 206, 210; *City of Philadelphia v. Campbell*, 11 Phila. 162, 164; *Fluester v. McClelland*, 3 C. B. (N. S.) 357, 359; *Gilmer v. Bird*, 15 Fla. 410, 421. The term as used includes notices and formal writs.

cedure. It will not do to frame notices or writs in entire disregard of legal rules, although the law is quite liberal respecting the form and service of notices and writs.

§ 171. **Test of sufficiency**—The modern rule by which a writ or notice is tested is liberal.¹ If it is sufficient to inform the party of the general nature of the case to which he is required to appear, and of the time and place of the hearing, it will ordinarily be deemed sufficient.² But, while the rule is liberal, it does not go to the extent of upholding a notice wholly unauthorized by law.³ If the statute explicitly requires that a notice shall be in a designated form, it must conform to the requirements of the statute,⁴ but, as a general rule, it is sufficient if the writ or notice is substantially such as the law requires.⁵ It is not, however, to be assumed that because the rule as to the form and contents of a notice or writ is liberal that a notice or summons is unimportant, for the reverse is true. A notice or summons is important inasmuch as it is essential to give jurisdiction of the person. If the notice or writ is so utterly defect-

¹ *Wilson v. Allen*, 3 How. Pr. R. 369; *People v. Tarbell*, 17 How. Pr. R. 120; *Matter of Gales*, 26 How. Pr. R. 179.

² *Pamor v. Rombauer*, 41 Kan. 295, 21 Pac. Rep. 784; *Shirley v. Birch*, 16 Ore. 1, 18 Pac. Rep. 344; *Freeman v. Paul*, 105 Ind. 451; *Quarl v. Abbett*, 102 Ind. 233; *Cicero Tp. v. Shirk*, 122 Ind. 572.

³ *Day v. Callow*, 39 Cal. 593; *Gutbrecht v. Prospect Park, etc., Co.*, 28 Hun. 497; *Burroughs v. Norton*, 48 How. Pr. R. 132; *McAlle v. The Latona*, 3 Wash. Ty. 332, 19 Pac. Rep. 131.

⁴ *Reese v. Smyth*, 95 N. Y. 645; *Cameron v. Equitable, etc., Co.*, 13 Jones & Sp. 628; *Guarantee, etc., Co. v. Buddinton*, 23 Fla. 514; *Weiser v. Day*, 77 Iowa, 25, 41 N. W. Rep. 476; *Allen v. Strickland*, 100 N. C. 225, 6 S. E. Rep. 780.

⁵ *Bollinger v. Manning* (Cal.), 21

Pac. Rep. 375; *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. Rep. 186. The rule as to writs and notices in the court of original jurisdiction is very liberal, and as there is no reason why it should be more strict on appeal, the decisions upon the subject of process in the trial court are relevant to appellate procedure. The rule is that formal defects will be disregarded. *Stout v. Woods*, 79 Ind. 108; *Robinson v. Brown*, 74 Ind. 365; *Nave v. First Nat. Bank*, 87 Ind. 204; *Johnson v. Lynch*, 87 Ind. 326; *Krug v. Davis*, 85 Ind. 309; *State v. Davis*, 73 Ind. 359; *Williams v. Hitzie*, 83 Ind. 303; *Freeman v. Paul*, 105 Ind. 451. If the notice brings a party into court and affords him an opportunity to defend, it is, as a general rule, sufficient. *Nysewander v. Lowman*, 124 Ind. 584; *Hawkins v. McDougall*, 126 Ind. 539, 541.

ive as to be destitute of force, it will not give jurisdiction.¹ But it is to be borne in mind that there is a marked and material difference between direct and collateral attacks, for where there is some notice, although defective, and it has been expressly or impliedly adjudged sufficient, it will repel a collateral attack.² Where there is some notice, the objection to its sufficiency must be specially made, unless it is so defective as to be absolutely ineffective.

§ 172. **Written Notice required**—Written notice is required; verbal notice can not serve the purpose of bringing a party into court.³ Actual notice is not sufficient, unless it is substantially such as the law requires.⁴ An essential requisite of the notice is that it should state the time and place of the hearing,⁵ but in appellate procedure, the designation of the case appealed and the court to which it is appealed is generally sufficient. Where, however, a motion is special, it is otherwise; in such a case, time and place must be designated with reasonable certainty. Notice, when required to bring a party into court, becomes part of the record in all cases where it is essential and questions arise respecting its sufficiency.⁶

¹ *Brooks v. Allen*, 62 Ind. 401. See *Faulkner v. Guild*, 10 Wis. 563; *Peabody v. Phelps*, 9 Cal. 213.

² *Muncey v. Yoest*, 74 Ind. 409; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduit*, 76 Ind. 598; *Oppenheim v. Pittsburgh, etc., Co.*, 85 Ind. 471; *Kleyla v. Haskett*, 112 Ind. 515; *Montgomery v. Wasem*, 116 Ind. 343; *Lake Shore, etc., Co. v. Cincinnati, etc., Co.*, 116 Ind. 578; *Hackett v. State*, 113 Ind. 532; *Bass v. City of Ft. Wayne*, 121 Ind. 389; *Essig v. Lower*, 120 Ind. 239; *Field v. Malone*, 102 Ind. 251; *Otis v. De Boer*, 116 Ind. 531; *Adams v. Harrington*, 114 Ind. 66; *Jackson v. State*, 104 Ind. 516. See, also, *Bonsall v. Isett*, 14 Iowa, 309; *Dutton v. Hobson*, 7 Kan. 196; *Shea v. Quintin*, 30 Iowa, 58; *Christian v. O'Neal*, 46 Miss. 669; *Cole v. Butler*, 43 Me. 401; *Hendrick v. Whittemore*, 105 Mass. 23;

Morrow v. Weed, 4 Iowa, 77; *Ballinger v. Tarbell*, 16 Iowa, 491; *People v. Hagar*, 52 Cal. 171; *Sheldon v. Wright*, 5 N. Y. 497; *Delaney v. Gault*, 30 Pa. St. 63; *Borden v. State*, 6 Eng. (Ark.) 519; *Paine v. Mooreland*, 15 Ohio, 435.

³ *Tidd's Pr.* 109. Our statute requires that the notice shall be in writing. *R. S.* 1881, § 482.

⁴ *Peabody v. Phelps*, 9 Cal. 213; *Karr v. Karr*, 19 N. J. Eq. 427; *Jordan v. Bowman*, 28 Mo. App. 608.

⁵ *Kitsmiller v. Kitchen*, 24 Iowa, 163.

⁶ The fact that notice may become part of the record is evidence that it should be in writing, for oral statements, unless made in open court and appropriately entered of record, or embodied in a bill of exceptions, are not part of the record. Notice may not, in strictness, always be an essential part of the record, but however this may be,

§ 173. **Notice as essential to Jurisdiction**—Notice is, it is true, essential to jurisdiction of the person,¹ but the legislature may prescribe the form of notice and the manner of its service.² It is competent for the legislature to provide for notice by publication, and when notice is given by publication as the statute requires it is effective.³ Where, however, a party is in court he is bound to be informed of what occurs there in due course without special notice. It is upon this principle that a statute providing for an appeal within a limited time, or in term, may be upheld, but it is obvious that to make such a statutory right available all the essential acts required by the statute must be performed in substantial conformity to its commands.

§ 174. **Time where there is no fixed rule must be Reasonable**—Where a notice of appeal is required and no time is fixed by the statute or by the rules of the court, reference is to be had to the general rules which govern analogous cases. The object of systematic procedure is to bring the rules of practice into harmony and prevent diversity. The rules of the court fix the time for giving notice to appellees in cases appealed under the act of 1885, and they require ten days' personal service in cases where personal service is proper and publication for a period of thirty days before submission.⁴ Notice of appeal under the statute of 1881 was given by ten days' personal service, and in case of non-residents by publication for three weeks thirty days

it must be in such form that it can always be made part of the record when necessary. It is to be regretted that in some cases the rule requiring written notice has been relaxed, but as to notice constituting legal process, the rule has not been broken upon.

¹ *Windsor v. McVeigh*, 93 U. S. 274; *Stuart v. Palmer*, 74 N. Y. 183, 190; *Kuntz v. Sumption*, 117 Ind. 1. In *Wiley v. Neal*, 24 Neb. 141, 37 N.W. Rep. 926, it was held that where there was no notice and no appearance the Supreme Court had no jurisdiction of the appeal.

² *Thotrvenin v. Rodriguez*, 24 Tex. 468; *Hurlbut v. Thomas*, 55 Conn. 181, 10

Atl. Rep. 556. Some of the courts hold that a judgment may be valid without any notice. *Flint River, etc., Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. This can not be sound doctrine, for without notice there can not be "due process of law." *Cooley's Const. Lim.* 356; *Hagar v. Reclamation District*, 111 U.S. 701, 707; *Ex parte Wall*, 107 U.S. 265; *Campbell v. Dwiggin*, 83 Ind. 473; *Garvin v. Daussman*, 114 Ind. 429; *Seifert v. Brooks*, 34 Wis. 443; *Whiteford Tp. v. Probate Judge*, 53 Mich. 130.

³ *Essig v. Lower*, 120 Ind. 239; *Quarl v. Abbett*, 102 Ind. 233.

⁴ Rule XVII.

before the first day of the term,¹ but the act of 1885 has, under the rules of the court, practically supplanted the provisions of the former statute.²

§ 175. **Notice not given in Time—When ineffective—Waiver—**Time is an essential element in the service of process. A notice not given in season is bad when directly and properly assailed. But where there is an appearance and no objection, defects are waived. It is not essential to constitute a waiver that there should be a formal or regular appearance, for waiver of notice may be implied from an indirect or informal appearance, as, for instance, by filing a brief upon the merits.³

§ 176. **Upon whom Process may be served—**Personal service may be made upon the party or upon his attorney of record. Where the notice is given below notice must also be served upon the clerk of the trial court, but where the notice issues from the appellate tribunal it is sufficient to serve it upon the adverse party or his attorney.⁴ If notice below is given the transcript must be filed in the office of the clerk of the Supreme Court within sixty days from the time of taking such appeal; if not so filed, the appeal will fail.⁵ But the failure of an appeal taken upon notice given below will not preclude the appellant from perfecting an appeal by issuing and serving notice as in cases where no notice is given below.⁶ It is, however, to be

¹ R. S., §§ 651, 652. As to length of time required, see *Hill v. Pressley*, 96 Ind. 447; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381.

² *Elliott's Supp.*, § 28. The act of 1885 is so vague and indefinite as to be incapable of practical enforcement without the aid of the rules adopted by the court. These rules have given it a practical effect, and under them the cases are submitted. These rules are valid upon the general principle that courts have power to make rules for the conduct of business, and the practice has been so uniform and so long continued that the rules may well be considered as the law.

³ *Schmidt v. Wright*, 88 Ind. 56; *Robertson v. O'Riley*, 14 Col. 441, 24 Pac. Rep. 560. See, generally, *State v. Hat-tabough*, 66 Ind. 223; *Clark v. Continental, etc., Co.*, 57 Ind. 135; *Summers v. State*, 51 Ind. 201; *Bates v. Scott*, 26 Mo. App. 428; *Benson v. Carrier*, 28 So. Car. 119, 5 S. E. Rep. 272; *Wilson v. Zeigler*, 44 Tex. 657.

⁴ R. S., § 640. We are, of course, speaking of appeals after term, for term appeals, as we have seen, do not require notice.

⁵ Rule II.

⁶ Rule II.

kept in mind that the appeal must, in any event, be perfected within the year, since that is the utmost limit within which an appeal can ordinarily be taken. An appeal attempted to be taken under the law regulating appeals in term may become a valid appeal upon notice although it may be ineffective as a term appeal, but in order that it may become effective as an appeal after term, notice must be issued and served within the year allowed for perfecting appeals.¹ It is essential in cases where notice is issued from the appellate tribunal that the transcript should be filed before the notice issues, and that errors should be assigned. Process issues against the parties named in the assignment of errors² and it is necessary that they should be properly named and designated.³

§ 177. **Service on the Attorney of Record**—Notice may be served upon the attorney of record in the trial court,⁴ although his employment as attorney may not continue beyond the trial and judgment.⁵ It is possible there may be cases where service upon the attorney will be ineffective,⁶ as, for instance, where the appellee has notice of the discharge of the attorney; but, however this may be, it is clear that, presumptively at least, the employment continues for the purpose of receiving notice of

¹ Rule I; *Holloran v. Midland Railway Co.*, 28 N. E. Rep. 549.

² Rule VI.

³ *Braden v. Leibenguth*, 126 Ind. 336; *Sparklin v. Wardens, etc.*, 119 Ind. 535; *Hawkins v. McDougall*, 126 Ind. 544; *Brookover v. Forst*, 31 Ind. 255. The decision in *Price v. Baker*, 41 Ind. 570, is modified by later decisions and is indeed in conflict with the earlier cases. See "The Assignment of Errors," Chapter XVI.

⁴ *Hurlbut v. Hurlbut*, 12 Ind. 346; *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. Rep. 816; *Beardsley v. Frame*, 73 Cal. 634, 15 Pac. Rep. 310; *Shirley v. Birch*, 16 Oregon, 1, 18 Pac. Rep. 344.

⁵ Taking the provisions of sections 640 and 651 of the code together, it is clear that where there is an attorney of

record, personal service must be made upon him, or upon his client, for service by publication is only allowable where there is no attorney of record and the adverse party is a non-resident. *Johnson v. Miller*, 43 Ind. 29.

⁶ In *Richardson v. Pate*, 93 Ind. 423, 430, it was said: "Service on the attorney who appeared of record is as good as upon the party himself, in the absence of evidence that the party proposing to appeal had notice of the attorney's discharge. The fact that the attorney accepted notice as but for one of the parties can make no difference; the service of notice on him is the material point, and, when made, is good as against all of the appellees for whom he appeared of record in the trial court."

the appeal. We are, indeed, inclined to doubt whether the appellee can in any case defeat the appellant by discharging the attorney, for the law provides that notice to the attorney of record shall be sufficient, and it is difficult to conceive any tenable ground upon which it can be held that the appellant can, in any event, be required to look beyond the record or to do more than the law requires. To permit the appellee, especially where he is a non-resident, to defeat an appeal by showing a discharge of the attorney and notice to the appellant, would often lead to injustice and would in many instances raise unnecessary and perplexing questions of fact. Notwithstanding the intimation in the opinion from which we have quoted we are inclined to believe that service upon the attorney of record is all that is required, and that no question as to notice of his discharge can be presented. We believe, however, that where the appellee has in good faith discharged his attorney the court, upon a timely and proper showing, would grant relief by setting aside a submission and extending the time for filing a brief, or the like, but we do not believe that there could be any order rightfully made which would so operate as to defeat the appeal.

§ 178. **Service on one of several Attorneys**—Where a party is represented by two or more attorneys, service upon one of them is sufficient.¹ If, however, there are parties with diverse interests having different attorneys, although nominally on the same side of the case, service of notice upon an attorney representing one of the parties would not be effective as against the others. This is so for the reason that service upon the attorney is effective only where he is of record the representative of the litigant.² If one attorney represents parties united in interest, then service upon him will be sufficient, no matter how numerous the parties may be, for in such a case the material purpose of the statute is given effect. Where there are several parties

¹ Comstock v. Cole, 28 Neb. 470, 44 E. Rep. 920. See, also, Goodwin v. N. W. Rep. 487; Cockrill v. Hall, 76 Hilliard, 76 Iowa, 555, 41 N. W. Rep. Cal. 192, 18 Pac. Rep. 318. 312.

² Anderson v. Fau, 79 Ga. 558, 4 S.

with diverse interests and different attorneys, the notices of appeal should be appropriately framed and severally served.¹

§ 179. **Proof of Service**—Service of notice of an appeal may be proved in various modes. Acceptance of service by the party himself, or by his attorney of record, is valid proof of due service of the notice. Service may be proved by the return of an officer duly authorized to serve legal process, or it may be proved by affidavit, when not made by an officer.² The acceptance of service, as well as the proof of service, should, in strictness, state the time and place of service, for so the statute requires.³ But the place of service is, in general, not required to be specifically set forth, although it is otherwise as to time. We suppose that, under the general rule, defects and irregularities which do not mislead or prejudice the party will be disregarded. The failure to state the place of service would not vitiate the notice or process. The provision of the code requiring the time and place to be stated, is to be taken in connection with other statutory provisions, and with settled principles, and when thus taken it is clear that it can not be allowed to defeat the service where the party served has not been misled or prejudiced. It has long been the practice to accept as sufficient proof of service a verified statement or an official return which does not designate the place, and this practice has given a practical exposition to the statute which can not be rightfully disregarded. Possibly, cases may arise where it is important that the place of service should be stated, as, for instance, in cases where the party is a non-resident, and so appears of record, but such cases are very rare. Presumptively an acknowledgment of service implies that it was made where the papers show the venue to be laid, and in cases where the service is by an officer the presumption is that service was made within his bailiwick.

§ 180. **Filing of Notice and Proof of Service**—Notices must be properly filed and so must the proof of service. They are mat-

¹ *Senter v. De Bernal*, 38 Cal. 637; ² Rule XVII; R. S., § 481, Subdiv. Thompson *v. Ellsworth*, 1 Barb. Ch. 1, 2.
624, 627; *Cotes v. Carroll*, 28 How. Pr. ³ R. S., § 481, Subdiv. 4.
436.

ters of record, and, while it is not necessary that they should always be copied into the order book or entry docket, they must be duly placed among the files in the cause. It seems from the decisions elsewhere, and from the rules which prevail in analogous cases, that where notice is issued and served below, the notice and proof of service should, in strictness, appear in the transcript.¹ It is probable, however, that the liberal rule which prevails in this state would sustain an appeal if the appellant should file with the transcript the notice of appeal and proof of service, but the safe method, and the proper one, is to cause the notice and proof of service to be embodied in the transcript certified to the appellate tribunal, in all cases where the appeal is taken by notice given below. It is in general true, that jurisdiction in cases of appeal must affirmatively appear from the record. This is illustrated by the numerous cases which hold that where the order for appeal must be made in the trial court the record must contain the order. It is also illustrated by our cases which assert that in appeals from interlocutory orders the record must affirmatively show that the steps required by statute in such cases were duly and timely taken.

§ 181. **Service of Notice on Co-parties**—The mode of making proof of service upon co-parties is not specifically prescribed, but under the rule that like principles will be extended to like cases,—for “like reason doth make like law,”—there can be little doubt that service may be made and proved as in cases where the parties are adverse. The practice has been to give notice substantially as in cases of adverse parties, and this long continued practice may well be deemed to establish the law. As to the time and all like matters the rule as to notifying adverse parties may be safely accepted as the guide. There seems to be no provision for notifying co-parties below, but we can see no reason why, upon general principles, all may not there be served with process. Any other conclusion would produce discord and confusion, since it would result in an appeal as to some of the parties being taken in one mode, and as to other parties in another and different mode.

¹ *Whipley v. Mills*, 9 Cal. 641; *Franklin v. Reiner*, 8 Cal. 340; *Hildreth v. Gwindon*, 10 Cal. 490.

§ 182. **Objections to Process**—Objections to process must be seasonably and specifically made or they will be deemed waived. A general appearance, a joinder in error, an agreement to submit, or the filing of a general brief will waive objections. In short, any act constituting an appearance will preclude a party from subsequently challenging the sufficiency of the notice.¹

§ 183. **Constructive Notice**—The usual mode of serving process is that denominated personal service, and where no provision is made by law for a different mode personal service is required. Where notice by publication is the only notice that can be given the provisions of the statute upon the subject must be substantially followed.² Our statute requires an affidavit that the party is not a resident of the state and that a notice can not be served upon the attorney of record below.³ The proper practice is to file the affidavit in the appellate tribunal and there obtain an order for the publication. If the affidavit or notice is not so defective as to be an absolute nullity, the order of the court will be effective although the affidavit or notice may not comply with the statute, but this rule will not prevail where objections are specifically and seasonably interposed.⁴ Even as

¹ *State v. Hattabough*, 66 Ind. 223; *State v. Walters*, 64 Ind. 226; *Peoples' Savings Bank v. Finney*, 63 Ind. 460; *Critchell v. Brown*, 72 Ind. 539; *Archey v. Knight*, 61 Ind. 311; *Beck v. State*, 72 Ind. 250; *Truman v. Scott*, 72 Ind. 258; *Ridenour v. Beekman*, 68 Ind. 236; *Field v. Burton*, 71 Ind. 380; *First National Bank v. Essex*, 84 Ind. 144; *Hendricks v. Frank*, 86 Ind. 278; *Boling v. Howell*, 93 Ind. 329; *Martin v. Orr*, 96 Ind. 491; *Dobbins v. Baker*, 80 Ind. 52; *Easter v. Acklemire*, 81 Ind. 163; *Walker v. Hill*, 111 Ind. 223; *Bender v. Wampler*, 84 Ind. 172; *Etter v. Anderson*, 84 Ind. 333; *Burk v. Simonson*, 104 Ind. 173; *Richardson v. Green*, 130 U. S. 104. See, *ante*, § 175, n. 3.

² *Galpin v. Page*, 18 Wall. 350, 369.

³ R. S., § 651.

⁴ *Goodell v. Starr*, 127 Ind. 198, 26 N.

E. Rep. 793; *Essig v. Lower*, 120 Ind. 239, 21 N. E. Rep. 1090; *Kleyla v. Haskett*, 112 Ind. 515, 14 N. E. Rep. 387; *Pickering v. State*, 106 Ind. 228, 6 N. E. Rep. 611; *Field v. Malone*, 102 Ind. 251; *Quarl v. Abbett*, 102 Ind. 233; *Dowell v. Lahr*, 97 Ind. 146; *Carrico v. Tarwater*, 103 Ind. 86. The general doctrine was correctly laid down in *Trew v. Gaskill*, 10 Ind. 265, and *Dronillard v. Whistler*, 29 Ind. 552, as well as in the later cases, but it was departed from in *Fontaine v. Houston*, 58 Ind. 316; *Brenner v. Quick*, 88 Ind. 546, and *Vizzard v. Taylor*, 97 Ind. 90. It is evident that these last named cases can not be sustained without overruling a long line of cases extending as far back, at least, as the case of *Evansville, etc., Co. v. City of Evansville*, 15 Ind. 395.

against a direct and seasonable attack immaterial or formal defects will not avail, for mere formal or unimportant defects in notice by publication will not vitiate.¹ An order for publication is essential,² but we suppose that if the court should act upon the notice on the presentation of the proof of publication the order then made would be valid as against a collateral attack. Where there is a seasonable and direct attack upon the affidavit and notice it will prevail if there is an omission of some material matter required by the statute.³ If the notice should be insufficient a second notice may be given, provided the time designated for perfecting the appeal has not expired, and even if the time has expired the court may relieve the appellant if fraud or accident is clearly shown and it is made to appear that no fault of his contributed to render the notice ineffective. The principle which we have elsewhere stated and discussed justifies this conclusion, inasmuch as all courts of general superior jurisdiction have power to relieve an innocent and meritorious party from injury because of fraud or accident.⁴ But, as we have said, a party who invokes the exercise of this power must make a strong and clear case, otherwise the ordinary rules of procedure must prevail. As such an application asks extraordinary relief and proceeds upon the theory that the case is one appealing to the equity power of the court facts must be alleged which

¹ *Harris v. Clafflin*, 36 Kan. 543, 13 Pac. Rep. 830; *United States, etc., Co. v. Martin*, 43 Kan. 526, 23 Pac. Rep. 586; *Lane v. Innes*, 43 Minn. 437, 45 N. W. Rep. 4. Some of the cases, however, require great strictness in cases of the publication of notice. *Freeman v. Hawkins*, 77 Tex. 498, 14 S. W. Rep. 364; *Colton v. Rupert*, 60 Mich. 318, 27 N. W. Rep. 520.

² *Frisk v. Reigelman*, 75 Wis. 499, 43 N. W. Rep. 1117.

³ Some of the courts declare that a slight departure from the statute will vitiate the notice. *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. Rep. 585; *Aderson v. Marshall*, 7 Mont. 288, 16 Pac.

Rep. 576. But other courts take a more liberal view of the subject and lay down a rule substantially the same as that adopted by our own court. *Ligare v. California, etc., Co.*, 76 Cal. 610, 18 Pac. Rep. 777; *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. Rep. 857; *Allen v. Ray*, 96 Mo. 542, 10 S. W. Rep. 153; *Elting v. Gould*, 96 Mo. 535, 9 S. W. Rep. 922.

⁴ As elsewhere said, the term "accident," as used in decisions upon questions of procedure, means much more than it does when used in ordinary matters, for the signification assigned it is substantially that which the courts of chancery gave it.

make a case requiring the exercise of the power under which courts of equity grant relief from fraud and accident.

§ 184. **Proof of Publication**—Proof of the publication must be made substantially as the statute provides. The printed notice must appear as published or the proof will be insufficient, for without a copy of the published notice there can not be a substantial compliance with the statute. The affidavit of publication may be made by the printer, his foreman, his clerk, or “by any competent witness.”¹ It is evident that the term “competent witness” is employed in a somewhat restricted sense, for, taking it in connection with the specifically enumerated classes, it must be deemed to mean one who has a competent knowledge of the fact of publication.² The affidavit should show that the person who makes it has such a connection with the newspaper in which it was published as to enable him to acquire a knowledge of the time and mode of publication.³ The proof should state that the publication was made each week for the requisite number of weeks.⁴ The last publication must be complete the designated number of days prior to the hearing, but it is not necessary that there should be four insertions of the notice.⁵

§ 185. **Amendment of the Proof of Notice**—In the proper case and upon due application the proof of publication may be amended,⁶ but there can be no amendment unless the facts which justify it are affirmatively shown. An amendment can not ordinarily be made as of course, but leave must be obtained. In accordance with the general rule that a party who asks leave

¹ R. S., § 481, subdivision 3.

² In an analogous case it was held that an affidavit made by the book-keeper of the publisher was sufficient. *Andrews v. The Ohio, etc., R. Co.*, 14 Ind. 169.

³ *Cross v. Wilson*, 52 Ark. 312, 12 S. W. Rep. 576.

⁴ *Fisk v. Reigleman*, 75 Wis. 499, 43 N. W. Rep. 1117. See, *Davis v. Robinson*, 70 Texas, 394, 7 S. W. Rep. 749.

⁵ *Security, etc., Co. v. Arbuckle*, 123 Ind. 518, 24 N. E. Rep. 329; *Horn v.*

Indianapolis National Bank, 125 Ind. 381; *Smith v. Rowles*, 85 Ind. 264; *Rhoades v. Delaney*, 50 Ind. 468; *Meredith v. Chancey*, 59 Ind. 466; *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. Rep. 873. As to the character of the newspaper in which notice may be published, see, *Ralston v. Lander*, 126 Ill. 219, 18 N. E. Rep. 555; *Fisk v. Reigleman*, 75 Wis. 499, 43 N. W. Rep. 1117; *Shaw v. Williams*, 87 Ind. 158.

⁶ *Hackett v. Lathrop*, 36 Kan. 661, 14 Pac. Rep. 220.

to make an amendment must show cause, a party asking to amend the proof of publication should show sufficient cause for his application. In order to do this it is generally necessary to show a reasonable excuse for the mistake in the original proof of notice. Courts ordinarily require one who asks leave to correct a mistake in process to show that the mistake was not attributable to his own culpable negligence.

CHAPTER IX.

THE RECORD AND TRANSCRIPT.

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| § 186. Appeals are tried by the record. | § 196. What the transcript should contain—Generally. |
| 187. Record can not be made by agreement. | 197. Independent cases can not be included in one transcript. |
| 188. Remedying defects in the transcript by agreement. | 198. Matters embraced in an appeal. |
| 189. The difference between the record and the transcript. | 199. Practice where transcript contains improper matter. |
| 190. The record of the trial court. | 200. Directions to the clerk — <i>Precept</i> . |
| 191. Direct and collateral motions. | 201. Authentication of the transcript. |
| 192. Adding to the intrinsic record by special order. | 202. Constituent parts of the record as prescribed by the statute. |
| 193. Special cases — Default, questions upon instructions. | 203. Authority of the appellate tribunal over the transcript. |
| 194. The record on appeal. | 204. Marginal notes. |
| 195. Transcript—Requisites of. | |

§ 186. Appeals are tried by the Record—The transcript is the source from which appellate tribunals obtain their knowledge of the facts involved in the controversy between the parties before them, as well as the source from which they derive their knowledge of the questions upon which it is their duty to pronounce judgment. The reports contain many cases where parties acted as if they were ignorant of this principle,¹ and this excuses the statement of a principle so plain as to scarcely excuse its expression in words. The courts have again and again adjudged that appeals are heard upon the record and by the

¹ Columbus, etc., R. R. Co. v. Gibbs, Spangler v. San Francisco, 84 Cal. 12; 24 So. Car. 60; Clark v. Wright, 24 So. State v. Adamson (Minn.), 45 N. W. Car. 526; Hyatt v. Wolfe, 22 Mo. App. Rep. 152; Gibbons v. Van Alstyne, 191; Burton v. Ferguson, 69 Ind. 486, 56 Hun. 639, 9 N. Y. Supp. 156; 490; Stegman v. Berryhill, 72 Mo. 307; McArthur v. Schultz, 78 Iowa, 364, 43 Rigler v. Rigler, 120 Ind. 431, 433; N. W. Rep. 223.

record determined.¹ The principle is often thus expressed, "errors must be manifest on the face of the record."² It is the duty of the party who asks an appellate tribunal to reverse the judgment of a trial court to bring to the higher court "a perfect record."³ The record as embodied in a properly prepared and duly authenticated transcript imports absolute verity,⁴ and can not be aided, varied, or contradicted by extrinsic evidence.⁵ The record can not be contradicted by a plea in the appellate tribunal.⁶ For what is done in the trial court the Supreme Court "will look only to the transcript of its record." If the transcript does not contain all that is essential to show error the appeal will fail, since errors will not be presumed to exist, and a radically imperfect transcript can not show error.⁷

§ 187. **Record can not be Made by Agreement**—Records upon which appellate tribunals try appeals must be founded upon proceedings actually had in a trial court, and parties can not make a record by agreement where no such proceedings have been had.⁸ The principle which prohibits the considera-

¹ *McCardle v. McGinley*, 86 Ind. 538; *Wishmier v. State*, 110 Ind. 523; *Heizer v. Kelley*, 73 Ind. 582; *Vanderkarr v. State*, 51 Ind. 91; *Board v. Slatter*, 52 Ind. 171; *Mull v. McKnight*, 67 Ind. 525; *Combs v. State*, 75 Ind. 215; *Mitchell v. Stinson*, 80 Ind. 324; *Seager v. Aughe*, 97 Ind. 285; *Keesling v. Ryan*, 84 Ind. 89; *Baker v. Loring*, 65 Mo. 527; *Handlan v. McManus*, 100 Mo. 124, S. C. 18 Am. St. Rep. 533; *State v. Potts*, 20 Nev. 389, 22 Pac. Rep. 754; *Arcia v. State*, 28 Tex. App. 198.

² *Hudson v. Densmore*, 68 Ind. 391; *McCormack v. Earhart*, 72 Ind. 24; *Martin v. Martin*, 74 Ind. 207; *Crawford v. Anderson* (Ind.), Sept. 17, 1891, 28 N. E. Rep. 314.

³ *Collins v. United States Express Co.*, 27 Ind. 11; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Campbell v. Allen*, 61 Mo. 581; *Morningstar v. Musser* (Ind.), Nov. 3, 1891.

⁴ *Wells v. Lea*, 20 Mo. App. 352; *Walls v. Anderson, etc.*, R. R. Co., 60 Ind. 56; *Meredith v. Lackey*, 14 Ind. 529; *Beavers v. State*, 58 Ind. 530; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309.

⁵ *Wishmier v. State*, 110 Ind. 523, 526; *Justice v. Justice*, 115 Ind. 201; *Louisville, etc., Co. v. Boland*, 70 Ind. 595; *Du Souchett v. Dutcher*, 113 Ind. 249; *Evans v. Schafer*, 88 Ind. 92.

⁶ *Lewis v. Prenatt*, 24 Ind. 98. The record can not be contradicted by certificate of officers. *Travvick v. Martin Brown Co.*, 74 Tex. 522, 12 S. W. Rep. 216. See *Mitchell v. Stinson*, 80 Ind. 324.

⁷ *Miles v. Jennings*, 6 Mo. App. 589; *Bain v. Goss*, 123 Ind. 511.

⁸ *Board v. Newman*, 35 Ind. 10; *Whitman v. Weller*, 39 Ind. 515; *Lane v. Dorman*, 3 Scam. (Ill.) 238. S. C. 36 Am. Dec. 543; *Spangler v. San Francisco*, 84 Cal. 12, S. C. 18 Am. St. Rep. 158; *State v. Burns*, 14 Mo. App. 581;

tion of fictitious cases is violated where a record has no other foundation than the agreements or stipulations of litigants. As it is in the inception of the case, so it is on appeal; there must be more than a feigned controversy.¹ The transcript upon which the appellate tribunals act must be that of a record made by a trial court.

§ 188. **Remedying Defects in Transcript by Agreement**—While the general rule is that the record, and not the agreement of the parties, must present the case to the appellate tribunal for review, nevertheless defects or omissions in a transcript may be remedied or supplied by agreement.² This, however, does not break in upon the general rule, for the theory is that stipulations amending the transcript on appeal, or supplying omissions therein, are founded upon the record actually made in the trial court. It is not implied in permitting corrections and amendments in that mode that an original record may be made on appeal, but the implication is that such amendments or corrections are necessary to truthfully exhibit the rulings and proceedings of a trial court in an actual case.³ Nor is the rule impinged upon by the cases which hold that parties may by agreement limit the controversy to designated questions, for the agreement in such a case brings nothing into the record although it may have the practical effect to exclude some matters from it.

§ 189. **The Difference between the Record and the Transcript**—There is a difference between the record and the transcript, although the words "record" and "transcript" are often used

Mister v. Corrigan, 17 Mo. App. 510; *Mangels v. Mangels*, 8 Mo. App. 603; *St. Louis v. Missouri, etc., Co.*, 12 Mo. App. 576; *Oder v. Commonwealth*, 80 Ky. 32. See, *Saxon v. State*, 116 Ind. 6; *Crane v. Farmer*, 14 Col. 294, 23 Pac. Rep. 455; *Planters Ins. Co. v. Cramer*, 47 Miss. 200; *Marbury v. Madison*, 1 Cranch, 137; *Gillis v. Martin*, 2 Dev. Eq. 470, S. C. 25 Am. Dec. 729; *Goodwine v. Crane*, 41 Ind. 335.

¹ See, *ante*, Fictitious Cases.

² *Truitt v. Truitt*, 38 Ind. 16, 21.

³ *Glenn v. Fant*, 134 U. S. 398; *Harding v. Brophy* (Ill.), 24 N. E. Rep. 558; *Hill v. First Nat. Bank*, 42 Kan. 364, 22 Pac. Rep. 324; *McKenzie v. Ballard*, 14 Col. 426, 24 Pac. Rep. 1; *Philadelphia, etc., Co. v. Shipley*, 72 Md. 88, 19 Atl. Rep. 1. See, *ante*, "Record can not be made by agreement," § 187.

interchangeably. It is, perhaps, not always an inaccurate use of the word "record" to employ it as signifying the transcript certified by the clerk of the inferior court to the superior tribunal, but, nevertheless, there is a difference between the record and the transcript. Original papers and entries do not come up on appeal,¹ except in peculiar and very rare cases. The elements of the record are, the pleadings, rulings, entries and the like, filed, made and recorded in the trial court, whereas the transcript is, what the term denotes, a copy of such papers, instruments and entries. The one is original, the other is that which is transcribed, or copied, from the original.² The transcript, it is true, exhibits the original proceedings and records them, but it records them by copying or transcribing. While it is not always important to observe the distinction between the transcript and the record it is often necessary to do so in order to avoid confusion.

§ 190. **The Record of the Trial Court**—The record made in the trial court is the foundation of the subsequent proceedings. What is not there of record can not be put of record on appeal, as part of the trial court proceedings. It is one thing to amend the transcript and quite another to change the record made by the trial court. We are not unmindful of the rule that the record itself may be amended by a *nunc pro tunc* entry, but the right to such an entry rests upon the theory that the act or ruling sought to be entered on the order book was actually done or made, and that it was by mistake not properly evidenced. It is what the trial court acts upon, and what it does or refuses to do, that creates the elements out of which the record is constructed. Entries by the clerk of orders or rulings of the court are legitimate parts of the record, but unofficial minutes and statements do not constitute parts of the record of the court.³ Pleadings, proper, are part of the record, and within this rule

¹ Cox v. Macy, 76 Iowa, 316; Mitchell v. Stinson, 80 Ind. 324.

² Dearborn v. Patton, 4 Ore. 58, 60. See, generally, Davidson v. Murphy, 13 Conn. 213, 217; Danes v. Pettit, 11 Ark. 349, 355.

³ Vanderkarr v. State, 51 Ind. 91; Board v. Slatter, 52 Ind. 171; Mull v. McKnight, 67 Ind. 525; Lewis v. Godman (Ind.), 27 N. E. Rep. 563. See, generally, State v. McKee, 109 Ind. 497; Clarke v. Kane, 37 Mo. App. 258.

are direct motions or motions of course, but collateral motions are not.¹ Thus a motion to strike out a pleading is not in the record where there is no bill of exceptions or order of court, but a motion for a new trial is a direct motion, and hence part of the record.² But it is only the motion proper that is part of the record; affidavits, or recitals of extrinsic matters, filed with or contained in the motion, are not part of the record unless made so by bill of exceptions or special order.³ A motion for a change of venue is a collateral motion and not intrinsically a part of the record,⁴ although, of course, it may be made so by bill of exceptions. It has been held that a motion for judgment upon the pleadings is not properly and directly a part of the record. Substituted pleadings, when the substitution is ordered by the court, are part of the record; if not so ordered, they are not.⁵ Motions to suppress depositions are collateral motions, and can only get into the record by bill or order.⁶ A motion to rescind an order remanding a case to the court from which a

¹ *Washington Ice Co. v. Lay*, 103 Ind. 48; *Burntrager v. McDonald*, 34 Ind. 277; *Ferrier v. Deutchman*, 51 Ind. 21; *Orr v. Worden*, 10 Ind. 553; *Board v. Montgomery*, 109 Ind. 69; *Jarvis v. Banta*, 83 Ind. 528; *Merritt v. Cobb*, 17 Ind. 314. It would seem, on principle, that a motion to strike out a pleading or to make more specific is a direct motion and intrinsically part of the record, but the contrary doctrine has long prevailed. *Merritt v. Cobb*, *supra*; *Kibby v. Cannon*, 9 Ind. 371; *Shaw v. Binkard*, 10 Ind. 227; *Murphy v. Tilly*, 11 Ind. 511; *Greensburgh, etc., Co. v. Sidener*, 40 Ind. 424; *School Town v. Gebhart*, 61 Ind. 187.

² *Hunter v. Hatfield*, 68 Ind. 416; *Martin v. Harrison*, 50 Ind. 270; *Hill v. Newman*, 47 Ind. 187; *Nichol v. Thomas*, 53 Ind. 42; *Jarvis v. Banta*, 83 Ind. 528; *Block v. Ebner*, 54 Ind. 544; *Schnewind v. Hackett*, 54 Ind. 248. See *Davis v. Binford*, 58 Ind. 457; *Jenkins v. Corwin*, 55 Ind. 21; *Moore v. State*,

65 Ind. 213; *Cooper v. Board*, 64 Ind. 520.

³ *Kleespies v. State*, 106 Ind. 383; *Shields v. McMahan*, 101 Ind. 591; *Harrison School Tp. v. McGregor*, 96 Ind. 185; *Chambers v. Kyle*, 87 Ind. 83; *Williams v. Potter*, 72 Ind. 354.

⁴ *Johnson v. Johnson*, 115 Ind. 112; *Norton v. State*, 106 Ind. 163; *Ulrich v. Hervey*, 76 Ind. 107; *Cochran v. Dodd*, 16 Ind. 476; *Horton v. Wilson*, 25 Ind. 316. See, generally, *Kennedy v. State*, 66 Ind. 370; *Kesler v. Myers*, 41 Ind. 543; *Cline v. Gibson*, 23 Ind. 11; *Smith v. Smith*, 77 Ind. 80; *Board v. Benson*, 83 Ind. 469.

⁵ *Burkham v. McElfresh*, 88 Ind. 223. In *Hall v. Durham*, 109 Ind. 434, it was held that an entry of the clerk as to the direction given a jury was not necessarily a part of the record.

⁶ *Smith v. Kyler*, 74 Ind. 575. See, generally, *Lucas v. State*, 86 Ind. 180; *Long v. Town of Brookston*, 79 Ind. 183.

change of venue was taken is not inherently part of the record.¹ Motions to tax costs, to set aside rules to plead, and the like, are not properly parts of the record, because they are collateral motions.² To the class of collateral motions belongs a motion to submit a case to a jury for trial.³ Many cases held that a motion for a judgment on answers to interrogatories returned by a jury was a collateral motion, but they are overruled by the later cases.⁴

§ 191. **Direct and Collateral Motions**—A direct motion may be roughly defined to be a motion of course, immediately relating to and founded upon matters of record,⁵ while a collateral motion may be said, in general terms, to be a motion not in due course, but a special motion directed to matters not of record, although legitimately connected with matters of record. It seems, on principle, that a direct motion based exclusively upon matters appearing of record, needing no extrinsic matters to aid it, and determinable upon a bare inspection of the record, should be deemed necessarily and intrinsically a part of the record, not requiring a special order or a bill of exceptions to make it a part of the record proper. But, in view of the long line of decisions, it would be unsafe to act upon this principle. The doctrine deducible from the adjudged cases, we say with regret, is that almost all motions, whether founded entirely on matters of record or not, are collateral motions. This doctrine has resulted in overloading records and creating confusion without producing any corresponding benefit. It is, however, too firmly settled to be changed otherwise than by legislation. The safe course, therefore, is to incorporate all motions and the grounds on which they rest in a bill of exceptions, or else se-

¹ *Sidener v. Davis*, 87 Ind. 342.

² *Clodfelter v. Hulett*, 92 Ind. 426; *Hadley v. Hadley*, 82 Ind. 95; *Beard v. Hand*, 88 Ind. 183; *Gallimore v. Blankenship*, 99 Ind. 390; *Redenbo v. Fretz*, 99 Ind. 458; *Nicholls v. State*, 65 Ind. 512.

³ *Hauser v. Roth*, 37 Ind. 89.

⁴ *Redinbo v. Fretz*, 99 Ind. 458. There was conflict among the earlier

cases. *Monroe v. Adams Ex. Co.*, 65 Ind. 60; *Salander v. Lockwood*, 66 Ind. 285; *Terre Haute, etc., Co. v. Clark*, 73 Ind. 168; *Campbell v. Dutch*, 36 Ind. 504; *Shaw v. Merchants National Bank*, 60 Ind. 83.

⁵ *Pratt v. Rice*, 7 Nev. 123; *United States v. Parrott, McAll (U. S.)*, 447; *Freshour v. Logansport, etc., Co.*, 104 Ind. 463.

cure an order of court making them parts of the record, unless they are such as have been expressly adjudged not to be collateral motions. If the decisions are to be followed to their logical result, few motions, indeed, can be deemed any other than special or collateral. The tendency of the decisions is to multiply collateral or special motions and to restrict the number of direct motions, so that where there is doubt it is safest to embody the motion in a bill of exceptions.

§ 192. **Adding to Intrinsic Record by Special Order**—A record may be added to by an order of the court directing that instruments of evidence, or the like, not intrinsically or necessarily parts of the record, shall be made part of the record.¹ The statute requires an order of the court in the nature of a special order, and without such an order instruments of evidence, instructions, or the like, can not be regarded as in the record unless, of course, brought in by a bill of exceptions. It is necessary that the court should make the order. An entry by the clerk where there is no order would be destitute of force. The settled rule is that the unauthorized entries of the clerk and recitals interpolated by him go for nothing.² It is, therefore, necessary in every instance that there should be an order by the court, and, regularly, this order should be recorded by the clerk.

§ 193. **Special Cases—Default—Questions upon Instructions**—The statute makes provisions of a peculiar nature for preparing the record in special cases. Two of these cases we shall here

¹ They may, of course, be made part of the record by a proper bill of exceptions. *Plank v. Jackson* (Ind.), 27 N. E. Rep. 1117. But we are here speaking of adding to the record proper by an order of the court.

² *Young v. Martin*, 8 Wall. 354; *Hall v. Durham*, 109 Ind. 434; *Olds v. Deckman*, 98 Ind. 162; *Kesler v. Myers*, 41 Ind. 543; *Hasselback v. Linton*, 17 Ind. 545; *Vanderkarr v. State*, 51 Ind. 91; *Board v. Slatter*, 52 Ind. 171; *Mull v. McKnight*, 67 Ind. 525; *State v. Acker*, 52 N. J. L. 259, 19 Atl. Rep. 258; *People v. Beaver*, 83 Cal. 419, 23 Pac. Rep. 321; *Tennessee, etc., Co. v. East Alabama, etc., Co.*, 81 Ala. 94; *Sutherland v. Putnam* (Ariz.), 24 Pac. Rep. 320; *Clarke v. Kane*, 37 Mo. App. 258; *Baker v. Swift*, 87 Ala. 530, 6 So. Rep. 153; *People v. O'Brien*, 78 Cal. 49, 20 Pac. Rep. 359; *Gould v. Howe*, 127 Ill. 251; *Chicago, etc., Co. v. Yando*, 127 Ill. 214; *Bowen v. Fox*, 99 N. C. 127, 5 S. E. Rep. 437; *Watson v. Commonwealth*, 85 Va. 867, 9 S. E. Rep. 418.

notice; others will be elsewhere considered. The first of the cases we shall here consider is that wherein a judgment is rendered by default. We may preface our discussion of the special case mentioned by saying that where there is an appearance the summons need not be made part of the record.¹ It is obvious that while the appellant is not obliged to cause the summons to be brought into the record by order or by bill of exceptions in a case where there is an appearance, he may do so even in such cases where he desires to present a question upon the writ or its service.² Indeed, he must do so or no question of the kind will be presented. But where there is a default the summons must be deemed an elemental or intrinsic part of the record.³ The other special case to which we refer is that of appeals upon questions presented by the instructions.⁴ The object of the statute is clear, for it can not be doubted that it was intended to enable parties to present questions upon instructions without cumbering the record with a mass of evidence. The statute is remedial and hence should be liberally construed. By its rules and by its decisions the Supreme Court has endeavored to give the statute a practical and liberal construction.⁵ But liberal as the rule should be, it can not, without a violation of principle, be so extended as to permit a party to appeal under one statute and subsequently invoke the benefit of another and different one.⁶ In preparing the record for an appeal upon instructions a bill of exceptions is necessary, and in the bill these

¹ This is the direction of the statute. R. S., § 650. This provision refers to records for appeals and probably can not be considered as a provision covering all cases, as for instance cases where a complete record is required. But this is aside from our discussion, and we simply make a suggestion; we give no opinion.

² *Cincinnati, etc., Co. v. Heim*, 97 Ind. 525.

³ *Woods v. Brown*, 93 Ind. 164.

⁴ The statutory provision is this:

"When in any case an appeal is prosecuted upon the question of the correctness of instructions given or refused or

the modifications thereof, it shall not be necessary to set out in the record all the evidence given in the cause, but it shall be sufficient in the bill of exceptions to set out the instructions or modifications excepted to, with the recital of the fact that the same were applicable to the evidence in the cause."

⁵ Rule XXX; *Mercer v. Corbin*, 117 Ind. 450; *Jones v. Foley*, 121 Ind. 180; *Shugart v. Miles*, 125 Ind. 445; *Shewalter v. Bergman*, 123 Ind. 155, 158; *McCoy v. Trucks*, 121 Ind. 292.

⁶ *McCoy v. Trucks*, 121 Ind. 292; *Shewalter v. Bergman*, 123 Ind. 155.

essential matters should appear: 1. The request for written instructions. 2. The instructions given and refused, and, if modified, the modifications. 3. The exceptions. 4. A statement that there was competent evidence material to the point covered by the instructions tending to support the theory of the party who excepts. The statement that there was evidence material to the point or points covered by the instructions should be definite and clear; it should not only show that there was competent and material evidence but it should show, also, that the evidence tended to sustain the theory of the party. All the instructions given should be incorporated in the bill, since instructions are to be considered as an entirety, and where instructions are refused it is necessary that all given should be in the record, otherwise the presumption will be that those refused were covered by those given. The instructions as asked should appear as they were originally written, and so must the modifications where the attack is based upon the action of the court in modifying the instructions. The request should appear and be so fully stated as to show that it was in due form and submitted at the proper time. The exceptions must be shown, and, of course, shown to have been properly and seasonably taken and well reserved. It is safe and, certainly, not improper, to notify the trial court that the record is to be made up under the statute. We hardly need add that the pleadings must be exhibited in the transcript and the proper motion for a new trial must be duly made and shown by the record. An appeal upon the instructions is in many respects similar to an appeal in cases where questions of law are reserved under the statute.¹ There are, however, some important differences. Appeals under the statute governing appeals in cases of reserved questions of law are not confined to questions arising upon instructions, while the statutory provision giving appeals upon instructions is restricted to questions presented by the instructions. Where questions of law are reserved under the statute authorizing it, the party who appeals must notify the trial court that he intends to appeal upon the questions of law reserved and upon a bill

¹ R. S., § 630. It is evident that plicable where the appeal involves only much, but not all, that is decided in rulings upon instructions. *Shugart v. Miles*, 125 Ind. 445, is ap-

of exceptions, whereas no such requirement is made in the statute which declares what the record shall be where the appeal is from rulings upon instructions. What the record shall embrace in the latter case is declared by the statute directly, while in the former there is no explicit direction as to what the record shall contain. There is, however, a direction as to what the court shall do.

§ 194. **The Record on Appeal**—When the transcript comes into the appellate tribunal it may properly be regarded as a part of the record of that court. It becomes such by being certified and filed there in all cases where such steps are taken as confer jurisdiction. But, while the transcript may be regarded as part of the record of the court to which the case is appealed, it is by no means all of the record. Notices, orders, and the like, given and made on appeal, are essential parts of the record of the appellate tribunal. Of its records that tribunal has the custody and over them it has exclusive control. This must necessarily be so, since if it were otherwise the court could not be independent, nor could it properly perform its functions. Whatever relates to the record on appeal is matter for the consideration of the court having jurisdiction of the appeal, so that if changes or amendments are desired in the record of that court, the application must be there made. But, as we have substantially said, and here repeat to prevent misunderstanding, the record of the trial court remains, and changes in the entries there necessary must be there procured. The transcript does not remove the original record, although the appeal does remove the case.¹

§ 195. **Transcript—Requisites of**—The transcript must contain such matters as overcome the presumption in favor of the regularity of the proceedings and rulings of the trial court.²

¹ *Satterlee v. Bliss*, 36 Cal. 489, 521; 147; *Railsback v. Walke*, 81 Ind. 409; *Boston v. Haynes*, 31 Cal. 107; *Buckman v. Whitney*, 24 Cal. 267; *Bonds v. Hickman*, 29 Cal. 460, 464. See "Effect of the Appeal," Chapter XXIII.

² *Fellenzer v. Van Valzah*, 95 Ind. 128, 131; *Bintford v. Minor*, 101 Ind. 147; *Graves v. Duckwall*, 103 Ind. 560; *Harter v. Eltzroth*, 111 Ind. 159, 160; *Cline v. Lindsey*, 110 Ind. 337, 339; *Powers v. State*, 87 Ind. 144; *Rothrock v. Perkins*, 61 Ind. 39; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433.

It must show error.¹ The record must be complete in itself.² Not only must the presumption which prevails in favor of the rulings of the trial court (and which authorizes the *prima facie* assumption that the decision appealed from was correct) be overcome, but it must also appear from the record that the rulings complained of were prejudicial, or probably prejudicial, to the substantial rights of the appellant, for judgments are not reversed because of immaterial errors, which do no substantial harm to the appellant.³

§ 196. **What the Transcript should Contain—Generally**—A transcript should contain copies of pleadings, instruments and entries which are properly part of the record, “embraced in the appeal,” and no others.⁴ Instruments, pleadings, entries, or the like should not be copied into the transcript unless they are legitimately a part of the record made by the trial court. If, however, it appears, upon an inspection of the transcript, without reference to extrinsic matters, that any instrument, pleading, or the like exhibited therein is not a proper part of the record, the court, on examination, will disregard it. The court will not act upon matters not properly in the record, if attention be duly directed to the infirmity in the transcript. It is not necessary to move to strike out parts of a transcript

¹ *Cleveland, etc., Co. v. Closser*, 126 Ind. 348, 364; *Crawford v. Anderson* (Ind.), 28 N. E. Rep. 314; *Kiernas v. Wolff*, 56 Hun. 647, 10 N. Y. Supp. 79; *Coburn v. Ames*, 80 Cal. 243, 22 Pac. Rep. 174; *Perkins v. Hayward*, 124 Ind. 445; *Devereux v. Champion Cotton Mills*, 17 So. Car. 66, 72; *Scovern v. State*, 6 Ohio St. 288; *McGowan v. Wilmington, etc., Co.*, 95 N. C. 417; *Boutelle v. Westchester, etc., Co.*, 51 Vt. 4; *Ziegler v. Handrick*, 106 Pa. St. 87; *Lett v. Horner*, 5 Blackf. 296; *Indianapolis, etc., Co. v. Herkimer*, 46 Ind. 142.

² *Indiana, etc., Co. v. Keeney*, 93 Ind. 100; *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. R. 158; *Kimball v. Sem-*

ple, 31 Cal. 662; *Gates v. Walker*, 35 Cal. 289.

³ *Kernodle v. Gibson*, 114 Ind. 451, 453; *Becknell v. Becknell*, 110 Ind. 42; *Stewart v. State*, 111 Ind. 554; *Whisler v. Lawrence*, 112 Ind. 229; *Kelley v. Fitzell*, 65 Cal. 87; *Dye v. Mann*, 10 Mich. 291; *Weir v. Burlington, etc., Co.*, 19 Neb. 212; *Carne v. Truman*, 103 Ill. 321; *Heymes v. Champlin*, 52 Mich. 25; *McNeal v. Oats Co.*, 51 Vt. 316; *Trego v. Pierce*, 119 Pa. St. 139. See authorities cited in note 2. See, also, *Prejudicial error, post*.

⁴ *Mitchell v. Stinson*, 80 Ind. 324; *Burkham v. McElfresh*, 88 Ind. 223; *Dimick v. Campbell*, 31 Cal. 238; *Morris v. Angle*, 42 Cal. 236, 240; *Douglass v. Dakin*, 46 Cal. 49, 52.

because improper entries, instruments or the like are copied, in cases where the record itself fully discloses the grounds of objection, but it is proper to object to the consideration of the illegitimate parts, to point them out, and specifically state the objections.

§ 197. **Independent cases can not be included in one Transcript—**The rule that a transcript must cover one case, and be complete in itself, forbids that several cases should be included in the same transcript. Where there are several independent actions the general rule is that there must be a separate transcript for each action.¹ This rule does not, of course, apply where there is a single action or suit, although there may be many parties and diverse interests, since a suit or action is ordinarily a unit, and as such is to be prosecuted. Nor does the rule prevent the consolidation of cases involving the same questions, and properly constituting a complete action or suit. Nor does the rule operate where the proceedings are blended and the one is supplemental to the other.² It is not easy to fix specific limits to the rule, but what has been said is an outline of the scope and effect of the doctrine.

§ 198. **Matters embraced in an Appeal—**The appellant's duty is to bring to the appellate tribunal a transcript of so much of the record as is embraced in the appeal.³ What is embraced in the appeal must always appear in the transcript, but it is not every instance in which all the rulings, entries, and proceedings are necessarily embraced in an appeal. That the statute does not require that the transcript shall embody all rulings or entries made by the trial court, or all papers there filed, is clear enough, since it is declared that the appellant may direct what the transcript shall include.⁴ The plain implication is that it is not always necessary to make a transcript of the complete record. But while it is true that it is not necessary in every instance to bring to the appellate tribunal a transcript of an entire record, and also true that the appellant may specify what parts of the

¹ Rich v. Starbuck, 45 Ind. 310.

v. Alvord, 27 Ind. 495; Vanliew v.

² Sanford v. Tucker, 54 Ind. 219.

State, 10 Ind. 384.

³ Heizer v. Kelly, 73 Ind. 582; Watt

⁴ R. S., § 649.

record shall be embodied in the transcript, it is, nevertheless, true that the transcript must be full enough to manifest error and to cover so much of the record as is necessarily involved in the appeal. We suppose that if the transcript shows on its face that it covers only part of the rulings and proceedings upon a single and independent matter, it would be insufficient.¹ If, for instance, it should show only part of a series of instructions upon a single and indivisible question, it would not be sufficient to authorize a reversal, inasmuch as it would not exclude the presumption that other instructions correctly presented the case to the jury. The pleadings must, in general, be regarded as part of the record embraced in an appeal, since, in their absence, it would not be possible to ascertain what was in controversy.²

§ 199. **Practice where Transcript contains improper matter—** The rule that no motion to strike out is necessary or proper where the face of the transcript itself exhibits the fact that the parts objected to are not legitimate parts of the record does not apply where the fact does not appear from an inspection of the record. If the facts appearing from an inspection of the transcript are such as show that instruments, pleadings, or entries are improperly copied into it, the objection should be made in the brief or argument, the parts of the transcript containing improper matters pointed out and the reasons for the assault upon the transcript succinctly given.³ A motion to dismiss the appeal is not appropriate.⁴ Where the transcript does not exhibit the facts essential to show that the transcript contains illegitimate recitals, papers, or pleading, a different procedure must be adopted, as *certiorari* or the like.⁵ Where improper matters are embodied in the transcript the party blamable may, upon the proper motion, be

¹ We are here speaking of ordinary appeals, and cases where a peculiar and special procedure is provided are excluded from consideration.

² *McCardle v. McGinley*, 86 Ind. 538; *Seager v. Aughe*, 97 Ind. 285; *Sumner v. Goings*, 74 Ind. 293.

³ *Longworth v. Higham*, 89 Ind. 352.

⁴ *Miller v. Shriner*, 87 Ind. 141; *ante*. § 196.

⁵ *Lytle v. Lytle*, 37 Ind. 281; *Thom v. Wilson*, 24 Ind. 323.

taxed with costs, but such matters, if harmless, will not authorize an application to amend or correct the record. If matters incorporated in the transcript are injurious they can not, of course, be treated as mere surplusage, so that it is proper for the party prejudiced to ask the court to disregard them in all cases where the record discloses the grounds of the request; but where they are not so disclosed, an application must be made to correct the transcript by making it conform to the record. If the error or omission is in the record of the trial court it can not be corrected on appeal, but application must be made to the trial court to make the required correction by an order *nunc pro tunc*, or in some other appropriate method.

§ 200. **Directions to the Clerk—Precipe**—The appellant has a right to direct the clerk what part of the record he shall include in the transcript. The directions must be given in writing and the writing must be appended to the transcript.¹ If there is no written direction specifying the parts of the record of which a transcript is to be made it is the duty of the clerk to make a transcript of the whole record,² but what shall be considered a complete record in appellate procedure is designated by the statute. The directions to the clerk should be reasonably specific and certain, but a reasonably liberal construction will be given to the *precipe*.³ If a transcript of the whole record is desired an order in general terms will be sufficient.

§ 201. **Authentication of Transcript**—The transcript must be authenticated by the clerk by the appropriate certificate.⁴ For-

¹ R. S., § 649.

² Reid v. Houston, 49 Ind. 181; Watt v. Alvord, 27 Ind. 495. Where written directions are given the clerk must obey them and the party appealing must see to it that he does so. Allen v. Gann (Ind.), 29 N. E. Rep.

³ Powell v. Bunker, 91 Ind. 64, 71. See, generally, Miller v. Shriner, 87 Ind. 141. As the code provides that the party who prosecutes the appeal may direct what papers and entries shall be included in the transcript, and

as it is the duty of such a party to present a transcript making error manifest and showing its prejudicial character, the fault is his if the transcript does not conform to the law. If the transcript is defective the court may, at its election, either affirm the judgment or dismiss the appeal. Allen v. Gavin (Ind.), 29 N. E. Rep.

⁴ Boots v. Griffiths, 97 Ind. 241; Walker v. Hill, 111 Ind. 223; Conaway v. Ascherman, 94 Ind. 187.

merly a very rigid rule was enforced respecting the authentication of transcripts, but by rules and decisions a more liberal and less technical doctrine has been established. Where the transcript of the entire record is made, the certificate need only so declare, but where parts only of the record are carried into the transcript the certificate should specify the parts copied.¹ A motion to dismiss because of the insufficiency of the certificate comes too late unless made before the cause is submitted.² If a party desires to object to the sufficiency of the certificate he should file his motion, specifically stating the grounds of his objection, and give notice. The adverse party may, upon leave, secure an amendment of a defective certificate, but an unreasonable delay may be cause for dismissing his appeal.³

§ 202. **Constituent parts of the Record as prescribed by the Statute**—The constituent parts of a record are, all proper entries of the clerk,⁴ and all papers pertaining to a cause,⁵ except the summons, depositions and other instruments of evidence.⁶ Collateral motions and papers are not part of the record unless made so by an exception or order of court. Pleadings superseded by amendment are not proper parts of the record,⁷ nor are pleadings rejected on motion, unless expressly made part of the record in some appropriate method. A motion for a new trial is part of the record in the proper case, as it is not a collateral motion.⁸ Where no direction is given to the clerk he should put in the transcript what the statute directs.⁹ We have not attempted here to do more than state in a very general way the elemental parts of a record, as we have elsewhere considered the subject at length.

¹ Reid v. Houston, 49 Ind. 181.

² Cooper v. Cooper, 86 Ind. 75.

³ Jackson v. Van Devender, 76 Ind. 27.

⁴ R. S., § 650.

⁵ Mere statements of that officer are not part of transcript. Vanderkarr v. State, 51 Ind. 91; Board v. Slatter, 52 Ind. 171; Mull v. McKnight, 67 Ind. 525.

⁶ The instruments of evidence may be made part of record by bill of excep-

tions. See bills of exceptions, *post*.

⁷ R. S., § 650; Berghoff v. McDonald, 87 Ind. 549; Scotten v. Randolph, 96 Ind. 581; Carrothers v. Carrothers, 107 Ind. 530.

⁸ Nichol v. Thomas, 53 Ind. 42; O'Donald v. Constant, 82 Ind. 212. Collateral motions are not part of record unless specially made so. Jarvis v. Banta, 83 Ind. 528.

⁹ Kirby v. Cannon, 9 Ind. 371.

§ 203. **Authority of Appellate Tribunal over the Transcript**—As jurisdiction of an appeal carries with it to the appellate tribunal control over all incidents, it follows that if a transcript is altered after it is filed in the appellate tribunal, that tribunal may compel the restoration of the transcript to its original condition and may, in the proper case, punish the party who wrongfully makes the alteration. It has been the practice of the court to entertain motions to restore a transcript to its original condition, but the cases in which it has been called upon to exercise such authority have been very few. So far as we can discover there is only one decision upon the subject in our reports, and in that decision the authority to dismiss the appeal was assumed to exist, but it was held that as there was no corrupt purpose in changing the transcript the appeal would not be dismissed.¹ It may be well doubted whether it is not the imperative duty of the court to dismiss the appeal unless the party making the alteration clearly exculpates himself by showing that there was nothing more than an innocent mistake.²

§ 204. **Marginal Notes**—The appellant must cause the pages and lines of the transcript to be numbered. It is his duty to cause marginal notes to be placed on the transcript in the appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, the orders of the court and the bills of exceptions. Where the evidence is contained in the transcript the names of the witnesses must be given. All motions and rulings, and all instructions given and refused, must be referred to in the marginal notes whenever questions are presented upon them.³ The requirements of the rule of which we have given a synopsis are important and should be obeyed. It has been said that the absence of marginal notes is "good evidence that counsel have not studied the record," and there is much of truth in this statement. The rule does not prescribe what course shall be pursued in the event of a failure to comply with it, and it has not been very strictly enforced by our courts.

¹ *Montgomery v. Gorrell*, 49 Ind. 230.

² Rule XXII.

³ "Every presumption is made against a wrong-doer."

In some of the cases the court set aside the submission,¹ but this is obviously very seldom a punishment to the appellant.² As he is the party in fault—for it is a fault to disobey a rule of court—he should be treated as a delinquent and not dealt with very liberally. In one case it was held that the appellee must make the objection before submission,³ but this can not be the true rule, inasmuch as the appellee is entitled to a properly annotated transcript in order to prepare his brief. The annotation of the transcript is by no means an unimportant matter, and in many jurisdictions the failure to make the proper marginal notes is considered as a cause for dismissal. It is, on principle, the right of the court to dismiss the appeal⁴ or to cause notes to be made at the expense of the appellant, and this right is freely exercised by most of the courts.

¹ O'Neil v. Chandler, 42 Ind. 471; Rhodes v. Piper, 42 Ind. 474; Etter v. Armstrong, 42 Ind. 475; State v. Klaas, 42 Ind. 506.

² As Judge Works says, "But the right to punish the appellant should not be confined to setting aside the submission, as appeals are sometimes taken for delay, and to set aside the submission would assist him in this object."

² Works Practice, 21.

³ Cooper v. Cooper, 86 Ind. 75; Thompson v. Deprez, 96 Ind. 67; Bass v. Doerman, 112 Ind. 390; Anderson, etc., Ass'n v. Thompson, 87 Ind. 278.

⁴ We are aware that it has been decided that the failure to make marginal notes is not cause for dismissal. O'Neil v. Chandler, 42 Ind. 471. But we can not think that the holding is defensible on principle.

CHAPTER X.

CORRECTING AND AMENDING THE RECORD AND TRANSCRIPT.

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| <p>§ 205. The record below and the record on appeal.</p> <p>206. Amendments and corrections of the trial court record.</p> <p>207. Effect of an amendment of the record of the trial court.</p> <p>208. Amendments not allowed after the decision on appeal.</p> <p>209. Entries <i>nunc pro tunc</i>.</p> <p>210. The application to correct the trial court record.</p> <p>211. By whom the motion may be made.</p> <p>212. Notice of the motion.</p> <p>213. Evidence on the hearing of the motion.</p> | <p>§ 214. Appeal from the ruling on application for <i>nunc pro tunc</i> entry.</p> <p>215. Presenting the ruling on appeal.</p> <p>216. <i>Certiorari</i>.</p> <p>217. Duty of party to apply for <i>certiorari</i>.</p> <p>218. Who may obtain a <i>certiorari</i>.</p> <p>219. Time of making the application.</p> <p>220. Requisites of an application for a <i>certiorari</i>.</p> <p>221. Notice of the application.</p> <p>222. Submitting the motion for hearing.</p> |
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§ 205. **The Record below and the Record on Appeal**—We have elsewhere pointed out the difference between the record of the trial court and the record on appeal, and have shown that the difference is an important one, inasmuch as over the one record power remains in the trial court, while over the other it resides exclusively in the appellate tribunal.¹ In saying that the higher court can not make an original entry for the trial court, nor perform an act which it is the right and duty of the trial court to perform, and that the trial court can not exercise the slightest control over the record of the higher, little more is done than to repeat what has already been said. Appellate courts do not make trial court entries nor trial court rulings in any instance where the appeal is from a judgment or decree of a trial court. There are rare cases in which original jurisdiction is exercised

¹ *Ante*, "Difference between the record of the trial court," § 190; "The record and the transcript," § 189; "The record on appeal," § 194.

by the appellate tribunals and in which all rulings and all entries are there made, but in the vast majority of cases the original rulings and entries are those of the trial court. In such cases the original record remains in the trial court,¹ and is transcribed and certified to the appellate tribunal.

§ 206. Amendments and Corrections of the Trial Court Record—Where the defect is in the trial court record, or where the rulings of that court have not been duly entered, the application to correct or amend the record must be made to that court.² An application made elsewhere will be fruitless. Appellate tribunals have jurisdiction to review a ruling sustaining or denying an application to amend or correct the record remaining in the inferior court, but the jurisdiction is appellate and can not be made original save by a statute enacted under constitutional authority. As the jurisdiction is appellate, it must be invoked in accordance with the rules of procedure, and hence the foundation must be laid in the trial court. There the original proceedings must be taken, and, if a review is sought, the record must be made up and exceptions so entered and preserved that the questions shall be open to investigation and require judgment. The appellate tribunal proceeds upon a transcript of the proceedings of the court of original jurisdiction, and not upon original pleadings, papers, rulings or entries.³

§ 207. Effect of an Amendment of the Record of the Trial Court—Where a trial court record is corrected or amended upon an

¹ *Peterson v. Swan*, 119 N. Y. 662.

² *Claffin v. Dunne*, 129 Ill. 241, 21 N. E. Rep. 834; *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. Rep. 888; *State v. Scheper* (So. Car.), 11 S. E. Rep. 623; *State v. Farrar*, 104 N. C. 702, 10 S. E. Rep. 159; *Lee Chuck v. Quan Wo Chung Co.*, 81 Cal. 222, 22 Pac. Rep. 594; *Stephens v. Bradley*, 23 Fla. 393, 2 So. Rep. 667; *Martin v. St. Louis, etc., Co.*, 53 Ark. 250, 13 S. W. Rep. 765; *Saxon v. State*, 116 Ind. 5, 18 N. E. Rep. 268; *Hamilton v. Burch*, 28 Ind. 233; *State v. Cromwell* (N. Y.), 10 N. E. Rep. 270;

Gamble v. Gibson, 83 Mo. 290. In *Thom v. Wilson*, 24 Ind. 323, it was said: "We can not make a record for any of the lower courts; that is their province, and all applications must be made to them." Presumption where trial court refuses to amend. *People v. Samario*, 84 Cal. 484, 24 Pac. Rep. 283.

³ *Dooley v. Martin*, 28 Ind. 189; *Doe v. Owen*, 2 Blackf. 452; *Jones v. Van Patten*, 3 Ind. 107; *Colerick v. Hooper*, 3 Ind. 316.

application there filed, the amendment or correction becomes part of the original record in legal contemplation, and the party desiring its presentation on appeal should apply for an order to have it certified to the appellate tribunal. The application to the trial court to amend or correct the record when made pending an appeal is not, as a general rule, to be considered as an independent proceeding, but it is to be deemed such an incident of the original case as to constitute an integral part of it. Theoretically, at least, there is only one case and one appeal.¹ If the application to amend is denied by the trial court, or it is wrongly granted, the rulings and papers should be brought to the higher court as part of the original appeal.²

208. **Amendments not allowed after the Decision on Appeal.**—The rule is well settled that amendments will not be permitted after the decision on appeal.³ The duty of parties is to see that the record is properly made up, and if they fail to move promptly for securing a correction or amendment, where amendments or corrections are necessary to make a perfect record or fully present the questions, their complaint will not be heeded. It is incumbent upon the party desiring the amendment or correction to take the necessary steps to secure it before the record is finally acted upon, and he must see that the officers of the courts are required perform those duties.

209. **Entries *nunc pro tunc*.**—In correcting the original record the theory is that the ruling involved was actually made but was not properly entered. There is no right under a proceeding *nunc pro*

¹ 21 Philb. 45; Col. 116; Ind. 111; 30 Ill. 200; 111 Cal. 100; 111

1007; 107 Cal. 206; Jackson, 107 Cal. 113; 107 Cal. 113; 107

113; 107 Cal. 206; Knox v. Mc. Int. 113; 113 Cal. 113; 113

113; 113 Cal. 113; 113 Cal. 113; 113 Cal. 113; 113 Cal. 113; 113

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cure the amendment or correction of a record to have a new ruling created or an entirely new element brought into the record since, as is well settled, there "must be something to amend by."¹ The proceeding is curative rather than creative.² The facts are assumed to be in existence but the record evidence is regarded as imperfect or incomplete. It is a necessary conclusion from the principle stated that an application for a *nunc pro tunc* order will not warrant the revision of a judgment or decree although it may authorize a correction or amendment of the record entry. If the decree or judgment expresses the decision rendered, or intended to be rendered, a *nunc pro tunc* order can not be granted.³

¹ As said in Kirby v. Bowland, 69 Ind. 290: "A court may record a fact *nunc pro tunc*, that is, if the fact existed then it may be recorded now, but it can not record a fact now which did not exist then, and there must be some record, note, entry, or minute of some kind on which to base it, connecting it with the case." This doctrine is asserted in many cases. Makepeace v. Lukens, 27 Ind. 435; Morgan v. Hays, 91 Ind. 132; Jenkins v. Long, 23 Ind. 460; Seig v. Long, 72 Ind. 18; Hamilton v. Burch, 28 Ind. 233; Uland v. Carter, 34 Ind. 344; Beavers v. State, 58 Ind. 530; Hannah v. Dorrell, 73 Ind. 465; Firestone v. Firestone, 78 Ind. 534; Williams v. Henderson, 90 Ind. 577; Bole v. Newberger, 81 Ind. 274; Shaw v. Newsom, 78 Ind. 335; Johnson v. Moore, 112 Ind. 91; Chissom v. Barbour, 100 Ind. 1; Mohun's Case, 6 Mod. 59; Mitchell v. Overman, 103 U. S. 62; Ellis v. Ewbanks, 3 Scam. 190; Reid v. Morton, 119 Ill. 118, 6 N. E. Rep. 414; Chichester v. Cande, 3 Cowen, 59, 15 Am. Dec. 238.

² An entirely new bill of exceptions can not be created. Martin v. St. Louis, etc., Co., 53 Ark. 250, 13 S. W. Rep. 765. "It is not," said the court, "the

office of an amendment to create or originate something new, but only to perfect that which is imperfectly done." See, also, Cox v. Gress, 51 Ark. 224, 231, 11 S. W. Rep. 416. It is rightly held in Morgan v. Hays, 91 Ind. 132, that a bill of exceptions may be amended on due application to the trial court where there is something to amend by, but this does not authorize the conclusion that there may be an entirely new bill created by the trial court. Omitted evidence may be supplied. Jeffersonville, etc., Co. v. Bowen, 49 Ind. 154. The general statement in Marley v. Hornaday, 69 Ind. 106, which seems to indicate that an entirely new bill may be framed after judgment and pending an appeal can not be supported. It goes far beyond any of the authorities and is opposed by principle.

³ Garrison v. People, 6 Neb. 274; Moore v. State, 63 Ga. 165; Adams v. Higgins (Fla.), 1 So. Rep. 321; Hyde v. Curling, 10 Mo. 359; Strange v. Tyler, 95 Ind. 395; Bole v. Newberger, 81 Ind. 274; Gray v. Brignardello, 1 Wall. 627; Whitewell v. Emory, 3 Mich. 84, 59 Am. Dec. 220; Smith v. Hood, 25 Pa. St. 218; *In re* Limerick Petitioner, 18 Me. 183.

§ 210. **The Application to Correct the Trial Court Record**—A *nunc pro tunc* order may be obtained on motion in the proper case, and a formal complaint is not required.¹ If, however, a formal complaint or petition is filed, no harm is done, since the form of the pleading is of no importance where a correct result is reached.² But, while a formal complaint or petition is not required, there should be a written motion specifying with reasonable certainty the relief sought, and stating the grounds upon which the motion is founded.³ The sufficiency of a motion for a *nunc pro tunc* entry may, as it has been held, be questioned by a motion to quash, or by a motion to dismiss.⁴

§ 211. **By whom the Motion may be made**—A motion to correct the record by a *nunc pro tunc* entry can not be successfully made by one who is a stranger to the record. Such a motion can only be prosecuted by a party to the record or by a privy in blood, or a legal representative. The decisions indicate that a mere party in estate can not have the judgment or decree corrected in any case.⁵ It may well be doubted whether the general rule is not too broadly stated in some of the decisions, since it seems that there may be cases, although prob-

¹ Gray v. Robinson, 90 Ind. 527; Sherman v. Nixon, 37 Ind. 153; Hughes v. Hinds, 69 Ind. 93; Latta v. Griffith, 57 Ind. 329; Urbanski v. Manns, 87 Ind. 585; Miller v. Royce, 60 Ind. 189; Goodwine v. Hendrick, 29 Ind. 383; Jenkins v. Long, 23 Ind. 460.

² Gray v. Robinson, 90 Ind. 527; Holcraft v. King, 25 Ind. 352.

³ The reporter's note in Urbanski v. Manns, 87 Ind. 585, states the point decided too broadly. What was there said is that "special pleadings are not required." The meaning is, as the context shows, that formal pleadings are not necessary.

⁴ Douglass v. Keehn, 78 Ind. 199, citing Smith v. Noe, 30 Ind. 117; Nord v. Marty, 56 Ind. 531; Lake v. Jones, 49 Ind. 297; Ratliff v. Baldwin, 29 Ind.

16; Buck v. Havens, 40 Ind. 221. It is difficult to understand the reasoning in the case first cited, since it seems to treat a motion for a *nunc pro tunc* entry as a motion to set aside a default. The conclusion, however, is correct, as it must be true that if the motion is insufficient on its face the relief sought can not be awarded. If the motion discloses the infirmity there is no reason for proceeding further.

⁵ Runnels v. Kaylor, 95 Ind. 503, citing Cassel v. Case, 14 Ind. 393; Owen v. Cooper, 46 Ind. 524; Rogers v. Abbott, 37 Ind. 138; Miller v. Kolb, 47 Ind. 220; Lewis v. Owen, 64 Ind. 446; Angle v. Speer, 66 Ind. 488; Conyers v. Mericles, 75 Ind. 443; Keepler v. Force, 86 Ind. 81.

ably rare ones, where a privy in estate might successfully prosecute proceedings to correct a clerical error.

§ 212. **Notice of the Motion**—A motion for a *nunc pro tunc* order made after the close of the term requires notice. A party is under no duty to keep watch of proceedings after the close of the term. The notice which brings him into court, or the proceedings which require him to be in court either actually or constructively, spends its force with the close of the term at which a final judgment or decree terminating the proceedings is entered. This is the doctrine of the cases bearing directly upon a motion for a *nunc pro tunc* order,¹ and it is also the doctrine in closely analogous cases.² In one case it was held that four days' notice is sufficient.³

§ 213. **Evidence on the hearing of the motion**—It is declared by our court and by other courts that upon a motion for a *nunc pro tunc* entry, parol evidence is competent.⁴ But there is much confusion in the decided cases and it is not easy to extract a rule from them. We have, however, concluded upon an examination of our own and other cases, that the true rule is that while parol evidence is competent it is not of itself, unaided by any note, minute, or memorial, sufficient to authorize a *nunc pro tunc* order.⁵ It may be competent and yet insufficient. It

¹ *Smith v. Myers*, 5 Blackf. 223; *Bales v. Brown*, 57 Ind. 282; *Hughes v. Hinds*, 69 Ind. 93; *Benhold v. Fox*, 21 Minn. 51; *Hill v. Hoover*, 5 Wis. 386; *Weed v. Weed*, 25 Conn. 337; *Wallis v. Thomas*, 7 Vesey, 292; *Rockland Water Co. v. Pillsbury*, 60 Me. 420; *Wooster v. Glover*, 37 Conn. 315, 317; *Wheeler v. Goffe*, 24 Texas, 660; *Martin v. Bank*, 20 Ark. 636; *Alexander v. Stewart*, 23 Ark. 18; *Cook v. Wood*, 24 Ill. 295; *Swift v. Allen*, 55 Ill. 303. Amendments before a final judgment fully terminating the case may be made without notice. *McClellan v. Binkley*, 78 Ind. 503; *Burnside v. Ennis*, 43 Ind. 411; *Spanagel v. Dellinger*, 34 Cal. 476; *Layman v. Graybill*, 14 Ind. 166.

² *Corwin v. Thomas*, 83 Ind. 110; *Crews v. Ross*, 44 Ind. 481; *Hobbs v. Board*, 103 Ind. 575; *Board v. Fahlor*, 114 Ind. 176, and authorities cited. *Board v. Gruver*, 115 Ind. 224.

³ *Latta v. Griffith*, 57 Ind. 329. As to the effect of a *nunc pro tunc* entry see *Leonard v. Broughton*, 120 Ind. 536.

⁴ *Mitchell v. Lincoln*, 78 Ind. 531; *Jenkins v. Long*, 23 Ind. 460; *Brownlee v. Board*, 101 Ind. 401; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189; *Rugg v. Parker*, 7 Gray, 172; *Jacobs v. Burgwyn*, 63 N. C. 193; *Aydelotte v. Brittain*, 29 Kan. 98.

⁵ *Ellis v. Keller*, 82 Ind. 524; *Conway v. Day*, 92 Ind. 522. See, also, cases cited, ante, "Entries *nunc pro tunc*," § 209.

would certainly violate the rule laid down in a long line of cases to hold that parol evidence is all that is required. There is reason for holding that where there is a mistake in the calculation of the amount parol evidence may be heard to aid the record,¹ but it does not follow that it is competent to make a new, independent and original order or entry.

§ 214. **Appeal from ruling on the Application for a nunc pro tunc entry**—A party who desires to challenge the correctness of the decision of the court upon a motion for a *nunc pro tunc* order must do so by the appropriate proceeding. He may appeal from the decision.² As there is a remedy by appeal there can be no collateral attack. If there is jurisdiction of the subject and no effective attack the ruling will not be disturbed. A motion for a new trial is not required, as a motion to correct the record is regarded as a summary proceeding, in which there is, in the strict sense, no trial.³ An exception to the ruling on the motion has been held, in several cases, to be all that is necessary to reserve the question.⁴

§ 215. **Presenting the ruling on Appeal**—It is a necessary conclusion from the doctrine affirmed by many cases that no formal pleadings are necessary in proceedings to obtain a *nunc pro tunc* entry that all the papers, as well as the evidence, must be brought into the record by a bill of exceptions, or, in the proper case, by an order of court.⁵ The statements of the clerk are ineffective. The record must be made to speak in due and proper form.⁶ The record must show that the application was made to a court having power over the record, since no other could have jurisdiction.⁷ An attempt by a court other

¹ As in *Sherman v. Nixon*, 37 Ind. 53, or *Mitchell v. Lincoln*, 78 Ind. 531.

² *Walker v. State*, 102 Ind. 502.

³ *Blizzard v. Blizzard*, 40 Ind. 344; *Walker v. State*, 102 Ind. 502.

⁴ *Blizzard v. Blizzard*, 40 Ind. 344; *Runnels v. Kaylor*, 95 Ind. 503. Citing *Jenkins v. Long*, 23 Ind. 460; *Corwin v. Thomas*, 83 Ind. 110; *Dukes v.*

Working, 93 Ind. 501; *Coulter v. Coulter*, 81 Ind. 542; *Beeber v. Bevan*, 80 Ind. 31.

⁵ *Ellis v. Keller*, 82 Ind. 524; *Conway v. Day*, 79 Ind. 318; *Chissom v. Barbour*, 100 Ind. 1.

⁶ *Ellis v. Keller*, 82 Ind. 524.

⁷ *Wilcox v. Majors*, 88 Ind. 203.

than the one of whose record an amendment is sought to make a *nunc pro tunc* entry or order, would be abortive.

§ 216. **Certiorari**—If the orders and entries are correctly recorded below, but are improperly or incorrectly copied, or transcribed, the remedy is to apply to the appellate tribunal for an order to the clerk below to certify the amendments and corrections required to make the transcript faithfully and truly exhibit the rulings, entries and proceedings as the original record exhibits them. The order which issues upon such a motion, or application, is commonly called a *certiorari*.¹ It will issue to compel the eradication from the transcript of matters that do not belong there, as well as to bring into the transcript matters that are not copied into it which do belong there. Where, however, improper matter appears in a transcript, and its presence is revealed by a bare inspection of the record without the aid of entries, orders, or instruments not there appearing, a *certiorari* is not required. Thus if it appears upon the face of the record that a bill of exceptions has not been filed in time, or that motions not properly made part of the record are incorporated in the transcript, there is no necessity for asking a *certiorari*, nor for making a motion to expunge the improper matter from the transcript. All that need be done is to point out the improper matter in the brief.

§ 217. **Duty of party to apply for Certiorari**—The court may, if it deems proper for the furtherance of justice, direct a transcript to be corrected, or original papers to be certified up,² but it is not bound to do so. Primarily the duty of asking and obtaining a *certiorari* rests upon counsel; the court may, as a matter of discretion, make the necessary order, but that it shall make it of its own motion can not be insisted upon as a matter

¹ Phelps v. Osgood, 34 Ind. 150; Sumner v. Goings, 74 Ind. 293; Hall v. Durham, 113 Ind. 327; Du Souchet v. Dutcher, 113 Ind. 249; Miller v. Shriner, 87 Ind. 141; Kesler v. Myers, 41 Ind. 543; United States v. Adams, 9 Wall. 661; Fowler v. Lindsey, 3 Dall. 411, 413; Board, etc., v. Bond, 3 Col. 222.

² Hart v. State, 26 Ind. 100; State v. Pierce, 14 Ind. 302; Brown v. Osborn, 1 Blackf. 32; Grover, etc., Co. v. Barnes, 49 Ind. 136; Jones v. Van Patten, 3 Ind. 107; Songer v. Walker, 1 Blackf. 251; Gatling v. Newell, 12 Ind. 116; Colerick v. Hooper, 3 Ind. 316; Walker v. State, 102 Ind. 502.

of right.¹ Counsel are under a duty to examine the transcript, and the fault is theirs if they do not take steps necessary to rectify errors and secure amendments. If parties suffer judgment to be rendered on a defective transcript it will be as effective as if the transcript had been amended.²

§ 218. **Who may obtain a Certiorari**—Strangers to the record can not obtain an order to amend the transcript. A party to the record who does not appeal and whose interests are not involved, can not have a *certiorari*. In order to entitle an applicant to the order he must have a substantial interest that may be affected by the judgment on appeal, since it would be idle to direct an amendment upon the application of one who can neither be benefited nor harmed by the decision.³

§ 219. **Time of making Application**—An application for a *certiorari* may be made after the submission of the cause, but can not,⁴ of course, be made after the decision on appeal.⁵ But it is always within the power of the court to deny the application if the applicant has not proceeded with reasonable diligence. If necessary to enable a party who has acted promptly to secure an amendment of the transcript the court will grant an order staying proceedings.⁶ It is obvious that an application for a *certiorari* in cases where it is in aid of appellate jurisdiction can not, as a general rule, be made until the transcript is filed in the appellate tribunal.⁷

¹ *State v. Hallowell*, 91 Ind. 376. In *Kesler v. Myers*, 41 Ind. 543, 555, it was said: "We could not, with propriety, make any suggestion to the parties or counsel as to the condition of the record."

² *Davis v. Jenkins*, 14 Ind. 572; *Gregory v. Slaughter*, 19 Ind. 342.

³ *State v. Chastain*, 104 N. C. 900, 905, 10 S. E. Rep. 519.

⁴ *Clark v. Wright*, 67 Ind. 224; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *post*, § 221, n. 3.

⁵ *Ante*, "Amendments not allowed after decision on appeal." § 208.

⁶ *Doe v. Owen*, 2 Blackf. 452.

⁷ *Mullary v. Caskaden, Minor* (Ala.) 20. We are not, it is barely necessary to say, here speaking of a proceeding to compel a trial court to make a proper and rightful record, but of a proceeding to compel a ministerial officer to correctly transcribe or certify a record which has been duly made in the trial court. There is an important difference between requiring a court to make a record and compelling the clerk to copy and certify it as made.

§ 220. **Requisites of the Application for a Certiorari**—The safe course is to verify the motion for a *certiorari*, since it is difficult to conceive of a case in which a *certiorari* is necessary, wherein an unverified motion would be sufficient. As we have seen, where an inspection of the record discloses the presence of improper matter which may be disregarded without looking beyond the face of the record, no amendment is required, so that it is almost always necessary to show some matter not apparent on the face of the record in order to obtain a *certiorari*. Where there is no defect or imperfection apparent on the face of the record the presumption is that it is complete and perfect,¹ so that it is incumbent upon one who affirms that it is not to show wherein it is defective or imperfect. The motion or application must “clearly designate the parts of the record asserted to be defective, improperly omitted, or improperly incorporated in the transcript.”²

§ 221. **Notice of the Application**—After the cause has been submitted notice of the motion must be given, but notice need not be given where the motion is filed before the cause is submitted.³ The notice should specify the general character of the motion, and, in strictness, should be served ten days prior to the time fixed for the hearing.⁴ It has been held that the court will hear the motion at “any time after the opposite party or his attorney has had ten days’ notice in writing, though a day prior to the expiration of such period has been designated in the notice.”⁵

§ 222. **Submitting the Motion for Hearing**—The motion, with accompanying affidavits, is submitted to the court by the clerk,

¹ Von Glahan *v.* Von Glahan, 40 Ill. 73; Williams *v.* Quin, 7 Cowen, 539; Mullary *v.* Caskaken Minor (Ala.), 20.

² Rule XXXII. The rule is simply declaratory of a general principle, and should be closely followed.

³ Rule XXXII; Clark *v.* Wright, 67 Ind. 224; Pennsylvania Co. *v.* Holderman, 69 Ind. 18; Figart *v.* Halderman, 59 Ind. 424.

⁴ Rule XIV.

⁵ Durbin *v.* Haines, 99 Ind. 463. This doctrine is a reasonable one, for, if the notice is given for the requisite length of time, a new notice ought not to be required, nor ought the party to be prejudiced by the delay of the court or by operation of law. If the adverse party has notice for the length of time required by the rules of practice he can have no reason to complain.

and is acted upon without oral argument. It is proper, and, indeed, often necessary, for parties to file briefs upon the motion, but oral arguments are not heard. Counter affidavits are admissible but not verbal testimony.¹ If it appears that the defect sought to be remedied is entirely immaterial, exerting no influence upon the controversy, no case is made for a *certiorari*.

¹ Rule XXXIII.

CHAPTER XI.

AGREED CASE.

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| § 223. Agreed cases—Jurisdiction. | § 227. The affidavit. |
| 224. Agreed statement of facts does not make an agreed case. | 228. Requisites of the statement of facts. |
| 225. The distinctive features of an agreed case. | 229. Office of the statement of facts. |
| 226. No presumptions indulged in favor of the judgment of the trial court. | 230. Effect of the statement. |
| | 231. Mistake in the statement of facts. |
| | 232. The record. |

§ 223. **Agreed Cases—Jurisdiction**—The statute allows parties to make and present a case by agreement, but, to prevent a violation of the rule interdicting the submission of feigned controversies and to insure good faith,¹ it requires that designated acts shall be done by the parties. There must be a real controversy between actual parties, but the facts of the controversy may be agreed upon by the parties. The material acts required by the statute can not be dispensed with, for they are regarded as jurisdictional. Thus it is held that an affidavit is essential to jurisdiction,² but the affidavit of one of the parties is suffi-

¹ The case of *Smith v. Junction, etc., Co.*, 29 Ind. 546, strikingly illustrates the statement of the text. In that case the court received affidavits to show that the case was feigned and one of the parties fictitious, and quoted with approval from the opinion in *Lord v. Veazie*, 8 How. (U. S.) 251, 254, the following: "And any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, where there is no real and substantial controversy between those who appear as adverse parties to the suit is an abuse which courts of justice have always repre-

hended and treated as a punishable contempt of court." The following cases were also cited: *Brewington v. Lowe*, 1 Ind. 21; *Hotchkiss v. Jones*, 4 Ind. 260; *Cleveland v. Chamberlain*, 1 Black (U. S.), 419.

² *Sharpe v. Sharpe*, 27 Ind. 507, 508. In the case cited the court said, "No pleadings are required in such cases, but the affidavit referred to is necessary to give the court jurisdiction of the case, and the power to hear and determine the question involved, and render judgment without pleadings." Speaking of this ruling it was said in *Manchester v. Dodge*, 57 Ind. 584, "And, indeed, it could not well be held other-

cient.¹ As jurisdiction depends upon the affidavit it is indispensably necessary that it should form part of the record, for its absence will be fatal to the appeal.²

§ 224. **Agreed statement of Facts does not make an Agreed Case—** There is a material difference between an agreed case and a case where there is simply an agreement or stipulation as to the facts.³ The agreement as to the facts does not make an agreed case under the statute. This difference between the two cases is radical and leads to important results. It is only necessary to here note a few of the important differences; one is that pleadings are required in ordinary cases but not in agreed cases;⁴ a motion for a new trial is not required in agreed cases,⁵ but is required in cases where there is simply an agreed statement of facts.⁶ Where parties act upon the theory in the trial court that the case is an agreed case they will be held to that theory on appeal, although the case may not come within the statute.⁷

wise." These cases are approved in *Godfrey v. Wilson*, 70 Ind. 50, 58. The absence of the required affidavit was declared fatal in *Myers v. Lawyer*, 99 Ind. 237. The Supreme Court of Wisconsin in *Plainfield v. Plainfield*, 67 Wis. 525, declared that "The required affidavit is essential to the jurisdiction of the court to render a judgment on the matter submitted." See, also, to same effect, *Donald v. St. Louis, etc., Co.*, 52 Iowa, 411.

¹ *Booth v. Cottingham*, 126 Ind. 431.

² The statement of the clerk that an affidavit such as the statute requires was filed will not supply the place of the affidavit, for that must appear in the record. *Myers v. Lawyer*, 99 Ind. 237.

³ *Witz v. Dale* (Ind.), 27 N. E. Rep. 498; *Zeller v. City of Crawfordsville*, 99 Ind. 262; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Citizens Insurance Co. v. Harris*, 108 Ind. 392, 9 N. E. Rep. 299; *Western Union Tel. Co. v. Frank*, 85 Ind. 480; *Slessman v. Crozier*, 80 Ind. 487; *Downey v. Wash-*

burn, 79 Ind. 242; *Openheim v. Pittsburgh, etc., Co.*, 85 Ind. 471, 472; *Lofton v. Moore*, 83 Ind. 112; *Martin v. Martin*, 74 Ind. 207; *Fisher v. Purdue*, 48 Ind. 323; *Carlton v. Cummins*, 51 Ind. 478. In *Fisher v. Purdue*, *supra*, the court misapplies the term "statement of facts," but this error does not invalidate the conclusion reached. *Thatcher v. Ireland*, 77 Ind. 486, is to be understood as an agreed case. An agreement as to the facts embodied in a statement of facts is no more than a stipulation as to what the evidence would establish. *Pennsylvania Co. v. Niblack*, *supra*.

⁴ *Warrick, etc., Co. v. Hougland*, 90 Ind. 115.

⁵ *Lofton v. Moore*, 83 Ind. 112.

⁶ *McDonald v. Stader*, 10 Ind. 171; *State v. Swarts et al.*, 9 Ind. 221.

⁷ *Booth v. Cottingham*, 126 Ind. 431, citing *Carver v. Carver*, 97 Ind. 497, 516; *Louisville, etc., Co. v. Wood*, 113 Ind. 544, 564; *Brink v. Reid*, 122 Ind. 257. In the case first cited it was said by the court: "Where parties agree upon a theory we can not with propri-

But this rule would not, of course, prevail against a party who had resisted the theory in the trial court.

§ 225. **The distinctive features of an Agreed Case**—An agreed case is one wherein there is neither process nor pleadings, and wherein there are no controverted questions of fact nor, indeed, any questions except questions of law arising on the agreed statement. The court looks to the agreed statement required by the statute, and if that fails to show a right of recovery in the plaintiff none can be adjudged.¹ A motion for a new trial is not required as we have elsewhere more fully shown,² but an exception to the finding is necessary.³ If pleadings are filed they will be disregarded,⁴ and from this it necessarily results that no errors in rulings on the pleadings can be of the slightest avail.

§ 226. **No Presumptions indulged in favor of the Judgment of the Trial Court**—The rule in agreed cases upon the subject of presumptions in favor of the rulings of the trial court is radically different from that which prevails in other cases. It has long been settled that no presumptions will be made in favor of the trial court in agreed cases under the statute.⁵ The party who

ety deny their agreement except, perhaps, where it is plainly necessary to do so in order to prevent manifest injustice."

¹ *Gregory v. Perdue*, 29 Ind. 66. "It must appear," it was said in the case cited, "from such statement of facts that there exists a cause of action in favor of one of the parties against the other."

² *Witz v. Dale* (Ind.), 27 N. E. Rep. 498. In *State v. Board*, 66 Ind. 216, the rule and the reason sustaining it were thus stated: "It is not necessary to move for a new trial, because the facts agreed to would necessarily be the same on a second trial as they were upon the first, and nothing would thereby be gained. *Fisher v. Purdue*, 48 Ind. 323."

³ *The Warrick, etc., Co. v. Houg-*

land, 90 Ind. 115, 117. "In such a case," said the court in the case cited, "there must be an exception to the decision of the court upon the agreed statement of facts in order to reserve any question for this court." The cases of *Fisher v. Purdue*, 48 Ind. 323, and *Lofton v. Moore*, 83 Ind. 112, were cited in support of the proposition stated.

⁴ *Day v. Day*, 100 Ind. 460, 461; *Keeline v. Council Bluffs*, 62 Iowa, 450.

⁵ *Indianapolis, etc., Co. v. Kinney*, 8 Ind. 402; *Hannum v. State*, 38 Ind. 32; *Warrick, etc., Co. v. Hougland*, 90 Ind. 115, 117; *Day v. Day*, 100 Ind. 460, 461. It is to be said of *Hannum v. State*, *supra*, that the court and counsel seem to have erroneously treated the case as an agreed case under the statute. It certainly was not such a case.

has the burden must, therefore, show clearly and fully such facts as entitle him to relief, or he will fail. The facts must appear in the agreed statement required by the statute for they can not be properly exhibited in any other mode.

§ 227. **The Affidavit**—The importance of the affidavit is such as to make it necessary that it should in all material particulars conform to the statute. It would defeat a principal purpose of the statute¹ to permit cases to be submitted without an affidavit fully and clearly stating the facts which the law says the affidavit shall contain. It would also contravene a sound rule of public policy² to permit an agreed case to be filed without the affidavit prescribed, so that there is ample reason for holding the language of the statute to be mandatory. The affidavit must, as it has been held—and held upon substantial reasons—be made by one of the parties.³ While it is generally true that

¹ The affidavit is essential to jurisdiction. *Ante*, § 223.

² In the case of the Newark, etc., Co. v. Perry Co., 30 Ohio St. 120, the court said, in speaking of the statute providing for agreed cases, that, "It is obvious from a reading of these provisions, that it was intended to provide for the submission of a real case between the parties in which judgment settling the controversy could be rendered, and which would be a bar to a future action, for the same subject-matter and afford the ordinary relief obtained by a final judgment. It was not intended to provide for the submission of questions of law, for the opinion of the court, merely without a case in which a judgment might be rendered in accordance with its opinion legally determining the rights of the parties. It does not authorize the submission of questions in cases that are merely anticipated, nor of cases where the facts are disputed. Nor was such submission intended to be merely advisory as to the rights of the parties. It is rather a substitute for an action, and its effect upon the rights

of the parties is the same as that of an action. It is a short and convenient mode for the final adjudication of the case submitted."

³ In denying the right of an attorney to make the affidavit the Court of Appeals of New York in *Bloomfield v. Ketcham*, 5 N. Y. Civil Proc. Rep. 407, (S. C. 95 N. Y. 657) said: "To avoid collusive or fictitious submissions the code provides (§ 1279) that to entitle parties to submit a controversy, the case must be accompanied with the affidavit of one of the parties to the effect that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties. An attempt has been made in the present case to comply with that provision, but the affidavit, instead of being made by one of the parties, is made by an attorney in fact of the parties, who swears that the submission is made in good faith and that the controversy is real, to the best of his knowledge, information and belief. There is no authority in the code for making such an affidavit by an attorney, and as the facts required

an attorney may make an affidavit in cases where one is required, there are, nevertheless, cases where it must be made by a party, as, for instance, where the facts are peculiarly within the knowledge of the parties, and it is necessary that the sworn statement should come from one who can speak from his own knowledge. This is especially true in agreed cases where intention and positive knowledge are important factors. But it is evident that the general rule stated is not without exceptions. In cases of corporations, as for instance the State,¹ the rule can not be given effect, and there are doubtless other exceptions to the rule.

§ 228. **Requisites of the Statement of Facts**—The statement of facts must be so full and definite that the court can declare the law of the case, and by the appropriate judgment or decree adjudicate and settle the controversy between the parties. The inferential and ultimate facts, and not mere evidence of the facts, must be stated.² The court will not assume to make any other than necessary and legal inferences from the facts.³ Matters of law should not be stated,⁴ but the facts must so appear as that nothing remains for the court but to decide the questions of law arising on the facts,⁵ since the court will not determine any question of fact nor give heed to mere matters of evidence. Not only must the facts be so stated as to enable the court to decide the questions of law, but they must be such facts as constitute a case upon which a final judgment or decree can be rendered.⁶ The facts, as stated, must show a present and act-

to be stated are peculiarly within the knowledge of the parties, we think the affidavit should be made by one of them, and that the affidavit of an attorney is not a compliance with the statute, where there is a material person a party to the proceeding, by whom it may be made."

¹ *State v. Coghlen*, 86 Ind. 404.

² *Powers v. Provident Institution*, 122 Mass. 443; *Mayhew v. Dunham*, 138 Mass. 584.

³ *Fearing v. Irwin*, 55 N. Y. 486;

Union National Bank v. Kupper, 63 N. Y. 617; *Clark v. Wise*, 46 N. Y. 612.

⁴ *Ford v. City of Cameron*, 19 Mo. App. 467.

⁵ *Smith v. Cudworth*, 24 Pick. 196; *Clark v. Wise*, 46 N. Y. 612; *Neilson v. Commercial Mutual Ins. Co.*, 3 Duer, 455. See *Wood v. Squires*, 60 N. Y. 191; *Dickinson v. Dickey*, 76 N. Y. 602.

⁶ Speaking of the provision of the code respecting agreed cases, the court said, in *Williams v. City of Rochester*,

ual controversy within the jurisdiction of the court, for the court can give no decision upon questions agreed upon and submitted where it does not properly appear that there is an existing and actual dispute which it requires a judicial decision to settle.¹

§ 229. **Office of the Statement of Facts**—The statement of facts, when properly prepared, submits an entire controversy to the court as fully as does a special verdict.² Its office is to state all the ultimate facts. As some of the adjudged cases say, "it stands as a substitute for a special verdict," and is governed by substantially the same leading rules as those framed for the government of special verdicts returned by a jury in a civil action. This is obviously true, for the statement of facts in an agreed case is essentially the same thing as a case stated at common law.³ It is, therefore, proper to look for guidance and

2 LANS. 169, that: "Its object is to enable parties, without resort to legal process or formal pleadings, to submit to the court for its adjudication, some alleged cause of action or claim for relief. The submission must be for an adjudication. A case must be presented on which a judgment may be rendered in favor of one and against the other of the parties to the submission." To the same effect are *Cunard Steamship Co. v. Voorhis*, 104 N. Y. 525, and *Day v. Day*, 100 Ind. 460, 462.

¹ In the case of *Hobart College v. Fitzhugh*, 27 N. Y. 130, questions were agreed upon and submitted, and it was held that there was no case before the court. In the course of the opinion it was said: "The difficulty is that there was no controversy between the parties that might then be the subject of a civil action in which a judgment could be rendered. No judgment could be rendered other than a judgment for the defendant, dismissing the controversy or action, or rather case." It is true of an agreed case, as of all other suits and actions, that there can be no appeal to a judicial tribunal un-

less the judgment of a court is required to enforce the existing legal or equitable rights of one of the parties, and thus put an end to the controversy by a final adjudication.

² *Heni v. Grand, etc., Co.*, 59 Mo. 581; *Gage v. Gates*, 62 Mo. 412; *Shaw v. Padley*, 64 Mo. 519; *Hughes v. Moore*, 17 Mo. App. 148; *Moore v. Henry*, 18 Mo. App. 35; *Ford v. Cameron*, 19 Mo. App. 467; *Field v. Chicago, etc., Co.*, 21 Mo. App. 600.

³ Mr. Tidd speaks of what is often called a case stated as "a special case." He says: "In a special case as in a special verdict, the facts proved at the trial ought to be stated and not merely the evidence of facts, and it is drawn and settled in like manner by counsel." He also says: "A special case was stated for the opinion of the court and it appearing that the greater part of the statement was fictitious, the court fined the attorney for his misconduct." 2 *Tidd's Practice* (4th Am. ed.), top p. 898. In another work it is said: "A case stated is a substitute for a general verdict, and the same general rules apply to both." 1 *Troubat & Haley's Prac-*

information to the common law rules upon the subject of a case stated.¹

§ 230. **Effect of the Statement**—The agreed statement excludes all other questions except such as arise upon the facts exhibited. If the parties agree to a statement which excludes the benefit of a defense the defense is lost. Thus, if parties agree as to the facts they can not be heard to aver that their adversaries were estopped to make the facts available.² But this rule can not apply where the facts themselves plainly establish an estoppel and are so stated as to make it appear that the estoppel is relied upon or is not waived. As the chief object of an agreed statement of facts is to obtain a final judgment settling the controversy it must necessarily follow that the judgment duly pronounced is a conclusive adjudication. It further follows that the appellate tribunal may so frame its judgment as to justly declare the law upon the agreed facts.³

§ 231. **Mistake in the statement of Facts**—It has been held that a mistake in the statement of facts filed in an agreed case may be corrected upon proper application.⁴ The doctrine declared

tice, 409, § 733. See, generally, *Whitesides v. Russell*, 8 Watts & S. 44; *Berks County v. Jones*, 21 Pa. St. 413; *Da Costa v. Guien*, 7 Sergt. & R. 462; *Holmes v. Wallace*, 46 Pa. St. 266; *Lippincott v. Ledyard*, 8 Phila. 18; *Parker v. Urie*, 21 Pa. St. 305; *Diehl v. Ihrie*, 3 Whart. (Pa.) 143; *Berks County v. Pile*, 18 Pa. St. 493; *Philadelphia, etc., Co. v. Waterman*, 54 Pa. St. 337; *James v. McWilliams*, 6 Munf. (Va.) 501.

¹ We here confine our remarks solely to that part of an agreed case commonly called the statement of the case, or the statement of the facts, inasmuch as the other elements of an agreed case are principally statutory.

² *Boston v. Tileston*, 11 Mass. 467; *Wheelock v. Henshaw*, 19 Pick. 341.

³ *Farmers Bank v. Sprigg*, 11 Md. 389; *Simpers v. Simpser*, 15 Md. 160;

Phelps v. Phelps, 17 Md. 120; *People's Bank v. Shyrock*, 48 Md. 427; *Howard v. Carpenter*, 22 Md. 249, 258, 259; *McAfee v. Reynolds* (Ind.), 28 N. E. Rep. 423. The purpose of the parties in agreeing to the facts is to leave only questions of law for decision, and the effect of their agreement is to forever settle all controversy as to the facts, while the effect of the judgment of the court is to end all dispute as to the law. It is evident, therefore, that it is the duty of the appellate tribunal to direct the proper specific judgment, where such directions are appropriate, leaving nothing for the trial court to do but give effect to the mandate.

⁴ *State v. Coghlen*, 86 Ind. 404, 413. In support of its ruling the court cited. *Jenkins v. Long*, 23 Ind. 460; *Miller v. Royce*, 60 Ind. 189; *Reiley v. Burton*, 71 Ind. 118; *Mitchell v. Lincoln*, 78

in the case referred to is one to be cautiously applied, and requires limitation rather than expansion. Where parties deliberately and solemnly agree upon facts, embody them in a statement for the purpose of obtaining the judgment of a court upon them, and verify the statement by oath, an unusually clear and strong showing of a mistake in the statement is necessary to authorize the court to attempt to rectify it. Not only should it be shown that a material mistake was made, but it should also be shown that the party was not in fault. Any other rule would open the door to great abuses and enable parties to impose upon the courts.¹

§ 232. **The Record**—The code evidently contemplates that the record shall be a brief one, and that no bill of exceptions shall be required to exhibit the statement of facts. It declares that the "statement of the case, the submission and the judgment shall constitute the record."² The decisions indicate very clearly that no bill of exceptions is required to exhibit the facts.³ The court long since engrafted upon the statute the requirement that the finding shall be excepted to, but how this exception shall be shown does not seem to have been directly decided. We venture to say that, in view of the evident purpose of the statute to make the record brief and to place the decision entirely and solely upon the facts embodied in the statement, there is no necessity for a bill of exceptions, but that it is sufficient to take the exception and cause it to be entered of record.⁴ The express provision of the statute (under the familiar rule, that the

Ind. 531. But the cases cited by the court are not true types of the case they are adduced to support. The principal case must, as we think, be regarded as an unusual one, and the rule asserted one that can not be successfully invoked except in the strongest and clearest cases of excusable and unavoidable mistake.

¹ It is, indeed, doubtful whether the statement can be corrected in any case except where the error in it was brought about by fraud or caused by an accident.

² R. S., § 554.

³ *Martin v. Martin*, 74 Ind. 207, 208; *Citizens Insurance Co. v. Harris*, 108 Ind. 392.

⁴ We can not avoid the conclusion that in holding that an exception is required the court has added a substantive provision to the statute. We are, at all events, convinced that the court ought not to go further and add the provision that a formal bill of exceptions is necessary to make the exception available.

expression of one thing implies the exclusion of others) implies that no other things than those enumerated shall be required. There is no more necessity for requiring a bill of exceptions in an agreed case than there is for holding that a bill of exceptions is necessary to exhibit an exception to a ruling upon a demurrer to a complaint, answer or reply. The exception is, as we think, part of the record by entry in the order book without a bill of exceptions. There would certainly be no useful purpose subserved by cumbering the record with a bill of exceptions. A brief note of an exception will accomplish all that a formal bill of exceptions can properly do, and the entry of such an exception is as essentially a part of the record as is the noting of an exception to a ruling upon a demurrer addressed to a pleading.¹

¹ The Ohio code is the same as ours, required. In the course of the opinion and it was held by the Supreme Court it was said: "There was nothing to put of that State in *Brown v. Mott*, 22 Ohio in the bill of exceptions. The record St. 149, 159, that neither a motion for was complete without it." a new trial nor a bill of exceptions is

CHAPTER XII.

RESERVED QUESTIONS OF LAW.

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| § 233. Object of the statute. | § 239. Exceptions to the rulings upon which questions are reserved necessary. |
| 234. The case must be made up under the statute. | 240. Bill of exceptions required. |
| 235. Notifying the court of the intention to reserve questions. | 241. Office of the bill of exceptions. |
| 236. Only questions of law can be reserved. | 242. A motion for new trial necessary. |
| 237. On what rulings questions may be reserved. | 243. Appeal before final judgment not authorized. |
| 238. Questions of fact must be excluded by the record. | 244. Supersedeas. |

§ 233. **Object of the Statute**—The leading object of the statute providing that questions of law may be reserved is to permit questions to be presented without embodying the entire evidence in the record.¹ The statute is remedial in its character, and, upon principle, should be liberally construed, but the earlier cases seem to have proceeded upon an essentially different theory.² The provisions of the statute, justly interpreted and fairly enforced, are well adapted to simplify procedure, prevent the cumbering of the record with unnecessary matter and to clearly present the questions of law to the appellate tribunal. It is seldom that the entire evidence is required to present questions

¹ R. S., 1881, § 630.

² *Starry v. Winning*, 7 Ind. 311; *Doe v. Herr*, 8 Ind. 24; *State v. Swarts*, 9 Ind. 221; *Zehnor v. Beard*, 8 Ind. 96. The evidence in full is, in general, only necessary where the question is one of fact. The principle is elementary that where there is some material evidence tending to support the theory of a party he is entitled to the law applicable to that theory. *State v. Harrison*, 5 Jones (N. C.), 115; *Breese v. State*, 12 Ohio

St. 146; *First National Bank v. Hurford*, 29 Iowa, 579; *Jeffersonville, etc., Co. v. Swift*, 26 Ind. 459. It is also fundamental that an appellate tribunal will not weigh evidence. There is, therefore, rarely any reason for bringing all the evidence into the record. Many of the courts of last resort will not permit it to be done except in unusual cases, but, unfortunately, our court has taken a different view of the subject.

of law, and in most cases succinct statements of fact present such questions in a clearer and stronger light than it is possible to do by bringing all the evidence into the record. The later decisions have recognized the utility and value of the statute providing for reserving questions of law and have strongly intimated a purpose to give it a liberal construction.¹

§ 234. The Case must be made up under the Statute—It is necessary that parties who desire to avail themselves of the provisions of the statute should conform to its requirements in essential particulars. A party can not appeal under some other statute, and, upon finding his appeal or record defective, assume that it is a valid appeal and a sufficient record under the statute providing for reserving questions of law.² To permit this to be done would violate the fundamental principle of procedure which requires parties to proceed upon a definite theory. An appeal taken in one distinct mode can not be prosecuted under a statutory provision which prescribes another and different mode.

§ 235. Notifying the Court of the intention to Reserve Questions—A party who desires to reserve questions of law under the statute is required to give notice to the court of his intention. This notice is indispensable.³ It can hardly be said that the law requires the notice to be in writing, but it is certainly safer to put it in writing, and it is in accordance with good practice to do so. Some of the courts, under statutes somewhat similar to ours, indicate that it is sufficient to give the notice in time to enable the court to cause the record to be properly prepared.⁴

¹ *Mercer v. Corbin*, 117 Ind. 450; *Jones v. Foley*, 121 Ind. 180; *Shugart v. Miles*, 125 Ind. 445, 449; *Shewalter v. Bergman*, 123 Ind. 155; *McCoy v. State*, 121 Ind. 160.

² *Shugart v. Miles*, 125 Ind. 445, 449; *Jones v. Foley*, 121 Ind. 180; *McCoy v. State*, 121 Ind. 160; *New Albany, etc., Co. v. Callow*, 8 Ind. 471; *Mattinger v. Lake Shore, etc., Co.*, 117 Ind. 136.

³ *Shugart v. Miles*, 125 Ind. 445.

⁴ It seems quite clear that it is sufficient if the notice is given in such a mode and at such a time as to enable the court to make the necessary orders for the preparation of the record and to allow it reasonable time to prepare the record so as to accurately and fully present the facts, the rulings and the questions of law. In *Shugart v. Miles*, 125 Ind. 445, it is held that a notice

The notice must be shown by the record. It is not necessary at the time the ruling is made or exception taken that the objecting party should notify the court that he intends to reserve questions of law under the statute.¹ The notice is, it is manifest from the language of the statute, intended to secure a proper record, not to affect the judgment or decision of the court. The objection and exception challenges and directs attention to the ruling, but the notice directs attention to the mode of presenting the questions on appeal and informs the court, if properly framed, of the intention to reserve questions of law. The notice of the intention to reserve questions for consideration on appeal gives character to the case, and hence it should be so full and clear as to enable the court to make such a record, or to direct the making of such a record, as shall correctly exhibit its ruling and enable the "appellate tribunal to apprehend the particular point involved." It is not necessary that the notice should go into particulars, but it is necessary that it should inform the court of the intention to reserve questions of law, and, with reasonable certainty, indicate the rulings upon which questions are reserved. If it is so definite and certain as to fairly inform the court of the intention to reserve questions of law and fairly and reasonably designate the rulings upon which questions are intended to be reserved, it will accomplish the purpose the statute intended it should accomplish, inasmuch as it will enable the court to take the necessary steps to mold the record as the law requires.

given after the return of the verdict and at the time of filing the motion for a new trial is sufficient.

¹ *Shugart v. Miles*, *supra*. The case of *Drinkout v. Eagle Machine Works*, 90 Ind. 423, is limited in the case cited. See p. 452. It was not decided in *Dillon v. Bell*, 9 Ind. 320, that the notice must be given at the time the ruling is made. What was there said is this: "To make up the record properly under the latter provision, counsel should notify the court that it is the intention to take the question involved to the Supreme Court, to the end that the court

may mold the record as the statute requires." Nor does *Nay v. Byers*, 13 Ind. 412, decide that notice must be given when the ruling is made. It would render the statute practically nugatory to require notice to be given where the ruling is made, and no good purpose would be subserved by such a requirement. A party can not know that he will appeal until after verdict, and not always then, so that it would be contrary to principle to require him to notify the court that he intends to reserve questions under the special statute.

§ 236. **Only questions of law can be Reserved**—It is settled by the decisions—and settled in accordance with principle—that only questions of law can be reserved.¹ This is obviously the true doctrine since, as a general rule, questions of fact are not decided on appeal. It is the correct doctrine for the further reason that a question of fact can not be considered without the whole evidence, and a leading purpose of the provision respecting reserved questions is to dispense with the necessity of bringing up all the evidence. It is safe to say that where all the evidence is assumed to be incorporated in the record the clear inference is that the case is not one prepared in accordance with the statutory provision under immediate discussion. As appellate tribunals decide only such questions as have been decided by the trial court, it is necessary that the questions reserved should affirmatively appear to have been appropriately presented to the trial court for decision and by that court decided.² It must further appear that the questions of law decided by the trial court are material,³ and that they are not mere abstractions.⁴ It is evident, therefore, that there must be enough in the bill of exceptions which assumes to present the questions reserved, to affirmatively show their materiality and to show, also, that there was a real case pending at the time the rulings were made. If it appears that there were ordinary adversary proceedings the presumption, in the absence of countervailing facts, is, that there was a real and not a feigned controversy.⁵

§ 237. **On what Rulings questions may be reserved**—The statute provides for reserving “any question of law decided by the court during the progress of the cause,” and provides, also, for reserving questions upon rulings on demurrers to pleadings.⁶ The provision concerning questions arising on demurrer is of no

¹ *Fouty v. Morrison*, 73 Ind. 333; *Shugart v. Miles*, 125 Ind. 445, 449; *Commonwealth v. McDowell*, 86 Pa. St. 377. Mixed questions of law and fact can not be reserved. *Woodard v. Baker*, 116 Ind. 152.

² *Short v. Stutsman*, 81 Ind. 115.

³ *Pierse v. West*, 29 Ind. 266; *Miller v. Seligman*, 58 Ind. 460.

⁴ *Commonwealth v. McDowell*, 86 Pa. St. 377; *Woodard v. Baker*, 116 Ind. 152; *Irwin v. Wickersham*, 25 Pa. St. 316.

⁵ *Witz v. Dale* (Ind.), 27 N. E. Rep. 498.

⁶ R. S., § 640.

practical utility or importance, for the ordinary mode of presenting questions upon rulings on demurrer is quite as effective as that by reserving questions, and is simpler and less likely to result in error or confusion.¹ But questions upon pleadings may well and effectively be reserved where they do not arise on demurrer, as, for instance, where they arise upon a motion to make more specific, to compel a party to answer interrogatories, to strike out interrogatories, or the like. Questions arising on several rulings made in the progress of a cause may be reserved, for the party is not confined to a single ruling. Any question of law arising on a ruling made during the progress of the case may be reserved. Questions upon rulings on the evidence,² questions on instructions,³ and, indeed, all material questions of law actually arising upon rulings made during the progress of the cause, may be reserved for consideration on appeal.

§ 238. Questions of fact must be excluded by the Record—The only questions which can be reserved are questions of law.⁴ As only questions of law can be presented the facts must be so stated as to show the questions and to exclude any question of fact. The question of law must appear to have been presented to and decided by the trial court.⁵ The facts upon which the questions of law arise must appear in such a form, although not at full length or in detail, as will enable the appellate tribunal to apprehend the nature of the questions and see that they are not mere abstractions,⁶ but the facts sufficiently appear where the court makes a statement clearly showing their character and

¹ In *Bentley v. Dunkle*, 57 Ind. 374, one of the questions reserved was upon a ruling on a demurrer to the complaint, and the court, adjudging the complaint bad, reversed the judgment but did not deem it necessary to decide the other questions presented.

² *Bruce v. Tyler*, 127 Ind. 468. In the case cited a question was reserved upon a ruling admitting evidence, and the judgment was reversed.

³ In *Bissell v. Wert*, 35 Ind. 54, 62, the

question reserved arose on rulings upon the instructions.

⁴ *Fouty v. Morrison*, 73 Ind. 333; *Shugart v. Miles*, 125 Ind. 445, 449. The question reserved must, as some of the cases say, "be one of pure law." Blended questions of law and fact can not be reserved. *Commonwealth v. McDowell*, 86 Pa. St. 377.

⁵ *Short v. Stutsman*, 81 Ind. 115.

⁶ *Irwin v. Wickersham*, 25 Pa. St. 316.

bearing. It is the facts and not the evidence that the court should embrace in its statement.

§ 239. Exceptions to the rulings upon which Questions are Reserved, necessary—In accordance with the general principle of practice it is held, without diversity of opinion, that an exception to a ruling is essential to make it available in a case where questions of law are reserved. The absence of a proper and opportune exception is fatal. The exception must, of course, be taken at the time the ruling challenged is made, for, so far as concerns exceptions, the rule is the same in cases where questions of law are reserved as in other cases.¹

§ 240. Bill of Exceptions Required—In all cases except those in which the questions arise upon a ruling on demurrer, a bill of exceptions is required. The provisions of the code upon the subject of reserving questions of law are evidently borrowed from the common law practice of presenting special questions of law by a bill of exceptions, and at common law the bill must make the case. In jurisdictions where statutes somewhat similar to ours are in force it is held that the bill of exceptions must contain the whole case, including the motion for a new trial and similar motions.² There is reason for the conclusion that where a bill is necessary the whole case must be exhibited by the bill. The statute seems to contemplate this, for it provides, that the party "shall notify the court that he intends to take the question of law to the Supreme Court upon the bill of exceptions only, and the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record only and the state-

¹ The record must appropriately show of the ruling. *Kleinschmidt v. Mc-* that the exception was taken in due *Andrews*, 117 U. S. 282. See *Ex-* form and proper reason. *Dickson v. ceptions, post.* The "case made" *Rose*, 87 Ind. 103; *Engard v. Frazier*, 7 under the Kansas code (§ 547) is sim- *Ind.* 154; *Phelps v. Mayer*, 15 How. (U. ilar to a reserved case under our statute, *S.*) 160; *Turner v. Yates*, 16 How. (U. and it is held that exceptions must be *S.*) 14. For an able and elaborate re- taken as in other cases. *Hogden v.* view of the authorities see, *Danks v. Commissioners*, 10 Kan. 637. *Rodeheaver*, 26 W. Va. 274. But an ² *Parker v. Remington, etc., Co.*, 24 *exception can not be taken in advance Kan.* 31.

ment of the court as will enable the Supreme Court to apprehend the particular question involved."¹ The restriction as to the notice,—requiring that it shall inform the court that the party intends to take the case to the appellate tribunal on "the bill of exceptions only,"²—and the provision that the court shall cause a bill of exceptions "to be so made that it will distinctly and briefly embrace" part of the record, clearly imply that the whole case must be contained in the bill of exceptions. We can not escape the conclusion that, in view of the object of the statute, the source from which its essential provisions were obtained, and the language employed by its framers, the bill of exceptions must, where a bill is required, contain the whole case.³

§ 241. Office of the Bill of Exceptions.—The office of the bill of exceptions is, as we believe, to present the whole case on appeal. This is the rule under statutes somewhat different from ours, yet in their object and leading characteristics very similar. The object of the statute is, as we conceive, to secure a bill complete in itself,⁴ and so framed as to clearly and fully present all the questions of law reserved. It must embrace all that is necessary to enable the appellate tribunal "to apprehend the particular questions involved"⁵ since this is what the law commands the trial court to make it do. The requisite facts

¹ R. S. 1881, § 630.

² The adjective "only" is significant in view of the words with which it is associated.

³ There is nothing in the case of *Reid v. Houston*, 49 Ind. 181, opposing this conclusion. That case does not decide that reserved questions may be presented without a bill of exceptions, nor does it decide that where a bill is required, a case may be shown partly by the bill and partly in some other mode.

⁴ In speaking of a "case made" the Supreme Court of Kansas said in the *Missouri, etc., Co. v. Palmer*, 19 Kan. 471, "It is to contain matters of record as well as proceedings not entered on

the record. To comply with the statute, to present errors for review, it must embody a statement of so much of the issue, proceedings, evidence and other matters in the action as may be necessary to bring to our notice from an examination of the paper settled and authenticated as a case made, the errors complained of. Again, one object, we know of a case made, an object not always appreciated by counsel, is to reduce the size of the record." In another case, it was said that the "case must be complete in itself." See, *Parker v. Remington, etc., Co.*, 24 Kan. 31; *Lownsbury v. Rakestraw*, 14 Kan. 151.
⁵ *Miller v. Seligman*, 58 Ind. 460, 463.

must be briefly stated. The evidence in full need not be stated unless the case is one where all the evidence is necessary in order to present the questions of law.¹ Where, however, all the evidence is necessary it is better and safer to prepare the case for appeal in the ordinary mode. The questions reserved must be so presented as to make it affirmatively appear that the rulings were injurious to the complaining party,² and to do this it is necessary to exclude the presumption which prevails in favor of the trial court.³ While it is true that the statute in terms requires a statement of the court and not the evidence, it is, nevertheless, true, that under the construction given the statute there are cases where part, at least, of the evidence may be exhibited instead of the facts.⁴ But, as we suppose, where specific statements of the court are embodied in the bill and they are so full, complete and definite as to accurately and clearly exhibit the questions involved, the absence of the evidence is not material. If it were not for the decisions we should, indeed, be inclined to the opinion that it is not proper to set forth the evidence inasmuch as the statute makes no provision

¹ *Conner v. Town of Marion*, 112 Ind. 517. We can not avoid the conclusion that the framers of the statute intended that the facts should be embodied in the statement of the court and not the evidence, but the cases in our reports indicate a different doctrine.

² *Shugart v. Miles*, 125 Ind. 445, 450; *Downs v. Opp*, 82 Ind. 166; *Mitchell v. Dibble*, 14 Ind. 526.

³ *Hedrick v. Hedrick*, 74 Ind. 78; *Indiana, etc., Co. v. Adams*, 112 Ind. 302; *Conner v. Town of Marion*, 112 Ind. 517; *Perkins v. Hayward*, 124 Ind. 445; *Starry v. Winning*, 7 Ind. 311. If the error is exhibited and its harmful character shown, the question is well reserved. In *Lane v. Miller*, 17 Ind. 58, the court, in speaking of the statute under consideration, said: "That section was intended to enable parties to avail themselves of an error by stating the case so as to present the error and make it apparent without bringing up the

whole record. Where the error is apparent without such special statement or without the evidence, there is no necessity for either."

⁴ In the case of *The Indiana, etc., Co. v. Adams*, 112 Ind. 302, 307, it was said: "A mere recital by the court of its conclusions touching the point in controversy is not sufficient. Construing §§ 627, 630, R. S. 1881, in *pari materia*, it is necessary, when an appeal is taken under the latter section upon a bill of exceptions only, and the question reserved is upon the exclusion of evidence, that the bill of exceptions should show enough of the case and the evidence touching the point in controversy to show the relevancy of the evidence rejected. *Downs v. Opp*, 82 Ind. 166. In the absence of anything beyond the recitals in the bill of exceptions, we must presume the evidence rejected was irrelevant."

for setting forth the evidence, but expressly requires a statement of the court. The express mention of the one thing implies the exclusion of the other. We are, at all events, satisfied that where the proper statements of the court are given, the evidence is not required.

§ 242. **A motion for New Trial necessary**—The earlier cases were in conflict upon the question whether a motion for a new trial was or was not required, but it has been finally settled that such a motion is necessary.¹ This rule is in accordance with the wide reaching general principle that a motion for a new trial is essential in order to give the trial court an opportunity to review its rulings and, if need be, to correct errors into which it may have fallen. The rule is defensible upon the further ground that a statutory provision is not to be isolated and detached from other provisions, but is to be considered in connection with them. The doctrine that all the statutory provisions upon the same general subject should receive consideration, if adhered to, tends to prevent discord and secure symmetry and harmony, so that the rule as finally settled has much to commend it.

§ 243. **Appeal before final judgment not authorized**—The statute does not confer, nor assume to confer, a right of appeal; it simply provides the mode in which questions of law may be reserved. The fact that questions of law are reserved exerts an influence upon the mode of presenting the questions and of preparing the record, but leaves the right to appeal to be determined by other rules of law. The general rule that an appeal will not lie from intermediate rulings applies to cases where questions of law are reserved, and an attempt to appeal before final judgment will be fruitless.²

§ 244. **Supersedeas**—The statute, in terms, makes a case where questions of law are reserved a peculiar one in regard to the

¹ *State v. Swarts*, 9 Ind. 221; *Kent v. Ind.* 517; *Love v. Carpenter*, 30 Ind. 284; *Shugart v. Miles*, 125 Ind. 445.

Lawson, 12 Ind. 675; *Garver v. Dauspeck*, 22 Ind. 238; *Starnes v. State*, 61 Ind. 360; *Rousseau v. Corey*, 62 Ind. 120 Ind. 121.

² *Taylor v. Board of Commissioners*, 150; *Conner v. Town of Marion*, 112

stay of proceedings upon the judgment. Its language is explicit and it seems clear that a stay of proceedings can only be ordered by the appellate tribunal or some one of its members. We have been unable to find any decision giving a construction to the statute, but its language seems so clear and decisive that there is no room for construction.¹

¹ The language of the statute is this: unless so ordered by the Supreme Court "The appeal in such a case shall not or some judge thereof." R. S. 1881, § stay proceedings upon the judgment 631.

CHAPTER XIII.

MODES OF APPEAL IN CIVIL ACTIONS.

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| § 245. The different modes of appeal. | § 250. Appeal after term. |
| 246. Appeals in term. | 251. Classes of appeals after term. |
| 247. Requisites of an appeal in term. | 252. Civil actions—Definition. |
| 248. A bond essential to an appeal in term. | 253. What cases are appealable as civil actions. |
| 249. Ineffectual attempt to appeal in term. | |

§ 245. **The different modes of Appeal**—While the remedy in all civil actions is by appeal there are, nevertheless, different modes of procedure. All civil actions are appealable as such under the general rules prescribed for appeals, but the procedure is not the same in all cases. A party may elect which of the statutory methods he will pursue, and an appeal perfected within the time prescribed and in the manner provided will be effective. But it is to be borne in mind that the general rules governing appeals in civil actions apply to appeals from final judgments and not to appeals from interlocutory orders. As we have already suggested, express and special provisions govern appeals from interlocutory orders, and from such an order no appeal can be effectual unless taken within the time and in the mode prescribed. This rule is not contravened by the doctrine that errors respecting interlocutory orders may, as we have elsewhere shown, be made available on a general appeal bringing up the whole case. To prevent misconception it may be well enough to say that there is an essential difference between taking and perfecting an appeal under a special statute and making errors available in the appellate tribunal in cases where a general appeal is taken and perfected as the law requires.

§ 246. **Appeal in Term**—The first of the modes of appealing in civil actions may be appropriately designated as “An Appeal

in Term."¹ A marked feature of an appeal in term is that process need not be issued against, or served upon, the party against whom the appeal is prosecuted.² The party who appeals must do what is required to be done during term or within the time fixed in term by the trial court, otherwise his appeal will not be effective as a term time appeal; whether a different mode of procedure may be adopted is not here the immediate question, since we are directly concerned with an appeal in term.³ To perfect an appeal in term these steps must be taken: 1. An appeal must be prayed during the term at which the judgment was rendered, and it must be granted during that term. 2. The penalty of the bond must be fixed and the surety named during the term at which the judgment was rendered. 3. The bond must be filed during that term and approved by the court, or the court must, during that term, fix a time within which the bond shall be filed, and it must be filed and approved by the court within the time designated. 4. The transcript must be filed in the office of the clerk of the Supreme Court within sixty days after the filing of the bond.

§ 247. **Requisites of an Appeal in Term**—The first requirement of the statute governing appeals in term needs no discussion, nor does the second. The third requirement seems to require some consideration and for clearness and convenience it may be thus divided: The bond must be filed within the prescribed time; it must be approved by the court.⁴ In our judgment the bond must be filed as required by the statute or there is no ef-

¹ R. S., § 638.

² *Conaway v. Ascherman*, 94 Ind. 187, 188.

³ We are not now considering the effect of the appeal in term, nor are we dealing with the question whether the failure to perfect an appeal as in term will preclude an appeal in a different mode.

⁴ These propositions, we may say by way of preface, we discuss with reference to the question, what is essential to an appeal in term? and not with reference to the effect of a bond not given

within the time prescribed or to the question as to the effect of the appeal considered with respect to staying proceedings. We are considering it without any reference to consent or waiver, express or implied. We are, in short, attempting to prove what the law is where the appellee appropriately and opportunely insists that the appeal is not effective as an appeal in term upon the ground that the requirements of the statute have not been complied with by the party asserting a right to prosecute a term time appeal.

fective appeal in term.¹ The statute declares that a bond must be filed within the time designated, and this requirement is as

¹ We are aware that this conclusion is opposed to the views of Judge Buskirk, who says, "Where, therefore, a party takes an appeal in term, not intending it to operate as a supersedeas, he should simply pray an appeal and file his transcript in the clerk's office of the Supreme Court, and the appeal will be operative, but will not stay execution or other proceedings on the judgment." Buskirk's Prac. 62. The learned author cites the cases of *Jones v. Droneberger*, 23 Ind. 74; *Sturgis v. Rogers*, 26 Ind. 1; *Burt v. Hoettinger*, 28 Ind. 214; *Ham v. Greve*, 41 Ind. 531, but these cases do not support him. In the case last cited he said, in writing the opinion of the court, that, "The fixing of the penalty of the bond and the filing of the same within the time directed by the court are as essential to the effectiveness of the appeal in term so as to stay proceedings, as is the filing of the bond within thirty days from the judgment to an appeal from a justice of the peace. It would hardly be pretended that if a defendant in a judgment before a justice of the peace should file a bond after the expiration of thirty days, the surety in the bond would be held liable for such judgment." It seems to us that the reasoning proves that where no bond is filed within the time required by law there is no effective appeal in term. Whether an appeal may be taken upon notice is not the question, but the question is, can the court hold, when objection is made, that there may be an appeal in term although no bond is filed as the law requires? We think that the fundamental error is in assuming that some, only, of the steps made essential by the statute are required to be taken within the time limited. We believe, on the contrary, that all that the law makes essential to the

effectiveness of an appeal assumed to be taken in a particular mode must be done as the law prescribes. We have, on preceding pages, shown that the appeal must be fully perfected within the time by doing what the law requires. *Ante*, § 128. In the paragraphs that follow additional authorities will be cited, and additional reasons given for our opinion that the bond must be filed as the law requires or there is no appeal in term. While it is true that a bond is not always essential to an appeal, yet, where it is made essential, there can be no appeal in the mode in which it is required without it, and it is made essential to an appeal in term by the law. *Webber v. Bueger* (Col.), 27 Pac. Rep. 871. There may be an appeal in other modes, but not a term appeal, without a bond. Where no bond is filed there is no appeal in term, and the appeal must be upon notice. This conclusion is fully supported by the decision in *Holloran v. The Midland Railroad Co.*, 28 N. E. Rep. 549, where it was said, "In this case there was not a compliance with section 638, *supra*. There was no time fixed for the filing of a bond and no bond was filed in accordance with the provisions of the statute. All appeals not taken in accordance with section 638, *supra*, require notice to be given." As sustaining this conclusion the court cited *Ruschaupt v. Carpenter*, 63 Ind. 359; *Hays v. Wilstach*, 101 Ind. 100; *Goodwin v. Fox*, 120 U. S. 775, 777. The conclusion asserted in *Holloran v. Midland Railway Co.*, *supra*, is supported by many analogous cases. *Weir v. St. Paul, etc., Co.*, 18 Minn. 155; *McVey v. Heavenridge*, 30 Ind. 100; *Lefel v. Obenchain*, 90 Ind. 50. See, also, cases cited in the paragraphs that follow.

mandatory as any of the others, and, as said by the Supreme Court of the United States, "the court can not dispense with an act required by the law-making power." Our own cases show that where the statute requires that a bond shall be filed in order to perfect an appeal, there is no effective appeal unless the bond is filed as the statute requires. The cases in which this is expressly held are, it is true, based upon the statute which permits appeals from interlocutory orders,¹ but the principle asserted is the same. The Federal courts hold that where a bond is required an appeal is not perfected until one is filed.² Many cases affirm that where the statute requires a bond one must be filed or the appeal will be dismissed.³ Some of the courts hold that where a bond is required and none is filed the appellate court has no jurisdiction,⁴ but we think that under our statute the failure to file a bond may be obviated by giving notice and appealing in the mode prescribed for appealing after term. It is laid down by our own cases that the bond must be approved by the judge,⁵ and the Supreme Court of the United States so lays down the rule, holding that the authority to approve the bond can not be delegated.⁶ So it has been held

¹ *Staley v. Dorset*, 11 Ind. 367; *Keene v. White*, 136 Mass. 23; *Wheeler, Berry v. Berry*, 22 Ind. 275; *Simpson etc., Co. v. Burklingham*, 137 Mass. 581; *Pearson*, 31 Ind. 1. *Putnam v. Boyer*, 140 Mass. 235; *Little v. Jacks*, 68 Cal. 343; *Sutherland v. Putnam (Ariz.)*, 24 Pac. Rep. 320; *Danvers v. Durkin*, 14 Ore. 37, 12 Pac. Rep. 60; *Rozier v. Williams*, 92 Ill. 187; *Halloran v. Texas, etc., Co.*, 40 Texas. 465; *Canfield v. City of Erie*, 21 Mich. 160.

² *The S. S. Osborne*, 105 U. S. 447, 450; *Providence-Washington Ins. Co. v. Wager*, 37 Fed. Rep. 59; *Boyce v. Grundy*, 6 Pet. 777. But a bond may be waived. *Kingsbury v. Buckner*, 134 U. S. 650.

³ We cite a few of the numerous cases. *Bank of America v. Fortier*, 27 La. Ann. 243; *Henshaw v. McDowell*, 99 N. C. 181; *De Lashnutt v. Sellwood*, 10 Ore. 51; *Chicago, etc., Co. v. The President, etc.*, 104 Ill. 91; *Reed v. Creditors*, 37 La. Ann. 907; *Stratton v. Graham*, 68 Cal. 168; *Sharon v. Sharon*, 68 Cal. 326; *Eureka Steam Heating Co. v. Sloteman*, 67 Wis. 118; *Green v. Castello*, 35 Mo. App. 127; *Law v. Nelson*, 14 Col. 409, 24 Pac. Rep. 2.

⁴ *Henderson v. Benson*, 141 Mass. 218; *Stantom v. Ballard*, 133 Mass. 464;

⁵ *McCloskey, etc., Co. v. Indianapolis, etc., Co.*, 87 Ind. 20; *Burk v. Howard*, 15 Ind. 219. There may be a waiver by agreement. *Easter v. Acklemire*, 81 Ind. 163; *Jones v. Droneberger*, 23 Ind. 74.

⁶ *O'Reilly v. Edrington*, 96 U. S. 724; *Haskins v. St. Louis, etc., Co.*, 109 U. S. 106; *National Bank v. Omaha*, 96 U. S. 737. The bond may be approved by the judge out of court. *Hudgins v. Kemp*, 18 How. (U. S.) 530.

elsewhere.¹ It seems clear that if there must be a bond to approve there must be a bond filed within the time limited or there is no appeal in term.²

§ 248. **A Bond Essential to an Appeal in Term**—It is evident that the framers of the statute in providing for an appeal in term intended to designate all the steps that should be taken to perfect such an appeal, not to provide merely some of the steps that should be taken by the appellant. If one of the steps designated is important, so are they all, and the courts have as little power to dispense with one step as with all. What the statute requires must be done, or there is no appeal in term.³ The section of the statute giving an appeal in term⁴ provides for

¹ *Julian v. Rogers*, 87 Mo. 229.

² In the case of *Averill v. Dickerson*, 1 Blackf. 3, the general doctrine we assert was laid down and the court cited the case of *Hardin v. Owings*, 1 Bibb. 214. In stating what must be done in order to effect an appeal in term Judge Buskirk says: "1. An appeal must be prayed for and granted by the court during the term of the court at which the judgment was rendered. 2. The appeal bond must then be filed and approved by the court, or it must be filed within such time as the court may direct of record; but in either event the penalty of the bond must be fixed and the surety approved by the court. 3. If the bond is not filed in term, the court must fix the penalty, approve the surety, and direct in what time the bond must be filed. 4. The bond must be filed within the time directed. 5. The transcript must be filed in the office of the clerk of the Supreme Court within sixty days from the time the bond is filed." Buskirk's Prac. 61. This is a correct statement of what must be done to perfect an appeal in term, and we think the author's statement, quoted on a preceding page, that a bond need not be filed is erroneous. We venture to suggest that he was led

into error by confusing an appeal upon notice with an appeal in term wherein no notice is required. The performance of all the acts required by the statute dispenses with notice, but the court can not rightfully adjudge that performance of a part only of the acts required by law will dispense with notice.

³ The decision in *Burt v. Hoettinger*, 28 Ind. 214, does not oppose this conclusion, for there was no question in that case as to what was necessary to constitute an appeal in term. There was not any such question in *Sturgis v. Rogers*, 26 Ind. 1, and, of course, there could be no decision upon it, nor was there any. In *Jones v. Droneberger*, 23 Ind. 74, the bond was filed within the time fixed by the court, although there is in that case a single sentence declaring that the appeal was good without a bond. The question was not before the court, no authorities are cited and no reasons are given. Evidently the court did not mean to decide a question not before it, and what it said is purely *obiter dicta* and that of unusually little weight.

⁴ R. S., § 638. The provisions of this section require all the acts essential to an appeal in term to be done below, except that of filing the transcript. If not

a complete mode of appeal, and does not simply provide for some of the steps that must be taken. It dispenses with the important element of notice which is required in all other cases, but in doing this substitutes a system of procedure requiring that all the acts specified shall be performed.¹ If it be held that filing a bond is not essential to the appeal in term, then it is declared that it is in the power of the courts to accept as binding some of the provisions of one section of the statute and reject others, and this, too, where the statute is directed to a single object and intended to create a single and complete mode of appeal. Nor is this all, for, if the filing of the bond be not essential to the validity of an appeal in term, no one of the other enumerated acts can be deemed essential, for all are firmly interlaced, and severance is neither legally nor logically possible. It would result in rendering provisions of the statute ineffective, and it would also produce conflict to declare that a bond is not required as one of the steps of the appeal. Notice is required where no bond is exacted, as a step of the procedure, and it is evident that the statute contemplates that there shall be distinct modes of appeal in one of which a bond is essential to the ap-

there done the appeal is not perfected as a term appeal, although there may be a second appeal. But a second appeal implies the ineffectiveness of the first.

¹Judge Works says: "The statute authorizes an appeal during the term. A bond must be given in the court below during the term, or within the time fixed by the court, and the transcript must be filed within sixty days after filing the bond." 2 Works' Practice, 30. In *June v. Payne*, 107 Ind. 307, the filing of the bond is recognized as a step of the procedure. It was there said: "An appeal prayed for in term and perfected within the time limited by the court, suspends all proceedings on the judgment appealed from." The principle that where the statute makes a bond necessary to the appeal, it must be filed is asserted in *Raymond v. Richmond*, 76 N.Y. 106;

Langley v. Warner, 1 N. Y. 606; *Kelsey v. Campbell*, 38 Barb. 238; *Dresser v. Brooks*, 5 How. Pr. 75; *Cowdin v. Teal*, 67 N. Y. 581. It is true that the bond serves a double purpose, but this does not prove that it is not a step in perfecting the appeal. Doing one act is not sufficient to give efficacy to the appeal; all that the statute requires must be done. *Pratt v. Western Stage Co.*, 26 Iowa, 241. We understand quite well that there is a difference between perfecting an appeal and obtaining a stay of proceedings, but this does not affect the validity of our proposition that the statute makes a complete mode of appeal, prescribes what steps shall be taken, and that as the filing of the bond is one of the steps prescribed, the performance of that act, unless waived, is essential to the effectiveness of an appeal in term.

peal, not merely to the stay of proceedings. There can be no doubt that filing a transcript is part of the procedure essential to the effectiveness of the appeal, and the requirement that the transcript shall be filed is inseparably linked with the filing of the bond, and a severance can only be effected by a violent and unnatural construction.¹

§ 249. **Ineffective Attempt to Appeal in Term**—An ineffectual attempt to appeal in term will not preclude an appeal upon notice.² But the acts required to be done in order to perfect an appeal without giving notice must be substantially performed, or an appeal must be taken by giving notice.³ The only method

¹ R. S., §§ 638, 639, 640. The revision of 1881 adds a provision to section 633 of the code of 1852. That provision reads thus: "That nothing in this section shall be so construed as to prevent any such appellant from filing the transcript and perfecting an appeal afterward according to law." If the failure to do the acts indicated in the provision of the statute which prescribes the mode of appeal designated as an appeal in term, did not destroy the effectiveness of the appeal assumed to be taken as a term appeal, there would be no necessity for providing for a second appeal in a different mode, because of the failure to perfect the first. The true way to harmonize the provisions of the statute referred to is to hold that there are two general classes of appeals in civil actions; one, appeals upon notice, and the other, appeals in term, and that the appeal of the latter class can not be perfected without filing a bond. We think this conclusion is demanded by the fact that the statute enumerates what steps shall be taken to perfect an appeal in term, and that the filing of the bond is one of the steps made requisite. But there are other provisions of the code which require consideration, notably the provision which reads thus:

"No appeal shall be dismissed for any informality or defect in the transcript or appeal bond, if the appellant shall correct the informality or defect within a reasonable time." R. S., § 657. If there is not a class of appeals, wherein a bond is required as essential to the appeal, this provision respecting the bond is utterly meaningless, but that conclusion can not be reached without violating elementary principles of law. When all the provisions of the statute are given consideration the conclusion we have stated seems the correct one, and it is certainly the only doctrine upon which the statutory provisions can be fully harmonized and an unnatural and violent severance of the elements which are enumerated as essential to an appeal in term prevented.

² The statute secures a right to perfect a defective or incomplete appeal, for this is the evident purpose of section 639.

³ *Goodwin v. Fox*, 120 U. S. 775. This case lays down what seems to us to be, beyond controversy, the true rule. It was there said: "But as the bond was not filed until after the term, a citation or something equivalent was necessary as a matter of procedure to give the appellees notice that the appeal

of avoiding the obligation to give notice is by an appeal in term, and unless all that the statutes makes necessary to an appeal in term is done, there is no appeal under the statutory provisions regulating appeals in term. One of the chief purposes of the statute was to provide a mode of appeal without notice, and in the place of notice it puts the acts enumerated. Upon principle it must be concluded that there can be no effective appeal in term unless all the essential acts required by the statute are performed, and this conclusion is required by considerations of expediency and fairness. A party against whom an appeal is assumed to be taken in term has a right to presume that it is waived or abandoned, unless the party who assumes to prosecute the appeal does what the statute requires, and this assumption authorizes him to remain inactive. The failure to file a bond may, of course, be waived by a joinder in error, by filing a brief, or by any similar act, but if the objection that no bond was filed is duly made, the conclusion must be that the appeal as in term is ineffective. If, however, some bond, although an informal one, has been filed, it will save the appeal, unless specially objected to, and even then, if found to be informal, the court may allow a reasonable time to file another bond.¹ If the appealing party attempts to file a bond within the time limited he puts himself in a position very different from that

which had been allowed in term time had not been abandoned by the failure to furnish the security before the adjournment." The court cited *Dodge v. Knowles*, 114 U. S. 430; *Hewitt v. Filbert*, 116 U. S. 142. The principle asserted by us is that embodied in Rules I and II of the Supreme Court, for those rules can not be construed as dispensing with the necessity of filing a bond in order to perfect an appeal in term, for a rule of court can not stand against a valid statute. The effect of the rules referred to is to permit an appeal upon notice where the appeal in term is ineffective. *Ante*, § 247, note.

¹ *Bigler v. Waller*, 12 Wall. 142; *Seward v. Corneau*, 102 U. S. 161;

O'Reilly v. Edrington, 96 U. S. 724; *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506. The case of *Hadley v. Hill*, 73 Ind. 442, does not decide that there may be an appeal in term without a bond, but does decide that the failure to file the transcript within sixty days does not destroy the effectiveness of the appeal. Even this is questionable doctrine. The decision in *Mitchell v. Gregory*, 94 Ind. 363, was not directed to the question of the right to appeal in term without giving bond, but to the effect of an appeal where there was a failure to give bond, and it was held that the appeal did not preclude the plaintiff from taking out an execution. *June v. Payne*, 107 Ind. 307.

which he would occupy if he had entirely disregarded the statutory provision requiring a bond.¹

§ 250. Appeals after Term—The second class of appeals from final judgments in civil actions may be designated as “Appeals after Term.” As is evident from what we have already said, the essential difference between an “Appeal in Term” and an “Appeal after Term” is that in the one there must be a bond but there need not be notice, while in the other there must be notice² but there need not be a bond.³ It may be safely said that notice is indispensable to the effectiveness of an appeal after term. This statement is not contravened by the familiar rule that notice may be waived inasmuch as that rule concedes the necessity for notice, but treats the waiver as its equivalent. Where there is no effective appeal in term there must always be notice, or that which is equivalent to notice.⁴ There is a difference between cases where an appeal is prosecuted for the purpose only of reviewing the decisions of the trial court, and cases where both a review of such decisions and a stay of proceedings on the judgment are sought. The difference is an important one, inasmuch as a bond is essential to secure a stay of proceedings, but is not essential to an appeal taken upon notice where no stay is asked or desired.

§ 251. Classes of Appeals after Term—Appeals after term are subdivided into two classes: 1. Appeals upon notice issued and served below. 2. Appeals upon notice issued and served above.⁵ In the first class, notice must be issued and served upon the adverse party and also upon the clerk. In the second

¹ We have discussed elsewhere matters connected with the execution of appeal bonds, and our immediate purpose is to show what acts must be done in order to perfect a term-time appeal. See R. S., § 657.

² R. S., § 640.

³ *Ruschaupt v. Carpenter*, 63 Ind. 359; *Burt v. Hoettinger*, 28 Ind. 214; *Sturgis v. Rogers*, 26 Ind. 1; *Holloran*

v. The Midland R'y Co., 28 N. E. Rep. 549.

⁴ The decisions in *West v. Cavins*, 74 Ind. 265; *Gilbert v. Welsch*, 75 Ind. 557, and *Pedrick v. Post*, 85 Ind. 255, recognize the doctrine of waiver, but they do not hold that there may be an appeal in term without a bond.

⁵ *Opp v. Teneyck*, 99 Ind. 345; *Hays v. Wilstach*, 101 Ind. 100; R. S., § 640.

class, the appealing party must procure a transcript of the record, file it in the office of the clerk of the Supreme Court, and cause notice to be issued. It is essential that the appeal be perfected within the time prescribed by the statute. It is not enough to take part of the steps required, as, for instance, to give notice of the appeal. Upon the general principle (discussed in a former chapter) that appeals must be taken within the time limited, it is necessary to do all that the law requires to be done within the time designated.¹ An appeal, to repeat what has elsewhere been fully stated and amplified, must be completed within the time allowed or it will not be effective. While it is true that an appeal is not perfected until all the material acts required by law are done as the law prescribes, it is true, nevertheless, that an ineffectual effort to appeal in one mode does not necessarily preclude an appeal in another mode, provided, of course, the time for all modes of appeals has not expired. The provisions of the statute, the rules of court, and the general principles of law heretofore considered, save the rights of aggrieved parties in cases where there is a dismissal of an appeal for irregularities or informalities in taking it.² A mere informality or irregularity may, indeed, often be corrected and the particular appeal saved.³

§ 252. Civil Action—Definition—In matters connected with

¹ For a discussion of the subject of notice to parties, see "Time within which an appeal must be taken," "Process," Chapters VI, VIII. *Johnson v. Stephenson*, 104 Ind. 368, 4 N.E. Rep. 46. In *Lange v. Dammier*, 119 Ind. 567, 11 N.E. Rep. 33, it was said: "This court can not acquire jurisdiction of any appeal unless the same be taken and perfected within the time and in the manner prescribed by law." We quote from this case, although, because of an error in the record, the opinion was subsequently withdrawn, for the reason that it states the rule clearly and correctly. *Henderson v. Halliday*, 10 Ind. 24; *Bacon v. Witherow*, 110 Ind. 94. The statement in *Harshman v. Armstrong*, 43 Ind.

126, that an appeal is perfected when the transcript is filed can not be reconciled with the earlier or later authorities, nor with principle, but it is true that until the transcript is filed there is no appeal.

² R. S., §§ 639, 657; Rules I and II.

³ R. S., § 657. But the right to amend or correct mere irregularities does not depend solely upon statutory provisions or rules of court, for it is always within the power of an appellate tribunal to prevent the failure of justice by permitting corrections or amendments, although it can not heal errors that go to the jurisdiction of the subject. A party who asks a correction must, however, be diligent and prompt.

procedure the term "civil action" has a very wide and comprehensive signification. The code declares that there shall be but one form of action and that it shall be denominated "a civil action."¹ It is declared that the distinction between actions at law and suits in equity is abolished, but this declaration does not change the substantive rights,² for there are still equitable and legal rights and equitable and legal titles.³ Rights are beyond legislative reach except by a complete and rigid reduction of all principles to statutory provisions. Nor do the provisions of the code fully sweep away the distinction between law and equity in matters of procedure, for it has been again and again decided that where a party has an adequate legal remedy he can not invoke an equitable one.⁴ So, too, modes of trial are different; purely equitable suits are triable by the court while actions at law are triable by a jury.⁵ Where the facts fully appear and are such as to entitle the plaintiff to relief upon the theory assumed relief may be awarded,⁶ but a

¹ R. S., § 249; *Bixel v. Bixel*, 107 Ind. 534; *Hart v. Barnes*, 24 Neb. 782, 40 N. W. Rep. 322; *Omaha, etc., Co. v. Tabor*, 13 Col. 41, 21 Pac. Rep. 925.

² *Scott v. Crawford*, 12 Ind. 410; *Woodward v. Leavenworth*, 14 Ind. 311; *Matlock v. Todd*, 25 Ind. 128; *Dixon v. Caldwell*, 15 Ohio St. 412, 415. In the case last cited it was said, "The distinction between legal and equitable rights exists in the subject to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet the rights and liabilities of the parties, legal and equitable, as distinguished from the mode of procedure remain the same since, as before, the adoption of the code." See *Emmons v. Kiger*, 23 Ind. 483; *Ricketts v. Dorrell*, 55 Ind. 470.

³ *Stout v. McPheeters*, 84 Ind. 585; *Stehman v. Crull*, 26 Ind. 436; *Rowe v. Beckett*, 30 Ind. 154; *Groves v. Marks*, 32 Ind. 319; *Hunt v. Campbell*,

83 Ind. 48. See *McWhorter v. Heltzell*, 124 Ind. 129.

⁴ *Shoemaker v. Axtell*, 78 Ind. 561; *Sims v. City of Frankfort*, 79 Ind. 446; *Marshall v. Gill*, 77 Ind. 402; *Kyle v. Frost*, 29 Ind. 382; *Miller v. City of Indianapolis*, 123 Ind. 196; *Bass v. City of Fort Wayne*, 121 Ind. 389; *Smith v. Goodknight*, 121 Ind. 312.

⁵ *Kitts v. Willson*, 106 Ind. 147; *Deig v. Moorhead*, 110 Ind. 451; *Lake Erie, etc., Co. v. Griffin*, 92 Ind. 487; *Platter v. Board of Commissioners*, 103 Ind. 360; *Lane v. Schlemmer*, 114 Ind. 296; *Rogers v. Union Central Life Ins. Co.*, 111 Ind. 343; *Stix v. Sadler*, 109 Ind. 254. Where parties act upon the theory that the case is triable by a jury, no question can be made on appeal as to mode of trial. *Summers v. Greathouse*, 87 Ind. 205; *Sprague v. Pritchard*, 108 Ind. 491; *Jarboe v. Severin*, 112 Ind. 572.

⁶ *Grissom v. Moore*, 106 Ind. 296; *Blair v. Smith*, 114 Ind. 114; *Bonnell v. Allen*, 53 Ind. 130; *Troost v. Davis*, 31 Ind. 34. See *East v. Peden*, 108 Ind. 92.

definite theory must be adopted and the pleading must be good upon that theory.¹ In the cases decided in the early years of the code system there is apparent a purpose to make classes of what the court called special proceedings and thus keep up, in some measure, the distinction between statutory actions and ordinary actions or suits. There was very little strength in the reasoning of any of these cases and the doctrine they asserted is exploded by the later decisions.² The tendency of the later cases is to unify all proceedings and give the code the effect it was intended to have, for it is evident that the intention was not to multiply classes of action nor to recognize old forms, but to provide for one action and a uniform system of procedure.³ While the subject we have been considering is more directly connected with trial court practice than with appellate procedure, yet it is so connected with the preparation for appeal and with the practice on appeal, that it is almost impossible to consider appellate procedure without some discussion of the subject.

§ 253. What cases are Appealable as Civil Actions—There is, in this State, only one remedy, as elsewhere said, for the review of a judgment by the appellate tribunals, and that is by appeal, so that where there is a right to such a review there can be no doubt as to the remedy, but the modes of procedure are differ-

¹ *May v. Reed*, 125 Ind. 199; *Pearson v. Pearson*, 125 Ind. 341; *Trentman v. Neff*, 124 Ind. 503; *Bingham v. Stage*, 123 Ind. 281, and cases cited p. 285; *Wagner v. Winter*, 122 Ind. 57; *Rahm v. Deig*, 121 Ind. 283; *Brown v. Nichols, etc., Co.*, 123 Ind. 492, 24 N. E. Rep. 339; *Camp v. Smith*, 117 N. Y. 354, 22 N. E. Rep. 1044; *Coffin v. Argo*, 134 Ill. 276, 24 N. E. Rep. 1068; *Spies v. Chicago, etc., Co.*, 40 Fed. Rep. 34; *Olmstead v. Abbott*, 61 Vt. 281, 18 Atl. Rep. 315; *Indiana, etc., Co. v. Quick*, 109 Ind. 295.

² Judge Works in his very able book says, "It would seem clear from the language used that there could be but two forms of action, civil and criminal,

and that all such actions as were not criminal must necessarily fall under the denomination civil action, but the Supreme Court has held otherwise." 1 Works' Ind. Practice, 122. As will be shown elsewhere the later cases fully sustain the views expressed by Judge Works.

³ It by no means follows that because a right is created by a statute that there is also created a special proceeding. If it were true that the creation of a statutory right made a special proceeding then we should have many civil actions and many and diverse criminal prosecutions.

ent. The great majority of cases are appealable as civil actions and the cases not so appealable are exceptions to the general rule. It is safe to say that all controversies respecting civil rights and liabilities are appealable as civil actions,¹ whether they arise under special statutes or not, except where some provision respecting the appeal is made by the statute for such special cases.² The limitation placed upon the meaning

¹ There must be a contest concerning civil rights, and, as a general rule, there must be adversary parties. *Johnson v. Malloy*, 74 Cal. 430; *Thomas v. Musical, etc., Union*, 121 N. Y. 45, 8 Lawyers' Rep. Anno. 175; *Gilmore v. Board*, 35 Ind. 344; *Brown v. Grove*, 116 Ind. 84; *Pressley v. Harrison*, 102 Ind. 14; *Kundolf v. Thalheimer*, 12 N. Y. 591, 596; *Deer Lodge v. Kohrs*, 2 Mont. 66, 70; *Ableman v. Booth*, 11 Wis. 499, 516; *Ex parte Towles*, 48 Texas, 413, 433; *State v. One Bottle of Brandy*, 43 Vt. 297; *Martin v. Hunter's Lessee*, 1 Wheat. 35; *Osborn v. United States Bank*, 9 Wheat. 738, 819; *Wayman v. Southard*, 10 Wheat. 1, 30. It is upon the general principle that there must be adverse parties, that it is held that where a defendant actually begins and controls the case no valid judgment can be rendered. *Brown v. Grove*, 116 Ind. 84; *Gresley v. State*, 123 Ind. 72. See *State v. Green*, 16 Iowa, 239; *Watkins v. State*, 68 Ind. 427; *Halloran v. State*, 80 Ind. 586; *State Bank v. Abbott*, 20 Wis. 599; *Strang v. Beach*, 11 Ohio St. 283. Real parties are essential. *Nicholson v. Stephens*, 47 Ind. 185; *Brewington v. Lowe*, 1 Ind. 21.

² A reference to some of the cases declaring what shall be considered civil actions may serve to illustrate and enforce the statements of the text. A prosecution under the statute regulating proceedings in bastardy cases is a civil action, although a peculiar one. *State v. Brown*, 44 Ind. 329; *Abshire v. State*, 52 Ind. 99. Actions to recover

statutory penalties are civil actions within the meaning of the code. *City of Hammond v. New York, etc., Co.*, 126 Ind. 597; *City of Greely v. Hanman*, 12 Col. 94, 20 Pac. Rep. 1; *Durham v. State*, 117 Ind. 477; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; *United States v. Hoskins*, 5 Mackey, 478. So are proceedings in highway cases. *Schmied v. Keeney*, 72 Ind. 309. Claims against decedents' estates were held to be, in some respects, civil actions. *Lester v. Lester*, 70 Ind. 201. Informations in the nature of *quo warranto* are civil actions under our decisions. *Reynolds v. State*, 61 Ind. 392; *Bank of Vincennes v. State*, 1 Blackf. 267. So are proceedings supplementary to execution. *Burkett v. Holman*, 104 Ind. 6; *Burkett v. Bowen*, 104 Ind. 184, and cases cited. *Baker v. State*, 109 Ind. 47; *Bostwick v. Bryant*, 113 Ind. 448; *American White Bronze Co. v. Clark*, 123 Ind. 230; *McMahan v. Works*, 72 Ind. 19. So is a motion for leave to issue execution. *Joseph v. Schepper*, 1 Ind. App. 154, 27 N. E. Rep. 305. Suits for divorce are essentially, but not entirely, civil actions. *Simons v. Simons*, 107 Ind. 197; *Evans v. Evans*, 105 Ind. 204; *Powell v. Powell*, 104 Ind. 18. Drainage proceedings are civil actions so far as questions of procedure are concerned. *Bass v. Elliott*, 105 Ind. 517; *Neff v. Reed*, 98 Ind. 341; *Crume v. Wilson*, 104 Ind. 583. These cases go very far towards vindicating if, indeed, they do not fully vindicate, the statement of Judge Works, that, "No such

of the term "civil actions" excludes all criminal cases, and the provisions made for appeals in probate matters exclude all cases within the scope of that statute. As the statute makes express and special provisions for appeals from interlocutory orders such orders are not within the general rule stated in the present chapter. It is implied in what has already been said that where express provisions are made for the appeal of special cases, such cases are taken out of the general rules which govern appeals in civil actions in so far as concerns the mode of taking and perfecting the appeal, and it follows, as of course, that appeals in such cases must be taken and prosecuted under the special statutory provisions. It may, however, be said, for the sake of clearness, although at the expense of something like repetition, that ordinarily a case arising under a special statute is for the purpose of appeal, as, indeed, generally for all matters of procedure, a civil action,¹ but this rule does not apply where a special mode of taking an appeal is prescribed.

thing is known to the code as a special proceeding. If what might have been called special proceedings before the adoption of the code are not included in the statutory definition of a civil action there is no rule of pleading or practice that can be applied to them. Our pleading and our practice are governed exclusively by the code, and the statute affords no rules of practice or pleadings in special proceeding." 1 Works Ind. Prac. 126. The statements of the learned author while in the main correct need some limitation, or rather qualification, for common law rules are often called to the aid of the code and are often enforced. *Shaw v. Merchants National Bank*, 60 Ind. 83; *Board v. Spitler*, 13 Ind. 235; *Dawson v. Coffman*, 28 Ind. 220.

¹ In *Robertson v. Smith*, 109 Ind. 79, 87, it was said: "If, however, it were conceded that the position of the appellee is tenable, still, it would by no means result that section 312 does not apply, for it is now well settled that the provisions of the code do apply to all pro-

ceedings whether under special statutes or not, unless excluded by the provisions of the act." It was also said: "Statutes are to be regarded as forming parts of one great and uniform body of law, and are not to be deemed isolated and detached systems complete in themselves. *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Lutz v. City of Crawfordsville*, 109 Ind. 466." It is certainly true that so far as concerns the right of appeal cases are regarded as civil actions and are appealable as such unless some provision is made by statute to the contrary. The unbroken practice proves this to be true. And, it may be added, any other rule would involve the manifest absurdity of holding that each and every proceeding has annexed to it a peculiar mode of appeal. It is not to be expected that specific laws shall be enacted for each case; on the contrary laws lay down general rules, and they prevail unless some different rule applicable to the particular class of cases is shown to exist.

CHAPTER. XIV.

APPEALS IN MATTERS CONNECTED WITH DECEDENTS' ESTATES.

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| <p>§ 254. The special statute does not create an entirely independent system.</p> <p>255. What cases are governed by the statute respecting decedents' estates.</p> <p>256. Cases held not to be within the special statute.</p> <p>257. Cases within the statute.</p> <p>258. The conflict in the decisions.</p> <p>259. Construction of the statute.</p> <p>260. Effect of the construction suggested.</p> | <p>§ 261. Time for appealing.</p> <p>262. What the appellant must do to perfect the appeal.</p> <p>263. Extension of time.</p> <p>264. Steps essential to secure an extension of time.</p> <p>265. Notice of the application for an extension of time.</p> <p>266. Briefs on the application.</p> <p>267. Bond must be filed within the time limited.</p> <p>268. Intermediate decisions and interlocutory orders.</p> |
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§ 254. **The Special Statute does not create an entirely independent system**—The statute provides a mode of procedure for appealing in cases “growing out of any matter connected with a decedent’s estate,”¹ but the system provided is not, in the strict sense, an entirely independent one. The provisions of the code respecting the mode of taking appeals in civil actions do not in all respects apply to appeals in matters connected with decedents’ estates, but the appeal from decisions in such matters must be taken under the special statutory provisions.² While it is true that the appeal must be taken in accordance with the provisions of the special statute, it is also true that the procedure is to a very great extent governed by the general rules which

¹ R. S., §§ 2454, 2455, 2456, 2457; Elliott’s Sup., § 417.

² State v. Hughes, 15 Ind. 104; Thibaud v. Dufour, 57 Ind. 598; Seward v. Clark, 67 Ind. 289; Bell v. Mousset, 71 Ind. 347; Rinehart v. Vail, 103 Ind. 159; Taylor v. Burk, 91 Ind. 252; Bartlett’s Appeal, 82 Me. 210, 19 Atl. Rep. 170;

Bake v. Smiley, 84 Ind. 212; Weil v. Cavins, 74 Ind. 265; McCurdy v. Love, 97 Ind. 62; Browning v. McCracken, 97 Ind. 279; Bennett v. Bennett, 102 Ind. 86; Walker v. Steele, 121 Ind. 436. The doctrine of Hamlyn v. Nesbit, 37 Ind. 284, is overruled by the later cases.

obtain in civil actions. The special statute can not be deemed to create an entirely independent system, although it does make peculiar provisions respecting the mode of taking an appeal,¹ for, as to the assignment of errors and matters of a similiar nature, appeals under the special statute are governed by the general rules of procedure.²

§ 255. **What Cases are governed by the Statute respecting Decedents' Estates**—The question as to what cases fall within the statutory provisions referred to in the preceding paragraph has evoked much discussion, and it is not easy to lay down a general rule with certainty or precision. There can, of course, be no difficulty in determining the question where the controversy directly involves the rights of the administrator or executor as such irrespective of collateral or appendant interests, and where it can not be adjudicated without directly passing upon such rights; but, while this is true, it is also true that it is by no means every case that falls within what is sometimes called probate jurisdiction, that can be appealed under the special statute.³ It is safe to say that one who acts upon the assumption that all cases connected with matters within the jurisdiction of probate courts are within the special statute will be led into error. To say, as is sometimes done, that all probate cases are appealable under the special statute is to state the rule entirely too broadly.⁴ General statements can not convey an accurate or adequate conception of the law upon the subject of appeals under the statute as declared by our decisions. It is, indeed, not possible to secure a clear and full view of the scope and effect that has been assigned to the statute without considering the decided cases somewhat in detail.

§ 256. **Cases held not to be within the Special Statute**—It will best serve to show the scope and effect of the statute by first considering the cases which have been held not to fall within

¹ Scherer v. Ingerman, 110 Ind. 428.

² Rush v. Gray, 74 Ind. 231; Willson

³ The special statute applies to the time and mode of taking the appeal rather than to the procedure after the appeal is perfected.

v. Binford, 74 Ind. 424.

⁴ Jurisdiction of Probate Courts, 3 So. Law Rev. (N. S.) 254-267.

it, and then considering those which have been held to be embraced within its provisions. A suit by an executor to obtain the construction of a will has been held not to be within the statute.¹ Actions by an administrator to recover money on a contract have been held not to be appealable under the special statutory provisions.² A proceeding prosecuted by the creditor of a legatee for the purpose of reaching money in the hands of an administrator due the legatee is appealable as a civil action.³ Another case holds that a proceeding by an administrator to recover as assets a note and mortgage assigned by the decedent is not appealable under the special statute.⁴ Where the action is begun before the death of the intestate an appeal must be prosecuted under the statute governing appeals in civil actions.⁵ An action by an administrator to enforce a contract is held not to be within the statute respecting decedents' estates.⁶ One who is made a party to an action against an administrator founded upon a contract in which he is not jointly bound may appeal under the provisions of the code regulating appeal in civil actions.⁷ An appeal is to be prosecuted under those provisions in a case where an administrator is made a party in proceedings supplementary to execution to answer as to money in his hands belonging to the debtor.⁸ A case can not be brought under the special statute relating to decedents' estates by joining an administrator as a party.⁹ An action commenced during the life of the decedent and prosecuted by the administrator after the intestate's death must be prosecuted under the statute governing appeals in civil actions.¹⁰

§ 257. Cases within the Special Statute—In considering the cases which affirm that appeals must be taken under the special

¹ *Simmons v. Beazel*, 125 Ind. 362.

² *Heller v. Clark*, 103 Ind. 591; *Dillman v. Dillman*, 90 Ind. 585; *Yearley v. Sharp*, 96 Ind. 469.

³ *Koons v. Mellett*, 121 Ind. 585.

⁴ *Walker v. Steele*, 121 Ind. 436. This case and that first referred to in this paragraph of the text carry the doctrine very far, and their soundness may well be doubted.

⁵ *Heller v. Clark*, 103 Ind. 591.

⁶ *Hillenberg v. Bennett*, 88 Ind. 540; *Willson v. Binford*, 74 Ind. 424; *Rush v. Gray*, 74 Ind. 231. But is this not a matter connected with the settlement of a decedent's estate?

⁷ *Claypool v. Gish*, 108 Ind. 424; *Wright v. Manns*, 111 Ind. 422.

⁸ *Dillman v. Dillman*, 90 Ind. 585.

⁹ *Claypool v. Gish*, 108 Ind. 424.

¹⁰ *Heller v. Clark*, 103 Ind. 591.

statute, we shall particularly notice only those which possess peculiar features. A case extending the provisions of the statute very far may appropriately be first considered. The case to which we refer was a proceeding by mandamus to compel the sale of real estate. The surviving partner resisted the application and it was held that the case was not appealable as a civil action but must be appealed under the special statute.¹ A proceeding based upon a petition to set aside the final report of an administrator must be appealed under the special statute, and can not be appealed as an ordinary civil action.² A like rule applies to a proceeding founded on a petition for the sale of real estate of which the decedent died the owner.³ A similar rule applies to cases where a widow petitions for her allowance out of her deceased husband's estate.⁴ An ordinary claim filed against an administrator or executor by a creditor of the decedent must be appealed from as the special statute provides.⁵

§ 258. **The Conflict in the Decisions**—It is evident that there is not only confusion among the decided cases, but that there is conflict. There must be a reformation of some of the doctrines and a straightening of the lines, or else the confusion will deepen as the decisions multiply. Some general principle must be sought and found before the conflict can be removed and the confusion cleared away. We venture to suggest that the principle which will lead to a just result is to be found in some such statement as this: Where the controversy is connected with a decedent's estate, and an adjustment of the controversy is essential to a final settlement of the estate, the appeal must be taken under the special statute; otherwise, under the general

¹ *Bennett v. Bennett*, 102 Ind. 86. The decision in the case cited can not be harmonized with the decisions in some of the other cases, but we think it sound. The error, as it seems to us, is in the decisions which unduly limit the scope of the special statute, and not in those which give it a construction that makes it so operate as to secure prompt appeals in matters affecting the settlement of decedents' estates.

² *Webb v. Simpson*, 105 Ind. 327; *Taylor v. Burk*, 91 Ind. 252; *West v. Cavins*, 74 Ind. 265.

³ *Rinehart v. Vail*, 103 Ind. 159; *Hunter v. French*, 86 Ind. 320.

⁴ *Bender v. Wampler*, 84 Ind. 172.

⁵ *Miller v. Carmichael*, 98 Ind. 236; *Jones v. Jones*, 91 Ind. 378. See *Taylor v. Burk*, 91 Ind. 252.

statute regulating appeals in civil actions. The object of the statute is to require parties to appeal promptly, and thus prevent delay in the settlement of estates.¹ This is plainly so, for if this was not the object of the legislature then there was no necessity for such a statute, inasmuch as the general statute is sufficient for all other purposes. It is not to be assumed that the legislature had no definite object in view in enacting the statute, since that would be to declare that the law makers did a vain and idle thing, and this declaration can not be made without a violation of rudimental principles.

§ 259. **Construction of the Statute**—The language of the original act is comprehensive, for it is this: "Any person considering himself aggrieved by the decision of any circuit court or judge thereof in vacation, growing out of any matter connected with a decedent's estate may prosecute an appeal,"² and there is no valid reason for restricting this language so as to thwart the salutary policy of the law that decedents' estates shall be promptly settled. The amendatory act of 1885 evinces a plain intention to secure prompt appeals, for it declares that the transcript shall be filed in the office of the clerk of the Supreme Court within thirty days after filing the bond and provides that the bond shall be filed within ten days.³ It seems to us that instead of limiting the scope of the statute the courts should extend it so as to give just effect to the manifest purpose of the law to secure the prompt settlement of the estates of decedents. There certainly is no right to limit the statute so as to obstruct the operation of the salutary rule of which we have spoken, for

¹ In *Sewar v. Clark*, Adm., 67 Ind. 289, it was justly said: "It is very clear, we think, that the legislature never intended that the settlement of decedents' estates might be delayed and embarrassed by appeals to this court." So, in *Miller v. Carmichael*, 98 Ind. 236, it was said: "The object of the statute was to cut off delays in litigating matters affecting decedents' estates, and expedite final settlement of estates." The provisions of the statute, and the

spirit, as well as the words of the decisions, very clearly prove that the object of the law is to secure a speedy settlement of estates and the distribution of the assets to creditors, legatees and heirs. The decisions which oppose this settled doctrine can not be sound. The doctrine is affirmed in other cases. *Miller v. Carmichael*, 98 Ind. 236, and cases cited.

² R. S., § 2534.

³ Elliott's Supp., § 417.

the authorities strongly assert that appeals in matters connected with the settlement of decedents' estates must be taken strictly within the time and in the mode prescribed by law.¹

§ 260. **Effect of the Construction suggested**—The application of the general principle we have ventured to suggest can work no hardship and yet will secure prompt appeals and a proper obedience to the commands of the law, for parties will know their rights and certainty will prevail. The principle stated requires that controversies which keep open an estate shall be appealed under the special statute, but it affects no others. Thus, if the construction of a will is essential to the proper discharge of the duties of an executor in order to enable him to settle the estate, then the appeal should be prosecuted under the statute,² but if he can pay the money into court and secure a final order settling the estate leaving the devisees, legatees or heirs to litigate their respective claims to the money paid into court, the case is not within that statute because the controversy ceases to be connected with the settlement of a decedent's estate. It does not, at all events, delay settlement, and hence is not within the evil sought to be prevented. If, to adduce another illustration, it is necessary to collect a note as part of the assets of the estate, the case is within the statute for the reason that the assets must be collected before the estate can be closed. But, without multiplying illustrations, we think it safe to affirm, in view of the provisions of the statute and the fundamental principles of law, that wherever the case is one in which a decision is essential to the prompt settlement of a decedent's estate it must be appealed under the provisions of the statute regulating appeals from decisions "growing out of matters connected with a decedent's estate," and not under the general

¹ *Dennison v. Talmage*, 29 Ohio St. 640; *Merrills v. Adams, Kirby*, 249; 433; 435; *Morrow v. Walker*, 10 Ark. 569; *Arterburn v. Young*, 14 Bush (Ky.), 509; *Holtzclaw v. Ware*, 34 Ala. 307.
² We know that some of the decisions indicate a different doctrine, but we are here simply suggesting what it seems to us should be the rule.

In re Fisher, 75 Cal. 523, 17 Pac. Rep.

statute governing appeals in ordinary civil actions.¹ In an ordinary civil action no estate is kept open by the appeal, but in matters affecting the settlement of decedents' estates an estate is kept open and costs and expenses are augmented.

§ 261. **Time for Appealing**—The general rule that appeals must be taken within the time and in the mode prescribed by law is strictly applied to cases where appeals are taken from decisions in probate matters connected with the estates of decedents. The decisions declare that the statutory requirement can not be dispensed with by order of the court.² But the statement just made expresses a rule subject to exceptions, for the statute provides for an extension of time upon cause shown and leave duly prayed.³ If the appealing party is himself without fault and he is prevented from appealing within the time and in the mode prescribed by statute by the fraud of the adverse party, or by the fault or wrong of the court or of some officer, then under the inherent power resident in all superior appellate tribunals, of which we have spoken, he may be relieved and leave may be granted him to perfect an appeal.⁴

§ 262. **What appellant must do to perfect the Appeal**—The acts which the appellant must perform, or cause to be performed,

¹ The majority of our own cases support this conclusion. *Yearley v. Sharp*, 96 Ind. 469; *McCurdy v. Love*, 97 Ind. 62, 63; *Miller v. Carmichael*, 98 Ind. 236; *Webb v. Simpson*, 105 Ind. 327; *Rinehart v. Vail*, 103 Ind. 159; *Browning v. McCracken*, 97 Ind. 279; *Bennett v. Bennett*, 102 Ind. 86; *Hunter v. Trench*, 86 Ind. 320; *Bender v. Wampler*, 84 Ind. 172; *Jones v. Jones*, 91 Ind. 378; *Taylor v. Burk*, 91 Ind. 252. The view we have taken is strongly supported by the reasoning of Judge Works. 2 Works' Ind. Prac., § 1096.

² *Rinehart v. Vail*, 103 Ind. 159. See "Time within which Appeals may be Taken." Heckert's Appeal, 13 Sergt. & R. 48; *Claypool v. Norcross*, 36 N.J. Eq. 524; *Morrow v. Walker*, 10 Ark. 569;

Van Slyke v. Schmeck, 10 Paige, 301; *Lambert v. Merrill*, 56 Vt. 464; *Mount v. Slack*, 39 N. J. Eq. 230; *Ahearn v. Mann*, 63 N. H. 330; *In re Marston*, 79 Me. 25; *Brewster v. Shelton*, 24 Conn. 140. In *Miller v. Carmichael*, 98 Ind. 236, the question is treated as jurisdictional, the court saying, "Want of jurisdiction works a dismissal of the case at any stage of the proceedings." See, also, authorities cited in Chapter XIII; "Modes of Appeal in Civil Actions."

³ Elliott's Supp., § 417.

⁴ *Mount v. Van Ness*, 34 N. J. Eq. 523; *Biddison v. Moseley*, 57 Md. 89, 92; *Bensley v. Haeberle*, 20 Mo. App. 648. See, *ante*, §§ 113, 114, 115, 116.

in order to perfect an appeal in cases affecting the estate of a decedent, are these: 1. A bond must be filed within ten days after the decision is made. 2. The transcript must be filed in the office of the clerk of the Supreme Court within thirty days after the bond is filed.¹ The statement we have made expresses the general rule but to this general rule there are marked exceptions. One exception is that where the administrator or executor appeals no bond is necessary,² but he must file the transcript within the time limited in the office of the clerk of the Supreme Court.³ Another exception is that, for cause shown, the time for perfecting the appeal may be extended for a period not exceeding one year.

§ 263. Extension of Time—It is not to be assumed that the time for perfecting the appeal will be extended as of course; on the contrary, the statute allows an extension only for cause shown, and the rule that the settlement of decedents' estates shall not be delayed or embarrassed by appeals, as well as the general rule that time is of the essence, would be violated by extending the time for taking an appeal unless a clear and strong case is

¹ There has been some confusion in the decided cases as to the time within which the transcript is to be filed, but the statute plainly requires that it shall be filed within thirty days after the bond is filed, thus allowing forty days in which to perfect the appeal. *Elliott's Supp.*, § 417; *Webb v. Simpson*, 105 Ind. 327; *Rinehart v. Vail*, 103 Ind. 159; *Miller v. Carmichael*, 98 Ind. 236; *Browning v. McCracken*, 97 Ind. 279; *Yearley v. Sharpe*, 96 Ind. 469.

² It is the duty of an administrator to appeal if there is reasonable ground to believe that the trial court erred to the prejudice of the estate. *Ruch v. Biery*, 110 Ind. 444.

³ The decision in *Simons v. Simons* (Ind.), 28 N. E. Rep. 702, fully sustains the statement of the text that thirty days after filing the bond is allowed for perfecting the appeal, and that decision also

asserts that an administrator who appeals without filing a bond has the same length of time—namely, forty days—in which to perfect an appeal that is allowed a party who is required to give bond. In the case referred to it was said: "The law gives the same time to both parties to appeal. An executor or administrator is not required to file a bond, yet he may take the full forty days for perfecting an appeal, and the opposite party is entitled to the same time. The law is intended to be equal in its operation and to apply alike to the parties on both sides of the controversy. If the administrator, or executor, who files a bond may perfect his appeal at any time within forty days (about which there seems to be no doubt), there is no good reason why the opposite party may not have the same right."

shown. A party who asks an extension must show diligence and care, for if he is himself guilty of culpable fault the court will not interfere with the operation of the statutory rule.

§ 264. **Steps essential to secure extension of Time**—A party who seeks an extension of time must do all that it is incumbent upon him to do, so far as reasonable care and reasonable diligence will enable him to do it, for he can not justly ask relief if he has himself been inactive and negligent. It is necessary for him to petition for an extension of time when an extension is desired, and to show, in his petition, sufficient cause for the relief he prays, and this cause he can not show without showing what he has done and why he has been prevented from fully performing all that the statute makes essential to an appeal. The petition should be verified. In strictness, the petition should show merit in the appeal, not by vague general averments but by proper allegations of facts. Notice of the petition must be given.¹ It is true that there has been some conflict upon the question of the necessity for notice, but the only defensible rule is that notice shall be given. A party can not be expected to keep informed of collateral and independent motions or petitions, but the party who seeks relief through such petitions or motions is in duty bound to impart information by a notice prepared and served as the rules of the court or the statute direct. A party against whom an appeal is asked after the expiration of the time fixed by statute should have an opportunity of being heard in opposition to such a collateral motion or petition.²

§ 265. **Notice of the Application for an Extension of Time**—The notice should be sufficiently specific to inform the opposite party of the nature of the motion or petition and the time for the hear-

¹ Rule XI.

² *Duncan v. Gainey*, 108 Ind. 579; *Browning v. McCracken*, 97 Ind. 279. In the case last named it was said: "If such an order is desired, a formal and proper application must be made, and notice given to the appellee." This rule

is in harmony with the general doctrine that prevails in appellate procedure, for that doctrine is that notice must be given of all independent or purely collateral motions or petitions. The rules of the court clearly recognize the general doctrine. Rule XIII.

ing should be stated. The notice should be served ten days before the time fixed for the hearing.¹ The petition should be filed at the time of giving the notice. For this conclusion there are two reasons: First, it is incumbent upon the petitioner to proceed promptly and do what he reasonably can to avoid further delay; second, the rule of the court requires that the papers on which the notice is based shall be filed with the clerk.²

§ 266 Briefs upon the Application—If questions of law arise upon the petition briefs should be filed. There is no necessity for counsel to appear in person to the petition, for oral arguments are not heard in such matters.³ The practice is for counsel to file with the clerk such papers, affidavits and briefs as are deemed necessary to present the matter, and they are laid before the court by the clerk.

§ 267. Bond must be filed within time Limited—Where a bond is necessary to an appeal it must, upon the principle considered in discussing appeals in term,⁴ be filed within the time designated by the statute. As a bond is required from all persons other than administrators and executors, in appeals from decisions in cases growing out of matters connected with a decedent's estate, and as the statute fixes the time within which it must be filed there can be no appeal without the bond. The court may upon due application and for cause allow a bond to be filed after the expiration of the time limited, but ordinarily the bond must be filed within the time prescribed.⁵

¹ Rule X. *Newman v. Kiser* (Ind.), 26 N. E. Rep. 1006.

² Rule XIII.

³ Rule XIII. A motion or petition of the kind mentioned in the text belongs to the class called "special motions" and fall under Rule VII.

⁴ See, *ante*, § 263; *Simons v. Simons* (Ind.), 28 N. E. Rep. 702.

⁵ *Rinchart v. Vail*, 103 Ind. 159. Diligence is required, and one who is negligent will not be favored. *Grigsby v. Purcell*, 99 U. S. 505; *Hamilton v.*

Moore, 3 Dall. 371; *Blair v. Miller*, 7 Dall. 21; *Edmonson v. Bloomshire*, 7 Wall. 306. After the expiration of the time limited a bond can not be filed as a matter of course, for this is forbidden by the rule that all the steps essential to an appeal must be taken within the time fixed by the law. *Ante*, § 128. A party who neglects to do what the law requires may have relief upon a proper application, but he can not claim it as a matter of strict right. If he is in fault relief will seldom be granted him.

§ 268. **Intermediate Decisions and Interlocutory Orders**—The language of the special statute is very broad, and if it were considered without reference to the general principles of the law it would authorize an appeal from any decision, intermediate or final, but it is not to be so considered. It is limited and restricted by other statutory provisions and by settled principles,¹ and rightly so, since it is not to be assumed that the legislature meant to permit cases to be carved into fragments and appealed piecemeal. To permit this to be done would be to keep open the estates of decedents for an almost unlimited period and thus produce the evil which it was the principal object of the legislature to destroy. But there may be an appealable final judgment as to some particular and independent issue although the judgment may not settle anything more than the particular controversy. Thus, there may be a final judgment upon a particular claim,² or in a proceeding to sell land to pay debts, or the like. The question whether there is or is not a final judgment from which an appeal will lie is to be solved by ascertaining whether the decision appealed from was rendered in an independent controversy and was fully determinative of the rights of all the parties interested in the particular controversy. As we have elsewhere shown, there may be a final judgment authorizing an appeal although it does not cover an entire subject or affect the interests of all persons interested in the general subject.³ This general doctrine applies to a case in which a decedent's estate is interested in a contingent and general way, but wherein the particular controversy is an independent one and is fully and finally adjudicated as to the rights of all the parties interested in that controversy.

¹ *Thiebaud v. Dufour*, 57 Ind. 598; *Goodwin v. Goodwin*, 48 Ind. 584; *Wood v. Wood*, 51 Ind. 141. The court has uniformly applied to appeals under the statute the general rule that an appeal will lie only from a final judgment. *Pfeiffer v. Crane*, 89 Ind. 485; *Angevine v. Ward*, 66 Ind. 460; *Pyles v. Adams*, 97 Ind. 605. In *Thiebaud v. Dufour*, *supra*, the court cited the

cases of *Woolley v. The State*, 8 Ind. 377; *Reese v. Beck*, 9 Ind. 238; *Reed v. Reed*, 44 Ind. 429, thus indicating very clearly that the general rule as to appeals from interlocutory judgments was not changed by the special statute.

² This general doctrine is asserted in the case of *Beard v. First Presbyterian Church*, 15 Ind. 490.

³ *Ante*, §§ 95, 98.

CHAPTER XV.

APPEALS IN CRIMINAL CASES.

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|---|---|
| § 269. Statutory remedy exclusive. | § 284. Time within which the State must perfect the appeal. |
| 270. Appeals can not be taken under the statute providing for appeals in civil actions. | 285. Time—Waiver. |
| 271. Classes of appeals. | 286. Appeal by defendant. |
| 272. Appeal by the State. | 287. Defendants given a general right of appeal—What must be done to perfect an appeal. |
| 273. When an appeal will not lie from a denial of a motion in arrest. | 288. Appeal by one of several defendants. |
| 274. The State can present only questions of law. | 289. Waiver of the right of appeal. |
| 275. Preparation of the record. | 290. Waiver of errors. |
| 276. Bill of exceptions—When necessary. | 291. Presumptions. |
| 277. Exceptions must be reserved—Motion for new trial not required. | 292. Record must show prejudicial error. |
| 278. The State has no general right of appeal. | 293. Objections must be made in the trial court. |
| 279. How questions of law may arise. | 294. The record. |
| 280. What the record must show. | 295. Bill of exceptions—When necessary. |
| 281. Defective record. | 296. The bill of exceptions—Matters of practice. |
| 282. The initial step—Notice. | 297. Appeal does not vacate the judgment. |
| 283. Notice is merely one step towards perfecting the appeal. | 298. Effect of an appeal by the State. |

§ 269. **Statutory Remedy Exclusive**—The general rule is this: Where the statute furnishes a specific and adequate remedy for the review of a judgment in a criminal prosecution that remedy must be pursued.¹ At common law no appeal was provided for in criminal prosecutions in cases of felony, nor, indeed, was

¹ *Frazier v. State*, 106 Ind. 562; *State v. Lawrence*, 81 N. C. 522; *Wells' Case*, 2 Greenl. (Me.) 322; *People v. Carnal*, 6 N. Y. 463; *People v. Clark*, 7 N. Y. 385. In *State v. Daily*, 6 Ind. 9, it was held that the State had a right to a writ of error. See, however, *People v. Corning*, 2 Coms. (N. Y.) 9; *State v. Bartlett*, 9 Ind. 569.

the person convicted of a felony entitled to a new trial.¹ So, while it is true that we may look to the common law for principles of trial procedure in aid of the statute,² or to prevent the utter failure of justice,³ we can look only to the statute for the remedy for the review of a judgment in criminal cases. An accused must accept the benefit of the statute with its burdens,⁴ and the State can only take advantage of the statutory remedy as it is given.⁵

§ 270. Appeals can not be taken under the Statute providing for appeals in Civil Actions—Appeals in criminal cases must be taken and prosecuted under the provisions of the statute providing for appeals by the State or the accused, and not under the provisions regulating appeals in civil actions.⁶ But this rule does not exclude the application of settled principles to the case on appeal, nor does it preclude a reference to the general principles of civil procedure, although it does require that as to the modes of procedure in preparing and perfecting an appeal the statutory provisions must be complied with in every material particular. As to the time of appealing, the preparation of the transcript, the issuing and service of notice and the like, regard must be had to the criminal code, in cases where there are specific provisions upon that subject, but as to the matters of general practice as, for instance, the doctrine of waiver, reference may properly be had to general principles.⁷

¹ *Regina v. Murphy*, Law R. 2 P. C. 535; *Regina v. Bertrand*, 10 Cox C. C. 618; *Sanders v. State*, 85 Ind. 318, 324; *Mills v. State*, 52 Ind. 187; *Ex parte Bradley*, 48 Ind. 548.

² *Territory v. Laun*, 8 Mont. 322, 20 Pac. Rep. 652. See *Peterson v. Ottawa* 41 Kan. 293, 21 Pac. Rep. 263; *State v. Goings*, 100 N. C. 504, 6 S. E. Rep. 88.

³ *Marcus v. State*, 26 Ind. 101; *Walker v. State*, 23 Ind. 61; *Bell v. State*, 42 Ind. 335; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Wall v. State*, 23 Ind. 150; *Burk v. State*, 27 Ind. 442.

⁴ *Sanders v. State*, 85 Ind. 318.

⁵ *Butler v. State*, 97 Ind. 378, 383; *Veatch v. State*, 60 Ind. 291. See *Reynolds v. United States*, 98 U. S. 145; *Morris v. State*, 1 Blackf. 37; *State v. Wallace*, 41 Ind. 445. "And the civil code does not govern appeals in criminal cases." *Sturm v. State*, 74 Ind. 278, 282; *Farrel v. State*, 7 Ind. 345; *Whittem v. State*, 36 Ind. 196, 202.

⁷ This general doctrine is that, as to all things done by the consent, express or implied, of the parties, there is a waiver of objection. The doctrine may, indeed, be more strongly stated, but this

§ 271. **Classes of Appeals**—The subject of appeals in criminal cases naturally divides itself into two parts. Appeals by the State and appeals by the accused. The right of appeal is essentially different in the two classes, and the questions for decision are not the same. The effect of the judgment in the one class of cases is very different from what it is in the other, and there are material differences in the mode of procedure.

§ 272. **Appeal by the State**—The State may appeal in the following cases: 1. Upon a judgment for the defendant on quashing or setting aside an indictment or information. 2. Upon an order of the court arresting the judgment. 3. Upon a question reserved by the State.¹ The judgment contemplated by the statute is a final one,² for the general rule, heretofore discussed, that appeals can only be taken from final judgments applies to appeals in criminal cases.³ Where there is a conviction of the crime directly charged there can be no appeal by the State,⁴ but whether there can be an appeal where the conviction is of an offence of a less grade than that directly charged is left in doubt. In the only case which touches directly upon the point no question was made as to the right of the State to appeal, but the appeal of the State was sustained.⁵ As the question was not presented, or decided, that case can not be deemed decisive,

statement is sufficient for our present purpose. *Randon v. Toby*, 11 How. U. S. 493; *Mudget v. Kent*, 18 Me. 349; *Nixon v. Hammond*, 12 Cush. 285; *Mountjoy v. State*, 78 Ind. 172; *Norton v. State*, 106 Ind. 163; *Mullinix v. State* 10 Ind. 5.

¹ R. S. 1881, § 1882; *State v. Marsteller*, 84 N. C. 727; *State v. Padgett*, 82 N. C. 544.

² See "What may be Appealed From," Chapter V.

³ *State v. Ely*, 11 Ind. 313; *People v. Clark*, 7 N. Y. 385; *People v. Nestle*, 19 N. Y. 583. See, also, *Hornberger v. State*, 5 Ind. 300; *Dougherty v. State*, 5 Ind. 453; *Farrel v. State*, 7 Ind. 345; *Miller v. State*, 8 Ind. 325; *Pigg v. State*, 9 Ind. 363; *Green v.*

State, 10 Neb. 102; *Cochrane v. State*, 30 Ohio St. 61; *People v. Merrill*, 14 Kern, N. Y. 74. Parties can not confer jurisdiction by agreement where there is no final judgment. The finality of a judgment is essential to jurisdiction, and the familiar rule that jurisdiction can not be given by consent forbids the court from assuming authority over a case where questions remain to be tried and determined. *Wingo v. State*, 99 Ind. 343; *State v. Spencer*, 92 Ind. 115; *State v. Wiseman*, 68 N. C. 203; *State v. Jefferson*, 66 N. C. 309; *United States v. Norton*, 91 U. S. 566.

⁴ *State v. Hamilton*, 62 Ind. 409; *State v. Ely*, 11 Ind. 313; *State v. Credle*, 63 N. C. 506.

⁵ *State v. Johnson*, 102 Ind. 247.

although the fact that it was assumed that the appeal would lie indicates the opinion of the court. The question is difficult, for, on the one hand, it may be urged that if the accused is acquitted of the higher grade he ought not to be compelled to have the costs of an appeal taxed against him;¹ on the other hand, it may be forcibly urged that the object of the statute is to secure an authoritative decision upon questions of law, and that the acquittal of the higher grade is such a judgment of acquittal as entitles the State to appeal. We are inclined to the opinion that the State may appeal since this is the effect of the decision referred to, and for the further reason that this conclusion harmonizes with the general doctrine that a party may appeal from a judgment in his favor if the judgment is less favorable than that to which the law entitles him. The accused is not harmed beyond the question of costs, since a judgment in favor of the State would not authorize a second trial in a case where there is a conviction of an offence included in the indictment, for in such a case there can be no judgment of reversal.² The doctrine we have stated can have no application to a case where part only of the counts of an indictment are quashed, for in such a case there is no final acquittal of any part of an offense, nor, indeed, is there any final judgment.³ While the general rule is that neither the State nor the accused can appeal until there is a final judgment, the rule does not preclude an accused from prosecuting a second appeal where the first simply secures a modification of a mandate of the trial court designating the time for the execution of the accused, but it would be otherwise if the first appeal brought before the appellate tribunal the whole case for review.⁴ It is evident that the case instanced

¹ *State v. Tumey*, 81 Ind. 559.

² We assume in what has been said that the question discussed can only arise where there has been a trial and conviction of one grade of the offence charged, and this assumption is obviously valid since in order that the controversy can arise there must be a conviction of a lower grade and an acquittal of the higher.

³ In *State v. Evansville, etc., Co.*, 107

Ind. 581, 583, it was said: "The result of all the decisions is, that it is only from final judgments that appeals can be taken, unless otherwise specially authorized by statute, and it is only after judgment for the defendant either of final acquittal or in setting aside the whole information or indictment, that an appeal may be taken by the State."

⁴ *Koerner v. State*, 96 Ind. 243. A second appeal was taken in the case

does not fall within the reason of the rule, inasmuch as the designation of the time for the execution in violation of a positive statute is an error that must be first corrected in order to give the accused the time the law awards for taking and perfecting an appeal.

§ 273. **When an Appeal will not lie from a denial of a Motion in Arrest**—It has been held that the State can not appeal from a ruling denying a motion in arrest in a case where the cause assigned in the motion calls in question the correctness of the verdict on the evidence,¹ and this decision is, as we believe, correct, but it is probable that some of the expressions in the opinion require limitation. We suppose that the conclusion reached was right for the reason that an appeal by the State can not present for review any question of fact, but we suppose, also, that it is quite clear that a motion in arrest may present a pure question of law. We can not perceive how the State could in any case present a question upon the evidence by a motion in arrest; nor, indeed, are we able to perceive how the defendant could present a question upon the evidence in that mode. If, however, a motion in arrest presents, as it must do, a question of law the State may, by the appropriate procedure, reserve the ruling for review.

§ 274. **The State can present only Questions of Law**—A fundamental rule respecting procedure and jurisdiction is that the State can only bring questions of law before the appellate tribunal for review. The right of appeal is given by the statute and no authority is conferred to decide questions of fact;² it may, however, be necessary to state facts so that it may appear that a question of law is actually presented.³ If the questions

cited after the judgment of the trial court was corrected, and, on that appeal, the questions in the record were examined and decided. *Koerner v. State*, 98 Ind. 7.

¹ *State v. Rousch*, 60 Ind. 304. See *State v. Murphy*, 8 Blackf. 498.

² *State v. Hall*, 58 Ind. 512; *State v. Van Valkenburg*, 60 Ind. 302; *State v.*

Campbell, 67 Ind. 302; *State v. Overholser*, 69 Ind. 144.

³ *State v. Kern*, 127 Ind. 465; *State v. Frazer*, 28 Ind. 196; *State v. Ely*, 14 Ind. 291; *State v. Bartlett*, 9 Ind. 569, 570.

Enough must be stated in the record to show a real question and an error of law. "It is not enough to except to the opinion of the court." *State v. Bartlett*, *supra*.

sought to be presented can not be decided without also deciding upon controverted matters of fact the appellate tribunal will not give any judgment upon the questions presented by the State. In a case where there was an utter failure of evidence to sustain a criminal charge an appeal by the State, upon the ground that the trial court erred in directing a verdict for the defendant, was entertained, although it was held that the appeal was fruitless.¹ The question in the case cited arose upon an instruction asserting a specific theory of law and hence the question whether the trial court did or did not err in instructing the jury presented a question of law and not of fact, so that the court can not be said to have departed from the general rule in entertaining the appeal in that case. We think the correct general rule is this: Where the trial court in instructing the jury to return a verdict for the defendant in a criminal case asserts a definite theory of law the State may appeal, but where the instruction determines, as a pure matter of fact, that there is no evidence, an appeal will not lie. To hold that an appeal will lie where the court directs a verdict simply because there is no evidence, would be contrary to the settled doctrine that only questions of law can be reserved by the State.² The object of the statute providing for appeals by the State is not to secure a review of questions of fact, but to secure an authoritative exposition of the law.³

§ 275. **Preparation of the Record**—The record must be prepared in accordance with the fundamental principle that only questions of law can be presented to the appellate tribunal in cases where the State appeals. There can be little difficulty in reserving questions of law in cases where the rulings challenged

¹ *State v. Banks*, 48 Ind. 197.

² In *State v. Overholser*, 69 Ind. 144, the court said: "But to enable us to review the action of the court in the matter complained of, it would be necessary for us to go through the evidence and to determine what it may have tended, or may not have tended, to prove. That would be requiring us first to express an opinion upon the

facts of the case and then to draw conclusions of law from those facts, which would be a proceeding, in our opinion, not contemplated by the statute authorizing appeals by the State in criminal cases upon questions reserved at the trial."

³ The general doctrine was well and clearly stated in *State v. Swails*, 8 Ind. 524.

by the State arise on motions or demurrers addressed to indictments or informations, for in such cases a due and timely exception will save the question, and no bill of exceptions is required.¹ Where, however, the State seeks to reserve a question of law upon a ruling other than that made upon the indictment, information or other pleading, the record must be made up with a view to presenting that question, and so made up that the appellate tribunal can understand the question and obtain an adequate conception of the ruling out of which it arises.²

§ 276. **Bill of Exceptions—When necessary**—A bill of exceptions is essential to present a question reserved by the State on the trial, for no other construction can be placed upon the language of the statute providing for reserving such questions.³ The statute contemplates that only specific questions of law shall be reserved and to reserve such questions it is necessary that the particular rulings should be appropriately challenged in the trial court, the proper exceptions reserved and the appropriate record made. As only specific questions can be raised the exceptions must be to specific rulings, and the rulings and exceptions must be so fully exhibited by the record that the appellate tribunal can understand the particular question reserved and ascertain that the mode of reserving it is such as the law authorizes.

§ 277. **Exceptions must be reserved—Motion for New Trial not required**—An exception to the specific ruling is essential and a motion for a new trial can not, in our opinion, operate as an

¹ *State v. Day*, 52 Ind. 483; *State v. Vanderbilt*, 116 Ind. 11.

² Referring to the statute giving the State a right of appeal upon reserved questions, it was said in *The State v. Bartlett*, 9 Ind. 569, that, "The reserved case here spoken of in a criminal proceeding does not differ materially as to form from that provided for in the civil practice. In both cases, the record must be made up in the lower court with a view to its being brought here.

It is not enough in either case to except to the opinion of the court, but the record must be made up with so much of the evidence as is essential to a proper understanding of the case in this court. This is indispensable in reserved questions whether civil or criminal." We suppose, however, that appropriate general statements as to material facts would be sufficient.

³ R. S., § 1883; *Territory v. Jinks*, 8 Mont. 135, 19 Pac. Rep. 386.

exception. We think that a motion for a new trial on the part of the State is not contemplated by the statute and that it can subserve no useful purpose.¹ It is settled that the appellate tribunal can not require the accused to be again tried—that would violate a constitutional provision—so that the filing of a motion for a new trial would be a mere idle ceremony.² In the cases which have been appealed by the State the questions were, so far as our investigation has enabled us to discover, examined without any motion for a new trial in the record. The conclusion we assert is supported by analogous decisions under the provisions of the civil code, for it is held that a question upon conclusions of law stated in a special finding can not be presented by a motion for a new trial, but must be presented by a direct exception to the conclusions.³ There is stronger reason for applying the doctrine referred to in cases of the class under immediate mention than there is for applying it in civil cases, for, in that class of cases, a new trial may be awarded but the State can not have a second trial where there has been an acquittal. As the authorities already cited show, reserved questions are questions of law and not of fact,⁴ and such questions are properly made and saved by direct and specific exceptions. The great principle which runs throughout all the cases is that an exception presents a question of law and not of fact, and that ordinarily only questions of law are raised

¹ In the case of *State v. Ensey*, 42 Ind. 480, the court declined to decide whether an exception to a ruling on a motion for new trial is such an exception "as constitutes a reservation of a point of law." But the reasoning of the court upon another point leads, it seems to us, to the conclusion stated in the text. "It is only the question on which the court has given opinion," it was said in the case cited, "and to which opinion the prosecutor has excepted, which can be reviewed by this court, and the ruling on that question must be assigned as error in this court." The legitimate sequence from the propositions asserted is that there must be

a specific ruling and to that ruling a direct exception.

² *State v. Newkirk*, 80 Ind. 131; *State v. Tumey*, 81 Ind. 559.

³ *Bundy v. McClarnon*, 118 Ind. 165; *Clayton v. Blough*, 93 Ind. 85; *Schmitz v. Lauferty*, 29 Ind. 400; *Smith v. Davidson*, 45 Ind. 396; *Grimes v. Duzan*, 32 Ind. 361.

⁴ To the cases heretofore cited to the proposition that questions of fact will not be decided on an appeal by the State may be added, *State v. Yount*, 4 Ind. 653; *State v. Davis*, 4 Blackf. 345; *State v. Bouche*, 5 Blackf. 154; *State v. Johnson*, 8 Blackf. 533.

by an exception. It is also true that the rule that where an exception is made the appropriate method of presenting a question the exception itself is sufficient, when properly expressed and duly embodied in the record,¹ to present a question of law in cases where questions may be reserved. There is, therefore, no propriety in moving for a new trial.² The term "reserved questions" implies that questions may be made and saved by an exception taken as the law requires and duly carried into the record.

§ 278. **The State has no General Right of Appeal**—Only such questions of law as are reserved in conformity to the provisions of the statute will be considered in cases where the appeal is prosecuted by the State under the statutory provisions giving an appeal upon reserved questions. The statute does not confer upon the State a general right of appeal; on the contrary, the right is limited to the classes of cases specified. Hence it is correctly held that it is only the specific questions properly made and saved that can be considered on appeal.³

§ 279. **How Questions of Law may arise**—Questions of law may arise in various ways and such questions are available, when properly saved and exhibited, no matter at what stage of the proceedings, prior to final judgment, they arise, but, of course, until there is a final judgment⁴ there can be no appeal. Such

¹ It is implied, of course, that the exception must be such as presents the question sought to be reserved for review.

² *Fouty v. Morrison*, 73 Ind. 333; *Short v. Stutsman*, 81 Ind. 115. Where the law provides for presenting questions by an exception the taking of the exception and its reservation in the manner prescribed are all that need be done, for the exception notifies the court of the intention to challenge the ruling on appeal and the incorporation of the exception in the record properly preserves its force.

³ *State v. Lusk*, 68 Ind. 264. In this case the court said, "We are of the opinion, however, that we are not au-

thorized to consider upon this appeal any question not made and reserved upon the trial below, this appeal being only upon a specific question reserved by the State." All the authorities point in one direction, and that is, that there must be a specific ruling made, a direct exception, and a bill of exceptions embodying the ruling, the exception and such facts as are necessary to enable the appellate tribunal to understand and decide the particular question reserved.

⁴ Where there is a ruling finally determining the case an appeal will lie, although there may be no formal order discharging the accused. *State v. Allen*, 94 Ind. 441.

questions may arise on the giving of instructions or on the refusal to give instructions.¹ They may arise on rulings admitting or excluding evidence.² Refusal to permit an amendment may present a question of law,³ but, ordinarily, no available question can arise on such a ruling since the matter of permitting or refusing to permit an amendment is to a great extent one of discretion. It is very seldom, indeed, that the prosecuting attorney will be justified in appealing a case upon a ruling denying leave to amend. It has been held that the State may by appeal present the question as to the correctness of a ruling discharging a jury,⁴ and it may be said, generally, that all questions of law arising upon a ruling discharging an accused may be reserved by the State.⁵

§ 280. **What the Record must show**—In considering what the record must show in order to entitle the State to have the questions sought to be presented examined and determined, it is proper to begin with the statement that all appeals are tried by the record,⁶ and that nothing is part of the record which is not incorporated in it according to law. Thus, statements of the clerk and mere recitals of facts in motions are not parts of the record.⁷ The record must show a final judgment of

¹ *State v. Berdett*, 73 Ind. 185; *State v. Hallowell*, 91 Ind. 376; *State v. Sevier*, 117 Ind. 338; *State v. Ward*, 75 Iowa, 637, 36 N. W. Rep. 765.

² *State v. Tumey*, 81 Ind. 559.

³ *State v. Frain*, 82 Ind. 532; *State v. Walker*, 26 Ind. 346.

⁴ *Commonwealth v. Matthews* (Ky.), 12 S. W. Rep. 323.

⁵ *State v. Wilson*, 50 Ind. 487; *State v. Lenig*, 42 Ind. 541; *State v. Leach*, 120 Ind. 124.

⁶ *People v. Brennan*, 79 Mich. 362, 44 N. W. Rep. 618; *State v. Atkinson*, 33 So. Car. 100, 11 S. E. Rep. 693; *People v. Callaghan*, 4 Utah, 49, 6 Pac. Rep. 49; *Evans v. Commonwealth* (Ky.), 12 S. W. Rep. 768; *State v. Potts*, 20 Neb. 789, 22 Pac. Rep. 754.

⁷ *State v. Cooper*, 103 Ind. 75; *Dolan*

v. State, 122 Ind. 141; *Pattee v. State*, 109 Ind. 545; *Hollingsworth v. State*, 111 Ind. 289; *Brown v. State*, 111 Ind. 441; *Duncan v. State*, 84 Ind. 204; *Archibald v. State*, 122 Ind. 122, 23 N. E. Rep. 758; *Meredith v. State*, 122 Ind. 514, 24 N. E. Rep. 161; *Lawrence v. Commonwealth*, 86 Va. 573, 10 S. E. Rep. 840; *Sisson v. State*, 77 Wis. 273, 45 N. W. Rep. 1130; *Huffman v. State*, 28 Tex. App. 174, 12 S. W. Rep. 588; *State v. Reed* (Mo.), S. W. Rep. 1010; *State v. Carter*, 98 Mo. 176, 11 S. W. Rep. 624. It is hardly necessary to say that the rule stated applies in all cases, for it applies as well to appeals by the State as to appeals by the accused. The cases cited show the application of the settled general rule in a great variety of forms

acquittal.¹ Where an amendment is sought to be made the record must show the proposed amendment or no question will be presented.² Where leave to file a substituted affidavit in support of an information is asked, the proffered affidavit must be properly incorporated in the record.³ An agreement by the counsel for the accused can not take the place of a record,⁴ although such an agreement might be effective to supply omissions made in transcribing the record as actually made by the trial court. The conclusion to which the cases lead is that the State must bring into the record by a bill of exceptions all extrinsic facts, all special or collateral motions, all collateral affidavits and the like, or no question will be presented. It is, indeed, not possible to present reserved questions, except such as arise on the record proper, without a bill of exceptions.⁵

§ 281. **Defective Record**—If so much of the record is properly brought to the appellate tribunal as will enable the court to understand and decide the questions presented by the State, the appeal will not, as it has been held, be dismissed, but the accused may, by *certiorari*, supply defects or omissions.⁶ The case to which we refer states the doctrine somewhat too broadly. If the transcript shows on its face that it is so defective as not to present the question fully and fairly, both to the State and to the defendant, the appeal ought not to be entertained. The language of the statute, as well as the rule declared by the adjudged cases, clearly means that the State must bring up such a record as shall fairly and justly exhibit the questions.⁷ If,

¹ *State v. Hallowell*, 91 Ind. 376; *State v. Wheeler*, 65 Iowa, 619. The doctrine that consent can not give jurisdiction where there is no final judgment applies to appeals by the State as well as to appeals by the accused. *State v. Davis*, 47 Iowa, 634.

² *State v. Frain*, 82 Ind. 532.

³ *State v. McKee*, 109 Ind. 497.

⁴ *State v. Davis*, 47 Iowa, 634; *State v. Wheeler*, 65 Iowa, 619. See, also, *State v. Burnett*, 119 Ind. 392.

⁵ In the case of the *State v. McKee*, 109 Ind. 497, it was said: "The entry

thus made did not bring into the record either the motion by the State's attorney or the ruling thereon. The only way in which they could be brought into and made part of the record was by a bill of exceptions."

⁶ *State v. Weil*, 89 Ind. 286.

⁷ The statute, as has been held by the court from the first decision to the last, confers a special right upon the State, and to secure the right thus conferred the requirements of the law must be strictly obeyed.

however, there is a defect relating merely to a matter not essential to a full understanding of the question it may be disregarded, or an amendment may be ordered.

§ 282. **The Initial Step—Notice**—An appeal by the State is begun by serving a written notice upon the clerk of the court where the judgment was rendered, and by serving a like notice upon the defendant or his attorney, if either can be found, but if neither the defendant nor his attorney can be found, the notice must be posted for three weeks in a conspicuous place in the clerk's office.¹ The notice must show that the State appeals from a particular judgment and that judgment should be identified with reasonable certainty. Notice is indispensable to an appeal by the State,² and it must be given as the statute directs.³ It is said in some of the cases that the notice constitutes the appeal, but this can not be correct, for merely giving notice does not constitute an appeal in the true sense.⁴ It is, indeed, but one step towards taking an appeal, as all the well considered decisions prove, and as will hereafter be shown.

§ 283. **Notice is merely one step towards perfecting the Appeal**—All the provisions of the statute must be taken into consideration, and so they have been in the cases in which the question as to what constitutes an appeal has been fully considered and decided.⁵ It is perfectly clear upon a consideration of all the

¹ R. S., § 1887.

² *McLaughlin v. State*, 66 Ind. 193; *Buell v. State*, 69 Ind. 125; *Darr v. State*, 82 Ind. 11.

³ *Quick v. State*, 73 Ind. 147, 148.

⁴ It is obvious that there is no effective appeal until the jurisdiction of the appellate tribunal attaches, and jurisdiction can not attach where there is nothing upon which the appellate tribunal can act. A mere notice can not call into exercise the appellate jurisdiction; much more is required.

⁵ *Winsett v. State*, 54 Ind. 437; *Farrell v. State*, 85 Ind. 221; *Price v. State*, 74 Ind. 553. While it is said in some of the cases that the notice constitutes

the appeal, yet the decisions themselves show that there is no appeal unless the transcript is filed within the time limited. If it be true that the failure to file the transcript within the time specified requires a dismissal, it must be true that no valid appeal has been taken, since it is logically inconceivable that a valid appeal can be dismissed. To so hold is to adjudge that an appeal taken according to law is no appeal. We have, perhaps, given this question more attention than necessary, but our apology is that some of the decisions indicate that the notice constitutes the appeal and it seems proper to show that such a doctrine is erroneous.

statutory provisions that the mere notice does not constitute an appeal, and this conclusion is obvious when it is brought to mind that until the record and the assignment of errors are properly before the appellate tribunal there is nothing invoking the exercise of appellate jurisdiction. It is inconceivable that there can be an appeal in the true sense until the case gets into the appellate tribunal according to law, for it is only upon the record that appeals can be tried and determined. The truth is that the notice is but a step in the appeal, although it is an important one. It is not, at all events, all that is essential to an appeal, for it is not possible to consider the notice as the appeal without disregarding settled rules of law, as well as important provisions of the statute.

§ 284. Time within which the State must perfect the Appeal—The language employed in the statute and in the decisions upon the subject leaves the question of the time within which an appeal may be perfected in confusion, but it seems to us that this confusion may be cleared away by a just application of fundamental principles. The general words of the statute conferring the right of appeal in criminal cases are mandatory; they are these: "All appeals must be taken within one year after the judgment is rendered."¹ If this provision stood alone there could be but little doubt that all that is necessary to constitute a full appeal must be done within one year, but other provisions must be considered.² In another place it is provided that "an appeal is taken" by giving notice, and in the same section as that from which we first quoted, it is provided that "the transcript must be filed within ninety days after the appeal is taken." It is evident that the term "taken" does not mean a perfected appeal, for if that meaning be ascribed to the term, then all that is essential to an appeal is to give notice, but this can not be true, as the statute commands that the transcript shall be filed within ninety days. The word "taken" must, as we think, be construed to mean begun, for it can not be held to mean that an appeal is perfected, since that would involve the absurdity of holding that all that is necessary to constitute an

¹ R. S., § 1885; *ante*, § 128.

² R. S., § 1887.

appeal is the notice, and that all the procedure is confined to the trial court. In strictness an appeal is not taken until the case is before the appellate tribunal according to law, and that it can not possibly get there upon a mere notice is entirely clear.¹ The loose expressions in some of the cases that notice constitutes the appeal can not, therefore, be deemed authoritative. No one of the cases upon the subject, so far as our examination has enabled us to discover, holds that the time for perfecting an appeal may be prolonged beyond the time designated, or that the appeal is fully taken by giving notice.² The expressions contained in many of the cases bearing upon the question indicate a conclusion in accordance with the view we have expressed.³ Unless the notice perfects the appeal it can not be said to be fully taken, and, certainly, until so taken it is not pending in the appellate tribunal. That the notice does not perfect the appeal has been, in effect, decided.⁴ The Iowa statute is very similar to ours; there is, indeed,⁵ no substantial difference, and it was held by the Supreme Court of that State that the appeal must be taken within one year from the time the judgment was rendered. It was also held that the time for perfecting the appeal could not be extended by agreement.⁶

¹ To hold that the mere notice constitutes the appeal would be contrary to authority and subversive of principle. *Ante*, §§ 128, 162.

² In *Winsett v. State*, 54 Ind. 437, all the steps were taken within the year, and the only question for decision was as to the effect of the failure to file the transcript within thirty days after the notice was given. This is true of the case of *State v. Walters*, 64 Ind. 226, and so it is of the cases of *Buell v. State*, 69 Ind. 125; *Price v. State*, 74 Ind. 553.

³ In *Farrell v. State*, 85 Ind. 221, it was said: "For ninety days after the service of the notice the appellee is bound to take notice of the filing of the transcript, but, if it is not filed within that time, the appellee may presume that the appeal has been abandoned,

unless within a year from the date of the judgment a new notice of appeal shall be served." In *McLaughlin v. State*, 66 Ind. 193, it was said: "If we had proof that proper notice of an appeal had been given within the year during which an appeal was allowed, still this appeal could not be sustained."

⁴ In *Buell v. State*, 69 Ind. 125, it was said: "As the transcript of the cause was not filed within thirty days thereafter, the appeal would not have been perfected in accordance with the requirements of the statute." See *Lichtenfels v. State*, 53 Ind. 161; *post*, § 285.

⁵ 2 McClain's Stats. of Iowa, §§ 5907, 5909.

⁶ *State v. Fleming*, 13 Iowa, 443. It was said by the court, that: "This court can not, under this provision, acquire jurisdiction until there has been

§ 285. **Time—Waiver**—It has been held that the defendant may waive his right to avail himself of the failure to file the transcript within the time prescribed.¹ But we believe that this doctrine is erroneous and it certainly can not be extended without violating principle and opposing authority. It can not, at all events, be so extended as to sustain an appeal where the important steps have not been taken until after the expiration of one year from the time the judgment was rendered. If the statute is not so far complied with as to enable the appealing party to file the transcript within one year and ninety days after the judgment was rendered the appellate tribunal can not, as we believe, entertain jurisdiction, except in cases where fraud or some such cause is shown excusing the delay and making a case for relief under the general and inherent power to prevent fraud or oppression.² There is an explicit and direct

judgment rendered. The parties can not, even by agreement, appeal from the ruling of the district court upon a motion to quash or a demurrer to an indictment. There must be a judgment rendered before either party can appeal. The same may be said with reference to the latter clause of this section. It is equally, if not more, imperative. It is the policy of the criminal law that all criminal litigation should be as early terminated as possible. In view of this policy this provision was enacted. If a party fails to prosecute his appeal for one year after judgment such right is forever at an end, and this court has no power to entertain jurisdiction of a cause after this time has elapsed. Nor do we think that the attorney for the State can confer such jurisdiction." In a former chapter (Chapter V, "Time within which an Appeal may be Taken"), we collected many cases holding that time can not be extended by agreement, and to them may be added *Medcalf v. Commonwealth*, 84 Ky. 485; *Stratton v. Commonwealth*, 84 Ky. 190. See *State v. Davis*, 47 Iowa, 634.

¹ *State v. Walters*, 64 Ind. 226. Time,

as we have shown in Chapter V, is jurisdictional, and while it may be possible that a party can waive strict performance of one step in perfecting an appeal, we think it quite clear that he can not, by agreement, express or implied, extend the time beyond that fixed by law. *Ante*, §§ 111, 112, 128, 162.

² The decision in the case of the *State v. Walters*, 64 Ind. 226, does not oppose this conclusion, for in that case all the acts essential to the appeal were performed within the year. As appears from the quotations made from the decided cases the clear implication is that the notice must be served within the year or there can be no appeal. This is the interpretation put upon the case above named by the court in the case of *West v. Cavins*, 74 Ind. 265, where that case was cited, and it was said: "An agreement to submit made within the year allowed for the appeal and a postponement of the motion to dismiss beyond that time in good conscience should be held to constitute such waiver." In our judgment all the acts essential to an appeal, such as filing the transcript, and assigning error,

decision in support of the proposition that the appeal must be perfected within one year and ninety days from the time the judgment was rendered,¹ and, as the question was there directly presented and judgment directly given upon it, the decision must probably be considered as closing the question. It does unquestionably affirm that time is jurisdictional, and that the notice does not constitute the appeal. It may be doubted whether the decision that the time for appealing is one year and ninety days is right, since there is strong reason for the conclusion that the law means that the appeal shall be fully perfected within one year, but there can be no doubt that the decision that notice alone does not constitute the appeal is correct

§ 286. **Appeal by Defendant**—Appeals by defendants in criminal cases, so far as the time of taking an appeal² and the mode of giving notice are concerned, are governed by substantially the same rules as those governing appeals by the State, except as to the service of notice. Where a defendant appeals it is sufficient to serve notice upon the prosecuting attorney.³ The

as well as giving notice, must be done within the time fixed by law. But irregularities and informalities may be waived. *Beggs v. State*, 122 Ind. 54, 55.

¹ *Lichtenfels v. State*, 53 Ind. 161. In the case cited the question came before the court on a motion to dismiss the appeal, and it was the only question in the case. In giving judgment the court said: "The judgment was rendered at the April term, 1874. The transcript was filed in this court on the 15th day of June, 1876. This was too late. The appeal must be taken within one year after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken. The transcript must have been filed within one year and thirty days after the rendition of the judgment. This was not done." While there is confusion produced by the inaccurate use of the term the "appeal is taken," yet it is clear that the decision

is that until the transcript is filed there is no appeal. The effect of the decision is that a case is not in the appellate tribunal unless there has been performance of the entire series of required acts. It may be remarked that section 1889 of the criminal code (R. S. 1881) recognizes the difference between the appeal and the notice, as witness the words, "An appeal shall stand for trial immediately after filing the transcript and the notice of appeal." It may also be noted that at the time the decision referred to was made the statute required the transcript to be filed within thirty days after notice.

² The appeal must be perfected within one year and ninety days from the time the final judgment was rendered. *Ante*, §§ 284, 285; *Lichtenfels v. State*, 53 Ind. 161.

³ R. S., § 1887; *Darr v. State*, 82 Ind. 11.

criminal code does not provide for appeals in term so that all appeals must be taken upon notice given as the law requires.¹ Notice may be waived; this is so by express enactment, and it would be so upon general principles unless forbidden by positive law.²

§ 287. **Defendants given a general right of Appeal—What must be done to perfect an Appeal**—A defendant in a criminal case is given an appeal as of right, and the right is a general and comprehensive one, since all intermediate errors may, if appropriately saved, be presented for review. But the right given by the statute must be exercised under its provisions and the essential acts required to effect an appeal must be performed within the time prescribed. If there is a substantial compliance with the requirements of the statute the appeal can not be dismissed,³ for a dismissal for any defect or informality in taking the appeal is forbidden.⁴ A second appeal may be taken if the first is ineffective, because not properly perfected, but it must, as the statute declares, be taken "within the year."⁵ The words "within the year" mean, it is evident, *the* year designated in a preceding section of the statute,⁶ and it is difficult to perceive how they can be construed to mean a year and ninety days, but that is the construction adopted in the case heretofore cited.⁷ The conclusion we suggest seems to be required by the

¹ *McLaughlin v. State*, 66 Ind. 193; *Buell v. State*, 69 Ind. 125; *Beck v. State*, 72 Ind. 250.

² R. S., § 1883.

³ In *Beggs v. State*, 122 Ind. 54, it was said: "In the ordinary course an appeal is taken in a criminal case by serving notice on the prosecuting attorney that the appellant appeals to the Supreme Court, and by filing a transcript in the clerk's office within ninety days after such appeal or notice. In the present case a transcript was filed, after which notice was served upon the prosecuting attorney that an appeal had been taken. All this was done within the time in which an appeal could have been taken. While not a literal com-

pliance with the statute, it is in substantial conformity therewith, and must be held to constitute an appeal." It is important to note that this decision declares, as we have done, that the acts required by the statute must be done within the time prescribed.

⁴ R. S., § 1890.

⁵ R. S., § 1890.

⁶ R. S., § 1885.

⁷ *Lichtenfels v. State*, 53 Ind. 161. Unless the transcript is filed in the clerk's office of the Supreme Court within one year and ninety days the appellate tribunal can not entertain jurisdiction. *Hardt v. State*, 13 Texas App. 426. See, *ante*, §§ 284, 285.

language of the statute and by the decisions. It is certainly required by the rules declared in analogous cases.

§ 288. Appeal by one of Several Defendants—One of several defendants may appeal, and no notice to co-parties is required.¹ An appeal in a criminal case stands for trial “immediately after filing the transcript and notice of appeal, if the Supreme Court is in session; if not in session, at the next term thereof.”² The case may be submitted immediately upon filing the transcript and notice.³ A brief must be filed by the appellant within sixty days after the submission or the appeal will be dismissed.⁴ Error must be assigned or no questions will be presented.⁵ The rule governing the assignment of errors is substantially the same in criminal cases as it is in civil cases and the rules stated in another place govern the procedure in criminal cases.⁶

§ 289. Waiver of Right of Appeal—The doctrine of waiver has a wide and important influence in criminal cases as well as in civil. It underlies, in fact, all the cases which hold that the failure to interpose timely and proper objections in the trial court precludes an accused from taking advantage of rulings on appeal. Many rulings that would be available on appeal if timely and specific objections had been made in the trial court will not be available because of the failure to make the appropriate objections in the court of original jurisdiction.⁷ The

¹ R. S., § 1886.

² R. S., § 1889.

³ Rule XVIII.

⁴ Rule XVIII.

⁵ *Sturm v. State*, 74 Ind. 278; *Thoma v. State*, 86 Ind. 182; *Burst v. State*, 88 Ind. 341; *Powers v. State*, 87 Ind. 144, 153; *Millikan v. State*, 70 Ind. 283; *Burke v. State*, 47 Ind. 528; *Malott v. State*, 26 Ind. 93. “The errors must be specially assigned.” *Boswell v. State*, 8 Ind. 499. The decisions place civil and criminal cases substantially upon the same footing so far as concerns the assignment of errors. *Sturm v. State*, *supra*. “An assignment of error is a plead-

ing tendering an issue of law only, and must be signed by the party or his attorney.” *State v. Delano*, 34 Ind. 52.

⁶ “The Assignment of Errors,” Chapter XVI.

⁷ This principle is illustrated in criminal cases by the decisions which hold that where objections to an indictment are not made until after verdict they will be of no avail, although they would have been available on a motion to quash. *Nichols v. State*, 127 Ind. 406, 26 N. E. Rep. 839. In civil practice the principle is illustrated by the numerous cases which hold that defects in pleadings are cured by the verdict. *Jenkins*

right of appeal itself may be waived. It is waived by an accused who flees and becomes a fugitive from justice.¹ Some of the courts have carried the doctrine of waiver so far as to hold that payment of the fine waives the right of appeal, but this we believe to be wrong, for, in our opinion, a defendant who simply pays a fine adjudged against him does not consent to the judgment, inasmuch as he only does what the organ of the law exacts and what it may be necessary for him to do in order to escape imprisonment.² The principle we are considering finds a striking illustration in a case wherein it was held that a defendant who had received a pardon might prosecute an appeal.³ Where the positive law imperatively fixes a time to which the execution of a death sentence must be postponed, the failure to object will not waive the right to make the question on appeal.⁴ Some of our own decisions break in upon the established doctrine of waiver to an extent that, as we have elsewhere said, can not be vindicated upon principle or author-

v. Rice, 84 Ind. 342; *Du Souchet v. Dutcher*, 113 Ind. 249; *Taylor v. Johnson*, 113 Ind. 164; *Orton v. Tilden*, 110 Ind. 131. See *Waiver*.

¹ *Sargent v. State*, 96 Ind. 63; *McCorkle v. State*, 14 Ind. 39; *Heath v. State*, 101 Ind. 512; *Smith v. United States*, 94 U. S. 97; *Commonwealth v. Andrews*, 97 Mass. 543; *Leftwich v. Commonwealth*, 20 Gratt. 716; *People v. Genet*, 59 N. Y. 80, 17 Am. Rep. 315; *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32; *Bonahan v. Nebraska*, 125 U. S. 692, 8 Sup. Ct. Rep. 1390; *State v. Murrell*, 33 So. Car. 83, 11 S. E. Rep. 682.

² As we have shown, payment of a judgment by the defendant in a civil action does not waive the right of appeal, and there is much stronger reason for holding that it should not have that effect in criminal cases than there is in civil actions. *Hyer v. Norton*, 26 Ind. 269; *Armes v. Chappel*, 28 Ind. 469; *Hill v. Starkweather*, 30 Ind. 434; *Belton v. Smith*, 45 Ind. 291.

³ *Eighmy v. People*, 78 N. Y. 330. It was said in this case that: "The pardon issued because he was deemed a fit subject of mercy, and in consequence of it the sentence was not enforced, but from the judgment until reversed injury may be presumed. The defendant may not be punished according to its terms, but the infamy and discredit to which, by it, he is subjected will remain." For interesting and instructive decisions of the subject of pardons, see Mr. Thornton's article on "Pardon and Amnesty," 6 Crim. Law Mag. 457, and his note to *Woodward v. Murdock*, 13 Crim. Law Mag. 71. See, also, for a general statement of the effect of a pardon, *Butler v. State*, 97 Ind. 378, 383. As to the right of appeal, generally, because of the effect of the judgment, see *Johnson v. Commonwealth*, 87 Ky. 189, 13 S. W. Rep. 520; *State v. Gilmore*, 28 Mo. App. 561.

⁴ *Koerner v. State*, 96 Ind. 243. See *Wartner v. State*, 102 Ind. 51.

ity. We refer to the cases wherein it was held that an accused might plead guilty, appeal, and secure a reversal, because the indictment for selling liquor without license failed to allege that the quantity sold was less than a quart, although it did allege that the quantity sold was "one gill."¹ The confession embodied in a plea of guilty can not operate as a waiver of the right of appeal in a case where there is no law defining the offense, and, possibly, it may not operate as a waiver where there is not enough in the indictment or information to indicate the nature of the offense. But where there is a law defining the offense, and an attempt to charge the offense by stating facts fairly indicating the general nature of the offense, the plea of guilty must, as we are fully persuaded, be deemed to waive the right of appeal.² The indictment, or information, may be radically defective and yet the confession contained in the plea of guilty have the effect to waive the appeal, for, where there is a confession, deliberately made in court, that the defendant is guilty of the crime which the allegations of the indictment or information fairly informed him is attempted to be properly charged, there is really no existing controversy, and if no controversy, no jurisdiction.³ It is no doubt true that where the trial court has no jurisdiction the accused may appeal, for he has a right to have a void judgment annulled, but such a case is essentially different from one in which there is

¹ *Arbintrode v. State*, 67 Ind. 267. The court broadly stated that: "If it be true that the facts alleged do not constitute an offense, the appellant has lost nothing by pleading guilty." The doctrine seems to have originated in the case of *Henderson v. State*, 60 Ind. 206, but no authority is there cited which gives even the slenderest support to the broad doctrine asserted. The cases cited certainly intimate—some of them, indeed, assert—an entirely different doctrine. *Hornberger v. State*, 5 Ind. 300; *Hertzfield v. State*, 6 Ind. 23; *Stone v. State*, 42 Ind. 418. The point is not as to the right to challenge an indictment where there has been a plea of not

guilty, but the point is as to the right to confess the crime assumed to be charged and then successfully appeal. The confession is that the charge is true and sufficient, and the only possible question that can be open is whether there is any statute defining the crime assumed to be charged.

² *Casper v. State*, 27 Ohio, 572; *State v. Knowles*, 34 Kan. 393; *State v. Burthe*, 39 La. Ann. 328.

³ *Eberly v. Moore*, 24 How. (U. S.) 147, 158; *Scott v. Kelly*, 22 Wall. 57; *Commonwealth v. McCready*, 2 Metc. (Ky.) 376; *People v. M'Kay*, 18 Johns. 212; *State v. Kinney*, 41 Iowa, 424.

jurisdiction and an effort to charge an offense so fully carried out as to inform the accused in a general way of the crime intended to be charged against him.

§ 290. **Waiver of Errors**—Errors of the gravest character may be expressly or impliedly waived by a defendant in a criminal case, and when once effectively waived they can not be revived on appeal. Failure to object to the competency of a judge will operate as a waiver.¹ An accused may waive his right to the benefit of the constitutional provision that he shall be confronted by the witnesses for the State.² It has been held that a failure to object precludes the defendant from successfully urging on appeal that an indictment was erroneously returned at an adjourned term.³ Objections to the impaneling of the jury, to the qualifications and to the conduct of jurors are waived unless seasonably interposed,⁴ but if the grounds of the objection are unknown or could not be discovered by the exercise of prudence and diligence there is not necessarily a waiver. Objections to the form of a judgment must be made in the trial court, and specifically made, or they will not be available on appeal. Misconduct of counsel in

¹ *Case v. State*, 5 Ind. 1; *Smurr v. State*, 105 Ind. 125; *Henning v. State*, 106 Ind. 386, 395, 55 Am. Rep. 756; *Kennedy v. State*, 53 Ind. 542; *Schlunger v. State*, 113 Ind. 295; *Littleton v. Smith*, 119 Ind. 230; *Hayes v. Sykes*, 120 Ind. 180; *Bartley v. Phillips*, 114 Ind. 189; *Cargar v. Fee*, 119 Ind. 536; *Bowen v. Swandeer*, 121 Ind. 164. Whatever confusion some of the earlier cases may have created, the rule must now be regarded as settled that objections to a judge *pro tempore* must be opportunely made in the trial court. The authorities support this conclusion. *State v. Anone*, 2 Nott. & Mc. 27; *Taylor v. Skrine*, 2 Const. (S. C.) 696; *State v. Alling*, 12 Ohio, 16; *State v. Lowe*, 21 W. Va. 782; *Guice v. State*, 60 Miss. 714; *People v. Cornetti*, 92 N. Y. 85, 88; *State v. Bloom*, 17 Wis. 521.

² *Boggs v. State*, 8 Ind. 463; *Butler v. State*, 97 Ind. 378; *Shular v. State*, 105 Ind. 289. See, generally, *Williams v. State*, 61 Wis. 281; *Wills v. State*, 73 Ala. 362; *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131; *Hancock v. State*, 14 Texas App. 392; *Murphy v. State*, 97 Ind. 579; *State v. Wamire*, 16 Ind. 357; *Fight v. State*, 7 Ohio, 180; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *United States v. Davis*, 6 Blatch. 464.

³ *Porter v. State*, 2 Ind. 435.

⁴ *Henning v. State*, 106 Ind. 386, and cases cited p. 395. *Barlow v. State*, 2 Blackf. 114. See *Cray v. State*, 32 Ind. 384; *Romaine v. State*, 7 Ind. 63; *Murray v. State*, 26 Ind. 141; *Molihan v. State*, 30 Ind. 266; *Farrell v. State*, 33 Ind. 183; *Harman v. State*, 11 Ind. 311; *Long v. State*, 95 Ind. 481.

argument must be specifically and duly objected to or there will be a waiver. In almost every conceivable form the doctrine of waiver has been enforced in criminal cases;¹ it has been enforced in respect to pleadings, in respect to changes of venue,² and in respect to the admission and exclusion of evidence. Errors although saved in the trial court may be waived by a failure to direct attention to them on appeal,³ but this rule is one to be cautiously applied. It is entirely safe to say that many constitutional rights, and all rights not constitutional, or not affecting the jurisdiction of the subject, may be waived. This conclusion is supported by a great number of authorities.⁴

§ 291. **Presumptions**—It is an established rule in criminal cases, as well as in civil cases, that the appellate tribunal will indulge all reasonable presumptions in favor of the legality and regularity of the proceedings of the trial court.⁵ Where all the

¹ *Douglass v. State*, 72 Ind. 385, citing *Teal v. Spangler*, 72 Ind. 380; *Coble v. Elzroth*, 125 Ind. 429; *Grubb v. State*, 117 Ind. 277; *Coleman v. The State*, 111 Ind. 563; *Morrison v. State*, 76 Ind. 335. In *Coleman v. State*, *supra*, it was said: "It is a settled rule that a person having a knowledge of the incompetency or misconduct of a juror, or of any other matter not affecting the jurisdiction of the court, which would vitiate the trial, who, nevertheless, proceeds to a conclusion without objection, will not thereafter be heard to object that the trial was vitiated thereby." *State v. Caulfield*, 23 La. Ann. 148; *State v. Drogmond*, 55 Mo. 87; *Henslie v. State*, 3 Heisk. 202; *Commonwealth v. Dedham*, 16 Mass. 141.

² *Clark v. State*, 4 Ind. 268; *Duncan v. State*, 84 Ind. 204.

³ *Powers v. State*, 87 Ind. 144; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. Rep. 490, citing *Liggett v. Firestone*, 102 Ind. 514; *Pratt v. Allen*, 95 Ind. 404; *Northwestern, etc., Co. v. Hazlett*, 105 Ind. 217; *Landerwlen v. Wheeler*, 106 Ind. 523.

⁴ *Heath v. State*, 101 Ind. 512. See, "Waiver of Constitutional Rights in Criminal Cases," 6 *Crim. Law Mag.* 182, auth. note 186; *State v. Polson*, 29 Ia. 133; *State v. Worden*, 46 Conn. 349; *State v. Jarvis*, 20 Ore. 437, 23 *Pac. Rep.* 251; *State v. Leeper*, 70 Iowa, 748, 30 N. W. Rep. 501; *App v. State*, 90 Ind. 73; *McQueen v. State*, 82 Ind. 72. A striking illustration is supplied by the cases which hold that if incompetent evidence is allowed to go to the jury without objection and it makes out a case the judgment will not be reversed. *Cross v. People*, 47 Ill. 152, S. C. 95 *Am. Rep.* 474; *Graves v. State*, 121 Ind. 357; *Hickey v. State*, 23 Ind. 21. See, generally, *Mergentheim v. State*, 107 Ind. 567.

⁵ *State v. Hanna*, 84 Ind. 183; *Buell v. State*, 72 Ind. 523; *Parker v. State*, 78 Ind. 259; *Folden v. State*, 13 Neb. 328; *State v. Collins*, 33 La. Ann. 152; *Bohannon v. State*, 14 *Texas App.* 271; *State v. Brown*, 33 S. C. 151, 11 S. E. Rep. 641; *People v. Cline*, 83 Cal. 374, 23 *Pac. Rep.* 391; *Duncan v. State*, 88 Ala. 31, 7 *So. Rep.* 104; *State*

instructions are not in the record those asked by the defendant will be presumed to have been properly refused because included in the instructions given.¹ Where the evidence is not in the record it will be presumed that the instructions were based upon it, and that there was no error,² but if the instructions can not be correct upon any supposable state of the evidence this presumption will not prevail. It is held that where the record shows the presence of the accused at the beginning of the trial it will be presumed that he continued in court;³ this presumption would certainly prevail where it appeared that the accused had an opportunity to make, and did make, all of the motions that could be of service to him.⁴ It will be found, on investigation, that the rule that the trial court is presumed to have done its duty and conducted the proceedings legally and regularly is substantially the same in criminal cases as it is in civil cases. There is no valid reason why the rule should be different; on the contrary, the decisions very generally refer to civil cases in support of the conclusions asserted. The doctrine deducible from the decided cases is, it may be said in a general way, that the presumption is, that there was no prejudicial error, and that error must be shown affirmatively by the record, or the presumption will prevail.⁵

v. Weaver, 104 N. C. 758, 10 S. E. Rep. 486; *United States v. Groesbeck*, 4 Utah, 487, 11 Pac. Rep. 542; *Clarke v. State*, 87 Ala. 71, 6 So. Rep. 368; *Lowe v. State*, 88 Ala. 8, 7 So. Rep. 97; *Lienpo v. State*, 28 Texas App. 179, 12 S. W. Rep. 588.

¹ *Johns v. State*, 104 Ind. 557; *Stewart v. State*, 111 Ind. 554; *Gallagher v. State*, 101 Ind. 411; *Holmes v. State*, 88 Ind. 145; *Garrett v. State*, 109 Ind. 527; *Grubb v. State*, 117 Ind. 277; *Hunt v. Kemper*, 9 S. W. Rep. 803; *Carson v. State*, 80 Ga. 170, 5 S. E. Rep. 295; *Willis v. State*, 27 Neb. 98, 42 N. W. Rep. 920.

² *Butler v. State*, 97 Ind. 373, 378; *Powers v. State*, 87 Ind. 144; *People*

v. Von, 78 Cal. 1, 20 Pac. Rep. 35; *Territory v. Scott*, 7 Mont. 407, 17 Pac. Rep. 627; *State v. Dickerson*, 98 N. C. 708; *State v. Moore*, 77 Ia. 449, 42 N. W. Rep. 367; *State v. Wyatt*, 76 Ia. 328, 770, 41 N. W. Rep. 367.

³ *People v. Sing Lum*, 61 Cal. 538; *State v. Collins*, 33 La. Ann. 152; *Bohannon v. State*, 14 Texas App. 271; *Folden v. State*, 13 Neb. 328; *State v. Kline*, 54 Ia. 183, 6 N. W. Rep. 184; *State v. Miller*, 100 Mo. 606; *Carper v. State*, 27 Ohio St. 572.

⁴ *Ayers v. State*, 88 Ind. 275.

⁵ *Parker v. State*, 78 Ind. 259; *Unruh v. State*, 105 Ind. 117; *Wilson v. State*, 16 Ind. 392; *French v. State*, 12 Ind. 670; *Griffith v. State*, 12 Ind. 548; *Devlo*

§ 292. **Record must show Prejudicial Error**—To entitle the defendant to a reversal material error must be shown. To show this it is essential that there should be a decision, or a proper request for a decision and a refusal to decide.¹ The decision or ruling should be upon a material question. Our statutory provisions forbid the reversal for technical or formal errors or irregularities. In one place it is enacted that the court shall disregard formal errors or defects which do not prejudice the substantial rights of the defendant.² The right given to the defendant to except is confined to "a matter of law by which his substantial rights are affected."³ These statutory provisions, emphatic as they are, do little more than declare the general rule established by the later decisions, although it must be owned that many of the earlier cases gave little heed to the provisions of the statute. But the later cases uniformly enforce the statutory provisions.⁴ It is necessary, therefore, that the record should affirmatively show an exception to a ruling upon a matter of law affecting the substantial rights of the defendant, and show, also, that the ruling was prejudicial to him or was probably prejudicial to him.⁵ The

¹ *State*, 4 Ind. 200; *Woolley v. State*, 8 Ind. 502; *Sloan v. State*, 8 Ind. 312; *State v. Frazer*, 28 Ind. 196.

² *Keyes v. State*, 122 Ind. 527; *Coleman v. State*, 111 Ind. 563; *Waterman v. State*, 116 Ind. 51; *Welsh v. State*, 126 Ind. 71.

³ R. S., § 1891.

⁴ R. S., § 1845.

⁵ *Drew v. State*, 124 Ind. 9; *Qualter v. State*, 120 Ind. 92; *Beggs v. State*, 122 Ind. 54; *Lefler v. State*, 122 Ind. 206; *Kennegar v. State*, 120 Ind. 176; *Cooper v. State*, 120 Ind. 377; *Epps v. State*, 102 Ind. 539; *Sample v. State*, 104 Ind. 289; *Strong v. State*, 105 Ind. 1; *Brown v. State*, 105 Ind. 385; *Graeter v. State*, 105 Ind. 271; *Norton v. State*, 106 Ind. 163; *Henning v. State*, 106 Ind. 386; *Heyl v. State*, 109 Ind. 589; *Wood v. State*, 92 Ind. 269; *Norris v. State*, 95 Ind. 73; *Riley v. State*, 95 Ind.

446; *Clayton v. State*, 100 Ind. 201; *State v. Buchler*, 103 Mo. 203, 15 N. W. Rep. 331; *Muscoe v. Commonwealth*, 86 Va. 443, 12 S. E. Rep. 790. These cases, to which many more might be added, are sufficient to show that only substantial errors duly saved can be regarded, for they illustrate many forms and phases of the subject.

⁶ We do not mean to be understood as affirming that the record must expressly state that the error was prejudicial, or probably prejudicial. We intend to convey no such impression. The prejudicial character of the error may appear and, indeed, almost invariably does appear, from the character of the ruling itself and the circumstances under which it was made. If the record so exhibits the erroneous ruling as to make it appear to the appellate tribunal that it probably preju-

general rule that an exception is essential is, however, not applicable to cases where the indictment or information utterly fails to charge a public offence, since, as we have elsewhere shown, if the indictment or information does not charge a public offense it may be assailed in the assignment of errors for the first time.

§ 293. **Objections must be made in the Trial Court**—Objections must be made in the trial court and the questions saved by due and opportune exceptions. The groundwork for the appeal is ordinarily laid in the trial court, for, as a general rule, questions not there made and saved in an appropriate method will not be considered on appeal. Questions as to the jurisdiction of the subject and as to the sufficiency of the indictment or information may, however, be made for the first time in the assignment of errors on appeal.¹ Objections must be reasonably specific and certain.² Exceptions must be duly taken to the rulings upon which error is assigned,³ and the record must show the exceptions.⁴ Where a motion for new trial is necessary (as it generally is) to present questions for review, it must assign the proper causes,⁵ and must be reasonably definite and certain in

diced the substantial rights of the accused, there is, in contemplation of law, an affirmative showing of available error.

¹ *Hays v. State*, 77 Ind. 450; *Pattee v. State*, 109 Ind. 545. See, "Questions that may be First made on Appeal," Chapter XXIII.

² *Graves v. State*, 121 Ind. 357; *State v. Holcombe*, 41 La. Ann. 1066; *People v. Beaver*, 83 Cal. 419, 23 Pac. Rep. 321; *Habel v. State*, 28 Tex. App. 588, 13 S. W. Rep. 1001; *Stout v. State*, 90 Ind. 1; *Sutherland v. State*, 108 Ind. 389; *Willey v. State*, 52 Ind. 421; *McCorkle v. State*, 14 Ind. 39; *Branham v. State*, 11 Ind. 553; *State v. Bartlett*, 9 Ind. 569; *State v. Hope*, 100 Mo. 347, 8 Lawyer's Rep. Anno. 608 and note.

³ *Mullinix v. State*, 10 Ind. 5; *Stone v. State*, 42 Ind. 418; *State v. Downs*, 7 Ind. 283; *State v. Smith*, 8 Ind. 485; *O'Hare v. People*, 40 Ill. 533; *Dough-*

erty v. State, 5 Ind. 453; *People v. Barker*, 60 Mich. 277; *State v. Meyers*, 99 Mo. 107, 12 S. W. Rep. 516; *Graham v. State*, 28 Texas App. 582, 13 S. W. Rep. 1010.

⁴ *State v. Smith*, 8 Ind. 485; *Leverich v. State*, 105 Ind. 277; *Archibald v. State*, 122 Ind. 122; *Powers v. State*, 87 Ind. 144; *Gillooly v. State*, 58 Ind. 182; *Beard v. State*, 57 Ind. 8; *Colley v. Commonwealth (Ky.)*, 12 S. W. Rep. 132; *Steffy v. People*, 130 Ill. 98, 22 N. E. Rep. 861; *Wampler v. State*, 28 Texas App. 352, 13 S. W. Rep. 144; *State v. Gallo*, 18 Ore. 423, 23 Pac. Rep. 264; *Lawrence v. Commonwealth*, 86 Va. 573, 10 S. E. Rep. 840; *Sisson v. State*, 77 Wis. 273, 45 N. W. Rep. 1130.

⁵ *Simons v. State*, 25 Ind. 331; *Schlicht v. State*, 56 Ind. 173. Motion must be made as statute provides. *Hufford v. State*, 6 Ind. 365.

its specifications.¹ The instances we have given serve to show that the rule that questions must be properly made in the trial court, and there duly saved, or an appeal will be fruitless, is strictly enforced. Criminal cases have generally been selected by us in support of our statements, although there was little necessity for confining our reference to decisions in criminal cases, inasmuch as the rules governing the mode of saving and presenting questions for appeal are substantially the same in criminal cases as in civil actions. Upon almost every branch of the subject the rules of civil procedure are referred to and applied, so that the discussion of the general rules of practice applies as well to the one class of cases as to the other.

§ 294. The Record—The defendant must bring to the appellate tribunal a record exhibiting the rulings of which he complains. The rule that recitals of facts in motions can not be considered as part of the record applies as well to appeals by the accused as to appeals by the State. All rulings which require an examination of, and decisions upon, questions of fact must be exhibited so that they can be understood, and this can not be done unless the facts are properly brought into the record.

§ 295. Bill of Exceptions—When necessary—As we have said in speaking of the record where the State appeals, the general rule is that all matters not part of the record proper, as affidavits, matters of evidence, collateral or special motions, and the like, must be brought into the record by a bill of exceptions.²

¹ *State v. Newkirk*, 80 Ind. 131; *Stout v. State*, 78 Ind. 492; *Leyner v. State*, 8 Ind. 490; *Benson v. State*, 119 Ind. 488; *Stout v. State*, 90 Ind. 1; *State v. Riggs*, 92 Ind. 336; *State v. Lindley*, 98 Ind. 48; *Sutherland v. State*, 108 Ind. 389; *Nutter v. State*, 9 Ind. 178; *Cheek v. State*, 37 Ind. 533. See, generally, *Jones v. State*, 11 Ind. 357; *Cox v. State*, 49 Ind. 568; *Farley v. State*, 127 Ind. 419; *State v. Kern*, 127 Ind. 465; *Nichols v. State*, 127 Ind. 406; *Drew v. State*, 124 Ind. 9; *Coleman v. State*, 111 Ind. 563; *Grubb v. State*, 117 Ind. 277;

Waterman v. State, 116 Ind. 51; *Marshall v. State*, 123 Ind. 128; *Adams v. State*, 65 Ind. 565; *McClary v. State*, 75 Ind. 260; *Garber v. State*, 94 Ind. 219; *Rauck v. State*, 110 Ind. 384; *People v. Noonan*, 60 Hun. 578, 14 N. Y. Supp. 519; *People v. McKenna*, 58 Hun. 609; *Commonwealth v. Meserve (Mass.)*, 27 N. E. Rep. 997. These cases exhibit many different phases in which the general subject has been considered.

² *Leverich v. State*, 105 Ind. 277; *Kleepies v. State*, 106 Ind. 383; *Lockhart v. State*, 92 Ind. 452; *Shircliff v.*

The bill must be filed within the time limited;¹ the time can not be extended.² Facts alleged as constituting misconduct on the part of counsel or jurors must be embodied in a bill of exceptions, and affidavits referred to in a motion are not part of the record unless contained in the bill.³ Where all the evidence is necessary to present the questions of which a review is sought, all the evidence must be brought into the record by a bill of exceptions; if it appears that part of the evidence is omitted, the questions will not be decided although the bill recites that it contains all the evidence.⁴ But we do not deem it necessary to go into the authorities in detail; it is enough for our present purpose to declare that a bill of exceptions is as essential to bring into the record extrinsic matters in criminal cases as it is in civil cases, and to refer to another chapter where the subject of bills of exceptions is fully considered.

State, 96 Ind. 369; *Seibert v. State*, 95 Ind. 471; *Shular v. State*, 105 Ind. 289; *Powers v. State*, 87 Ind. 144; *State v. Cooper*, 103 Ind. 75; *Compton v. State*, 89 Ind. 338; *Pence v. State*, 110 Ind. 95; *Taulby v. State*, 38 Ind. 437; *Kennedy v. State*, 37 Ind. 355; *Grandolpho v. State*, 33 Ind. 439; *Long v. State*, 46 Ind. 582; *Harman v. State*, 22 Ind. 331; *Beard v. State*, 54 Ind. 413; *Mosher v. State*, 14 Ind. 261; *Wreidt v. State*, 48 Ind. 579. Where evidence is objected to the bill must show the specific objections. *State v. Wilson*, 52 Ind. 166. A motion for a new trial is part of the record proper, but extrinsic facts constituting the causes must be exhibited in the bill. *Bishop v. Welch*, 54 Ind. 527.

¹ *Pierce v. State*, 75 Ind. 199; *Colee v. State*, 75 Ind. 511; *Bruce v. State*, 87 Ind. 450; *Calvert v. State*, 91 Ind. 473; *Hunter v. State*, 101 Ind. 106; *Shercliff v. State*, 96 Ind. 369; *Marshall v. State*, 123 Ind. 128, 23 N. E. Rep. 1141.

² *Marshall v. State*, 123 Ind. 128, 23 N. E. Rep. 1141; *Bartley v. State*,

111 Ind. 358. In the case last cited it was held that the time could not be extended by agreement. It was said, "The rule to be observed in making out and filing bills of exceptions in criminal causes is less elastic, and has been and still is not so liberal as that prescribed in civil cases." But time may be given when final judgment is rendered. *Barnaby v. State*, 106 Ind. 539.

³ *Meredith v. State*, 122 Ind. 514; *Choen v. State*, 85 Ind. 209.

⁴ *Endsley v. State*, 76 Ind. 467. The opinion cites *Morrow v. State*, 48 Ind. 432; *Sidener v. Davis*, 69 Ind. 336; *Kimball v. Loomis*, 62 Ind. 201; *Aurora, etc., Co. v. Johnson*, 46 Ind. 315; *Columbus, etc., Co. v. Griffin*, 45 Ind. 369; *State v. President, etc.*, 44 Ind. 350; *Griffin v. Ransdell*, 71 Ind. 440. The case of *Endsley v. State*, *supra*, as well as many others, shows that the rule is ordinarily and generally the same in criminal cases as in civil actions.

§ 296. **The Bill of Exceptions—Matters of Practice**—The right to a bill of exceptions is given by statute, and, as is true in all instances where a statutory right is sought to be made available, there must be a compliance with the material provisions of the statute.¹ The statute requires the bill to be presented at the time of the trial, or within such time thereafter as the court may allow.² The exceptions, however, must, as the statute provides, be “taken at the time of the trial.” Leave to file the bill must be obtained concurrently with the final judgment or at some earlier stage of the proceedings.³ The statements of the bill can not be averred against nor aided by extrinsic matters, although errors may be corrected in the trial court, so that it is essential that it should be full and correct.⁴

§ 297. **Appeal does not vacate the Judgment**—An appeal by the defendant does not vacate the judgment of the trial court, nor does it operate as a stay of proceedings in cases where the punishment is imprisonment, but a judgment for fine and costs may be stayed.⁵ The statute does not in terms provide what course shall be pursued in securing a stay where there is a judgment for fine and costs, but a general power to order a stay is granted, and the grant of this principal power carries the incidental and subsidiary powers essential to effectuate the principal power, so that the courts may resort to the ordinary methods of procedure. It seems to us that there can be no doubt of the power to require a bond to secure the fine and costs, and if such power exists, a bond given for the purpose

¹ *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216, and note; 3 Whart. Crim. Law, § 3050; 1 Bishop's Crim. Law, § 840.

² R. S., § 1847.

³ *Calvert v. State*, 91 Ind. 473; *Hunter v. State*, 101 Ind. 406; *Barnaby v. State*, 106 Ind. 539; *Pence v. State*, 110 Ind. 95; *Hunter v. State*, 102 Ind. 428; *Heath v. State*, 101 Ind. 512; *Bartley v. State*, 111 Ind. 358, 12 N. E. Rep. 503; *Marshall v. State*, 123 Ind. 128, 23 N. E. Rep. 1141. The rules governing this subject are much the

same [in criminal cases as in civil cases, so that the discussion of the subject in a subsequent chapter is relevant to the signing and filing of bills of exceptions in criminal cases.

⁴ *People v. Brennan*, 79 Mich. 362, 44 N. W. Rep. 618; *State v. Atkinson*, 33 S. C. 100 11 S. E. Rep. 693. See *Dolan v. State*, 122 Ind. 141, 23 N. E. Rep. 761.

⁵ R. S., § 1888. The respite in capital cases must be granted by the Governor, as it involves the exercise of executive power. *Butler v. State*, 97 Ind. 378.

of securing a stay is valid and effective.¹ The judgment may be reversed in whole or in part, or it may be modified so as to secure a just disposition of the rights of the parties.²

§ 298. **Effect of an Appeal by the State**—The effect of an appeal by the State is restricted and limited by statute, as well as by the constitutional provision forbidding a second jeopardy. Where, however, there has been no jeopardy, as, for instance, where an indictment is quashed, the constitutional provision is not operative, but it is where there has been a trial, no matter how erroneous the proceedings may have been. The appeal of the State neither vacates nor stays the judgment in favor of the accused. The object of the judgment pronounced by the appellate tribunal, as we have elsewhere said, is to secure an authoritative exposition of the law that will bind all inferior tribunals, and not to secure a judgment upon the guilt or innocence of the accused in a particular case.³ The acquittal upon trial ends the right to prosecute, except, perhaps, where the acquittal was procured by such a fraud as rendered the proceedings void.⁴

¹ The bond may, as we think, be given either in the Supreme Court or in the trial court. The power to grant an appeal implies the power to prescribe the terms of the appeal, provided, of course, the terms are such as the general principles of law authorize or the statute provides. The practice of taking bond below has been so long continued that it may well be considered as established, even if there were no principle fully sustaining it. Moore's Crim. Law, § 467; Gillett's Crim. Law, § 1008. The civil code may be invoked

to supply an omitted case. R. S. 1881, § 1900.

² R. S. 1881, § 1892; *Kennedy v. State*, 62 Ind. 136. The general principle that superior appellate tribunals may so mould their judgments as to secure justice is discussed in the chapter on appellate jurisdiction, and in the chapter wherein the effect of a judgment on appeal is considered. See *ante*, Chapter II, and *post*, Chapter XXVIII.

³ R. S. 1881, § 1846; *State v. Granville*, 45 Ohio St. 264, 12 N. E. Rep. 803.

⁴ *Shideler v. State* (Ind.), 28 N. E. Rep. 537.

CHAPTER XVI.

THE ASSIGNMENT OF ERRORS.

- § 299. The office and form of the assignment of errors.
- 300. The assignment of errors is the complaint of the appellee.
- 301. The assignment of errors presents questions of law.
- 302. Leave to amend may precede the assignment of errors.
- 303. Assignment of errors essential to complete jurisdiction.
- 304. Relief where failure to assign errors is caused by accident or fraud.
- 305. Preliminary steps may precede the assignment of error in exceptional cases.
- 306. Specifications of error.
- 307. Statutory provisions.
- 308. Concerning the rule that the assignment shall be specific.
- 309. Each specification must be complete in itself.
- 310. Appeals from the Marion Superior Court.
- 311. By whom errors must be assigned.
- 312. Intervenors.
- 313. Incidental issues.
- 314. Only injured parties can assign error.
- 315. Parties privies may assign error.
- 316. The assignment can not contradict the record.
- 317. A favorable ruling can not be assigned as error.
- 318. Joint assignments.
- 319. Exception to the general rule.
- 320. Curing defects in the assignment.
- § 321. Correcting the assignment of errors as to parties.
- 322. Naming parties.
- 323. Exceptions to the rule requiring names of parties.
- 324. Groundwork of the assignment.
- 325. Distinction between resembling classes of cases.
- 326. Specifications of error defective because too general.
- 327. Meaning of the rule requiring specific assignments.
- 328. Errors respecting jurisdiction of the person.
- 329. Defective trial court process.
- 330. Application to trial court where process or service is defective.
- 331. The difference between cases where there is no jurisdiction and cases where the notice is defective.
- 332. Cases where there is no service.
- 333. Writs running beyond the term.
- 334. Judgments by default.
- 335. Failure to obey a rule to plead.
- 336. Rulings on pleadings—Generally.
- 337. Rulings on demurrers.
- 338. Interrogatories to parties.
- 339. *Habeas corpus* cases.
- 340. Identifying the ruling complained of.
- 341. Objections to the mode of impaneling the jury.
- 342. Rulings on verdicts.
- 343. Specifications in cases of rulings on verdicts.
- 344. Rulings on judgments.
- 345. Mode of objecting to judgments.

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| <p>§ 346. Original objections to judgments.</p> <p>347. Causes for a new trial not assignable as error.</p> <p>348. What matters are not assignable as reasons for a new trial.</p> <p>349. What should be made independent specifications of error.</p> | <p>§ 350. Independent specifications — When proper.</p> <p>351. Specifications of the motion for a new trial.</p> <p>352. Trial where issues of law are undecided.</p> <p>353. Amendment of the assignment of errors.</p> |
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§ 299. **The Office and Form of the Assignment of Errors**—The office of the assignment of errors is to specifically and definitely present for review by the appellate tribunal the rulings of the trial court which the appealing party deems erroneous. Each specification should be complete in itself, and so framed as to clearly present the question of law upon which a decision is sought. One point only, or, perhaps, more accurately, one ruling, should be embraced in each specification.¹ It is not meant by this, however, that every minor proposition should be specifically assigned, for a prolix assignment of errors is neither desirable nor proper.² Although a single specification of error³ should cover only one ruling, yet that one ruling may embrace many subsidiary questions, as, for instance, a specification that the court erred in overruling a demurrer to a complaint may present many subsidiary questions of law, or, a specification that the court erred in overruling a motion for a new trial may

¹ *Kelley v. Bennett*, 132 Pa. 218, 7 Lawyers' Rep. Anno. 120; *Good Intent, etc., Co. v. Hartzell*, 22 Pa. St. 277; *Bull's Appeal*, 24 Pa. St. 286; *McCormack v. Philips (Dak.)*, 34 N. W. Rep. 39; *Hughes v. Galveston, etc., Co.*, 67 Tex. 595, 4 S. W. Rep. 219.

² In the case of *Philips, etc., Co. v. Seymour*, 91 U. S. 646, the Supreme Court of the United States gave counsel a stinging rebuke for unnecessarily multiplying the specifications of errors, saying, among other things: "This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving

for the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on." See, also, *Brewster v. Baxter*, 2 Wash. Ty. 135.

³ The assignment of errors under our practice is a pleading composed of one specification, or of several specifications, and it is, therefore, conducive to perspicuity as well as to accuracy, to speak of the points stated as specifications rather than as assignments. In strict accuracy, an assignment of error is an entire pleading, although composed of parts or branches, and these parts or branches are specifications.

bring forward for review many and diverse rulings concerning the conduct of the trial.

§ 300. The Assignment of Errors is the Complaint of the Appellant—The assignment of errors is, in effect, the complaint in the appellate tribunal, and hence it is necessary that it should be so framed that issue can be joined upon it. It is the pleading which calls into exercise the appellate power, and without it that power is not invoked. By it the case is brought into the appellate court, and upon it is formed the issue, or issues, on which judgment is given in all cases except those in which a question outside of the record is presented in an appropriate mode. In all cases where a review of previously decided questions is sought, errors must be properly assigned.¹

§ 301. The Assignment of Errors presents Questions of Law—The assignment of errors, with few exceptions, concedes all disputed questions of fact and presents for review only questions of law. In a just sense the assignment does not and can not in any case controvert the record, inasmuch as it assumes the verity of the record and implies that error is apparent thereon.² Even in cases where the party challenges the verdict of a jury upon the evidence, or assails the finding of the trial court upon a question of fact, he does not contradict the record, but, on the contrary, he assumes that the record states the facts correctly and alleges that, on the facts as the record exhibits them, the verdict or finding is erroneous. While it is true that under our system an appellate court may be required to review a decision upon a question of fact it is, nevertheless, true that

¹ *Hollingsworth v. State*, 8 Ind. 257; *Hutts v. Hutts*, 62 Ind. 214. An assignment of errors may be required by a rule of court. *Collins v. City of Seattle*, 2 Wash. Ty. 354; *Parker v. Dacres*, 2 Wash. Ty. 440. When thus required, no question can be presented without it. *Brown v. Hazard*, 2 Wash. Ty. 464.

² *Fabyan v. Russell*, 39 N. H. 399; *Claggett v. Sims*, 31 N. H. 22.

³ *Riley v. Murray*, 8 Ind. 354; *Henderson v. Halliday*, 10 Ind. 24; *Deputy v. Hill*, 85 Ind. 75; *Williams v. Riley*, 88 Ind. 290; *Thoma v. State*, 86 Ind. 182; *Hays v. Johns*, 42 Ind. 505; *Wiggs v. Koontz*, 43 Ind. 430; *Pahmeyer v. Groverman*, 60 Ind. 7; *Elder v. Sidwell*, 66 Ind. 316; *Pruitt v. Edinburg, etc., Co.*, 71 Ind. 244; *Snyder v. State*, 124 Ind. 335; *Calvert v. State*, 91 Ind. 473;

it reviews the decision upon the theory that the facts are properly and correctly stated in the record. If it is desired to make an issue of fact outside of the record, or as against the record, it must be done by some other pleading than the assignment of errors. It is seldom that the appellant in the first instance requires any other original pleading on appeal than the assignment of errors; it is, indeed, almost impossible to conceive a case where any other pleading is required in the first instance, except where some defect in the record requires amendment.

§ 302. Leave to amend may precede the Assignment of Errors—

It is within the power of the court to grant an appellant leave to secure an amendment of the record before filing an assignment of errors, for it seems clear that a party can not be rightfully compelled to assign errors upon an imperfect record, but ordinarily the assignment of errors must precede a petition to amend. If, therefore, an appellant believes the record to be radically imperfect he can, upon the proper petition and notice seasonably filed and issued, secure an amendment before assigning errors.¹ He must, however, file such a transcript as he can obtain, since it is incumbent upon him to get the case into the appellate tribunal if it is in his power to do so. As it is his duty to present a complete and perfect record, he must make a clear showing to entitle him to a writ commanding the correction of the record and he should show that the record can not be corrected without the assistance of the appellate tribunal, nor can he obtain leave to have the record amended before assigning error without clearly showing that his case is a well defined and clearly marked exception to the settled general rule. It is, therefore, safest to first assign errors.

§ 303. Assignment of Errors essential to Complete Jurisdiction

—As the complaint of a plaintiff is essential to confer com-

¹ It is, however, to be remembered that changes in the record as it was made in the trial court can not be ordered on appeal; all that can be done or appeal is to make the transcript correctly show what was done below as

the record exhibits it. If an omission is to be supplied, or a defect remedied, and the omission or defect occurred in the trial court, the application to correct or amend must there be made.

plete jurisdiction upon the trial court, and as the assignment of errors is the appellant's complaint on appeal it must be true, as a general rule,—although that rule is not without exceptions,—that there is no jurisdiction of the case until the assignment of errors is properly filed. It is, therefore, correctly held that it is indispensably necessary to file the assignment of errors within the time designated by the statute for taking an appeal.¹ The filing of the transcript alone does not give the appellate tribunal full jurisdiction, nor is there a perfected appeal until the assignment of errors is filed.

§ 304. Relief where failure to assign errors is caused by Accident or Fraud—It is doubtless within the general power of an appellate tribunal to relieve a party who has been prevented by fraud, or by accident, from filing the assignment of errors within the time limited by law, but in the absence of a satisfactory showing of accident or fraud no such relief will be awarded.² If the failure to file the assignment of errors within the time limited by law is attributable to the fault or negligence of the appellant, or his counsel, the court can not permit the assignment to be filed after the expiration of the time designated by law. The requirement of the statute is rightly construed to be imperative and it is only where there is an accident, or a fraud, such as is cognizable under legal or equitable principles, that

¹ *Bacon v. Withrow*, 110 Ind. 94; *Lawrence v. Wood*, 122 Ind. 452, 24 N. E. Rep. 159; *Smythe v. Boswell*, 117 Ind. 365; *Hollingsworth v. State*, 8 Ind. 257; *Henderson v. Halliday*, 10 Ind. 24; *Riley v. Murray*, 8 Ind. 354; *Breeding v. Shinn*, 11 Ind. 547; *State v. Delano*, 34 Ind. 52; *Crawford v. Kansas City, etc., Co.*, 45 Kan. 474, 25 Pac. Rep. 865. As we have already shown the appeal must be fully perfected within the time designated by law. *Ante*, § 128. The question in *Harshman v. Armstrong*, 43 Ind. 126, was as to the notice, not as to the filing of the assignment of errors. Many of the statements in that case

upon the general questions must be deemed erroneous. In *Johnson v. Stephenson*, 104 Ind. 368, the question was not considered or decided.

² *Smythe v. Boswell*, 117 Ind. 365. The assignment of errors being a jurisdictional step, it must be taken within the time prescribed by law for taking the appeal. *Ante*, § 128. It necessarily results from this settled doctrine that a party who asks leave to file the assignment of errors after the time limited by law has expired must show either fraud or accident to which no fault or wrong of his contributed.

there can rightfully be any relaxation of the statutory requirement.

§ 305. Preliminary steps may precede the Assignment of Errors in Exceptional Cases—It has been held, and with reason, that a case may be in the appellate tribunal for the purpose of obtaining process, although no assignment of errors has been filed.¹ The principle upon which this ruling rests is substantially the same as that which authorizes the conclusion that a case may be considered in court for the purpose of securing the correction of the record, although no assignment of errors has been filed. These exceptions do not, however, overthrow the general rule; they simply prove or test it. The true rule is, as we believe, that there is no appeal which will authorize a judgment of review unless the assignment of errors is filed within the time limited by law, although there may be exceptional instances in which a case may be before the court for the purpose of disposing of preliminary or intermediate questions.² But even as to preliminary matters the general rule that the assignment must be made in order to give jurisdiction, will prevail unless the case is so extraordinary as to constitute an exception. Even in cases where preliminary proceedings are allowable the assignment of errors must be filed within the time prescribed, for the appeal must be fully perfected within that time.

§ 306. Specifications of Error—The specifications of error must cover all the rulings which the appellant desires reviewed. He can not, as we have seen, make any error available that is not well assigned, and errors are not well assigned unless they present to the appellate tribunal all the rulings upon which the appellant seeks the judgment of the court to which he prosecutes his

¹ Price v. Baker, 41 Ind. 570.

² Judge Buskirk says: "Until such an assignment is made, a case is not in the Supreme Court for any purpose whatever." Buskirk's Pr. 111. But it is evident that this statement requires some qualification, for although the general rule is that there is no jurisdiction until the assignment of errors is

filed, still it is stating the rule too broadly to say that there is no jurisdiction "for any purpose whatever." Bacon v. Withrow, 110 Ind. 94. The author from whom we have quoted undoubtedly states the general rule, but he states it too broadly, since his statement excludes all possible exceptions.

appeal.¹ If, for instance, a case commenced in one court is carried by a change of venue to another court, and the assignment of errors is limited to the judgment and proceedings of the court in which the action was brought, it will not bring in review rulings in the court into which it went upon change of venue.²

§ 307. **Statutory Provisions**—The statute provides that no pleadings shall be required on appeal except “a specific assignment of errors,”³ but it is obvious that this provision can not be literally construed, for if the language were taken literally there could, in no event, be more than one pleading on appeal. It is clear that no such construction can be justly given the statute, for it would, as every one knows, be impossible to conduct the ordinary business of an appellate court if there could be no motions, petitions, pleas, or the like. The statutory provision can not, however, be construed as a distinct enactment standing apart from all others without a violation of the settled rule that a statutory provision must be considered in connection with the written and unwritten laws of the country.⁴ Nor can it be so construed without doing violence to the familiar rule that the legislative intention must be sought and enforced.

¹ *Winbrenner v. Brunswick, etc., Co.* Hartman, 124 Ind. 186, 26 N. E. Rep. 91; *post*, § 340.

² *Bank v. Wright* (Iowa), 48 N. W. Rep. 91; *Waxel v. Haruman*, 35 Ill. App. 571; *Reagan v. Copeland*, 78 Texas, 551, 14 S. W. Rep. 1031; *Miller v. Wade*, 87 Cal. 410, 25 Pac. Rep. 487.

³ *Indiana, etc., Co. v. McBroom*, 98 Ind. 167; *State v. Terre Haute, etc., Co.*, 64 Ind. 297; *Martin v. Fox*, 40 Mo. App. 664; *St. Louis, etc., Co. v. McLain* (Tex.), 15 S. W. Rep. 789; *Honeycutt v. St. Louis, etc., Co.*, 40 Mo. App. 674; *Greer v. Greer*, 58 Hun. 251, 12 N. Y. Sup. 778. These decisions show that the specific error relied on must be clearly designated. See, also, *Heiney v. Garretson*, 1 Ind. App. 548, 27 N. E. Rep. 989; *Ringgenberger v. Humphries v. Davis*, 100 Ind. 274; *Robinson v. Rippey*, 111 Ind. 112; *Chicago, etc., Co. v. Summers*, 113 Ind. 10; *Morrison v. Jacoby*, 114 Ind. 84; *Bradley v. Thixton*, 117 Ind. 255; *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206. Upon this principle the logical and reasonable conclusion is that when the legislature creates an appellate tribunal it invests that tribunal, except as otherwise expressly or impliedly provided, with all the incidental powers of such a tribunal, whether such powers are prescribed by the written or by the unwritten law.

§ 308. **Concerning the Rule that the Assignment shall be Specific**—The statutory requirement that the assignment of errors shall be specific has been enforced in a great number of cases.¹ The rule, even in the absence of a statutory provision requiring it, is that errors shall be specifically assigned.² To give effective and practical force to the rule requiring specific assignments of the errors relied on, it is necessary that there should be distinct specifications, each complete in itself, and each, as we have seen, presenting for review a single ruling. This is essentially what is required by one of the rules of the Supreme Court,³ and a failure to comply with the provisions of that rule will justify the court in disregarding the assignment.⁴

§ 309. **Each Specification must be Complete in itself**—An assignment of errors is, as has been elsewhere said, composed of

¹ *Isler v. Bland*, 117 Ind. 457; *Durham v. Craig*, 79 Ind. 117; *Blizzard v. Riley*, 83 Ind. 300; *Bowlus v. Brier*, 87 Ind. 391; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Daunhauer v. Hilton*, 82 Ind. 531; *Peters v. Banta*, 120 Ind. 416; *Benson v. State*, 119 Ind. 488, 21 N. E. Rep. 11; *Foster v. Bringham*, 99 Ind. 505; *Lawless v. Harrington*, 75 Ind. 379; *Smith v. Ryan*, 83 Ind. 152; *Austin v. Earhart*, 88 Ind. 182; *Boswell v. State*, 8 Ind. 489; *Davis v. Scott*, 13 Ind. 506; *Ruffing v. Tilton*, 12 Ind. 259; *Moffatt v. Fisher*, 47 Iowa, 473, 474.

² *Dale v. Pruins* (Cal.), 20 Pac. Rep. 296; *Giltrak v. Watters*, 77 Ia. 149, 41 N. W. Rep. 600; *Blum v. Whitworth*, 66 Tex. 350, 1 S. W. Rep. 108; *Martin, etc., Co. v. Wainscott*, 66 Tex. 131, 1 S. W. Rep. 264; *Georgia Railroad Co. v. Olds*, 77 Ga. 673; *Denton v. Woods*, 86 Tenn. 37, 5 S. W. Rep. 489; *Duncombe v. Powers*, 75 Iowa, 185, 189, 39 N. W. Rep. 261; *Swift v. Mulkey*, 17 Oregon, 532, 21 Pac. Rep. 871; *Franz, etc., Co. v. Mielenz*, 5 Dak. Ty. 136, 37 N. W. Rep. 728; *Topeka, etc., Co. v. Martin*, 39 Kan. 750; *Harvie v. Carmack*, 6 Dana (Ky.), 242, 246; *Holman v. Herschser* (Tex.), 16 S. W. Rep. 984.

³ Supreme Court Rule III.

⁴ A disregard of a rule of the court, or of the law, requiring errors to be specified in a designated mode will justify a dismissal of the appeal. *Deutsch v. United States*, 15 Wall. 539. Or the court may affirm the judgment. *Ryan v. Koch*, 17 Wall. 19; *Maxwell v. Stewart*, 21 Wall. 71; *Treat v. Jamison*, 20 Wall. 652. The usual practice in this State is to dismiss the appeal. *Vaughan v. Ferrall*, 50 Ind. 221; *Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. Rep. 708; *Thomas v. Service*, 90 Ind. 128. The same practice obtains in other States. *Freeman v. Rhodes*, 36 Minn. 297, 30 N. W. Rep. 891; *State v. Stewart*, 68 Wis. 234, 32 N. W. Rep. 110; *State v. Whitten*, 23 Mo. App. 459. But the court may affirm the judgment. *Apple v. Atkinson*, 34 Ind. 518; *Rushfeldt v. Shave*, 37 Minn. 282, 33 N. W. Rep. 791; *International, etc., Co. v. Underwood*, 67 Tex. 589, 4 S. W. Rep. 216; *Savage v. Maresch*, 3 Wash. Ty. 259, 21 Pac. Rep. 386; *Territory v. Langford*, 3 Wash. Ty. 279, 21 Pac. Rep. 386; *Frazier v. Venon*, 3 Wash. Ty. 392, 17 Pac. Rep. 885.

specifications, and is in its nature closely analogous to a complaint or declaration,¹ and the same reasoning which leads to the conclusion that each paragraph of a complaint comprised of several paragraphs must be good in itself, requires that it be held that each specification in an assignment of errors should be sufficient in itself. If an assignment of errors is substantially a complaint, then, it is evident that each specification, like each paragraph of a complaint, must be complete in itself,² for one specification can not be aided by another, or by others, and so it is held.³ It is, therefore, necessary that each specification, unaided by any other, shall state at least one point upon which a ruling of the trial court can be reviewed. The court will not undertake to combine the different specifications, and, by a combination, produce a valid assignment, since to do so would be to violate the fundamental rules of pleading,⁴ nor would it be just to the appellee for the court to do work for the appellant by constructing for him a proper pleading in the form of an assignment of errors.

¹ *Associates of The Jersey Company v. Davison*, 5 Dutch (N. J.), 415; *Freeborn v. Denman*, 2 Hals. (N. J.) 190; *Moody v. Vreeland*, 7 Wend. 55; *Clarke v. Bell*, 2 Litt. (Ky.) 162; *Fitch v. Lothrop*, 2 Root (Conn.), 524. In the case first named the court said: "The assignment of errors is a pleading filed by the party complaining of the errors of the judge, and each assignment should be single and not multifarious." In support of this statement these cases were cited: *Oliver v. Phelps*, Spencer, 180, 183; *Coxe v. Field*, 1 Green (N. J.), 215, 218; *Williams v. Shepherd*, 1 Green, 76, 78; *Ludlam v. Broderick*, 3 Green, 269, 275.

² The specification must, as is elsewhere more fully shown, describe and designate the ruling of which a revision is sought. It will not do to specify one ruling and argue questions arising upon another ruling. *Dye v. State* (Ind.), (Oct. 15, '91).

³ *Trammel v. Chipman*, 74 Ind. 474, *Lake v. Lake*, 99 Ind. 339.

⁴ In the case of *Trammel v. Chipman*, *supra*, the cases of *Higgins v. Kendall*, 73 Ind. 522, and *McCallister v. Mount*, 73 Ind. 559, were cited and the court said: "A number of defective assignments can not be combined to constitute a good one, any more than several insufficient paragraphs of a complaint can be deemed to make a good complaint. The assignment of errors is, in effect, the appellant's complaint in this court, and, like the paragraphs of the complaint, each separate specification must in itself state a sufficient cause for reversing the judgment." This rule leads logically to the conclusion often declared, that where there is one good paragraph of a complaint an assignment of errors challenging the sufficiency of the pleading for the first time on appeal is unavailing. *Ashton v. Shepherd*, 120 Ind. 69.

§ 310. **Appeals from the Marion Superior Court**—The practice in appeals from the Marion Superior Court is a peculiar one, and it may well be doubted whether the decisions which created it are well supported, but the practice is now too firmly settled to justify a change by judicial decisions. The rule is, that errors must be specified upon the ruling of the general term in affirming or reversing, as the case may be, the judgment of the special term.¹ It is not easy to reconcile this ruling with the fundamental doctrine that errors must be specifically assigned, but as the errors must be specified in the assignment of errors filed in the general term there is no great practical harm done in holding that the general statement in the assignment made in the Supreme Court is sufficient. While the specification must be based upon the ruling of the general term in affirming or reversing, as the case may be, the judgment of the special term, it is, nevertheless, true that only such questions as were appropriately presented at special term can be considered on appeal.² The appeal must, with rare exceptions, be taken from the general term and can not be taken directly from the special term.³ The errors must be well assigned in the general term or no question will be presented on appeal.⁴ The record, in

¹ *Wesley v. Milford*, 41 Ind. 413; *Farman v. Ratcliff*, 42 Ind. 537; *Wilson v. Harrison*, 44 Ind. 468; *Van Dusen v. Kendleburger*, 44 Ind. 282; *Johnson v. Kohl*, 55 Ind. 454; *Cline v. Love*, 47 Ind. 258; *Munson v. Lock*, 48 Ind. 116; *Heshion v. Scott*, 94 Ind. 570; *Kirland v. Stumph*, 73 Ind. 514; *Deitch Demott*, 89 Ind. 601; *Hereth v. Hereth*, 100 Ind. 35; *Patterson v. Scottish, etc., Co.*, 107 Ind. 497; *Rotach v. McCarty*, 102 Ind. 461; *Beineke v. Wurgler*, 77 Ind. 468; *Leary v. Smith*, 81 Ind. 90. The practice in appeals from the Marion Superior Court is so peculiar that it is difficult to determine where to treat the subject, but we have concluded, not without hesitation, that, as the practice prevailing in such cases forms an exception to the rule that errors must be specifically assigned, the subject may be treated here as well as elsewhere.

² *Selking v. Jones*, 52 Ind. 409; *Huffman v. Indiana Nat. Bank*, 51 Ind. 394; *Russell v. Harrison*, 49 Ind. 97; *Thurston v. Boardman*, 48 Ind. 426; *Bush v. Grover, etc., Co.*, 48 Ind. 258; *Carpenter v. Sigler*, 47 Ind. 202. An appeal will lie from a reversal of the judgment of the special term. *Dubois v. Johnson*, 81 Ind. 520.

³ *McNeely v. Holliday*, 105 Ind. 324; *Gutperle v. Koehler*, 84 Ind. 237; *Wilson v. Vance*, 55 Ind. 394.

⁴ *Smith v. Harris*, 76 Ind. 104; *Cleveland v. Vajen*, 76 Ind. 146. Only such errors as are well assigned in general term will be considered on appeal. *McLaughlin v. Child*, 62 Ind. 412; *State v. Terre Haute, etc., Co.*, 64 Ind. 297; *Indianapolis, etc., R. Co. v. Negley*, 62 Ind. 178; *Miller v. State*, 61 Ind. 503.

case of a reversal by the general term, must be so made up as to show the rulings upon which the judgment at special term was reversed.¹ Where the errors are well assigned in general term and the specifications rest upon rulings to which objections at special term were properly made and exceptions duly taken, the questions will be presented on appeal by a general assignment that the general term erred in affirming or reversing, as the case may be, the judgment of the special term.² An exception to the judgment in general term need not be entered.³ The rules governing the assignment of errors in the Supreme Court apply, with few exceptions, to the assignment of errors in the general term of the Superior Court.⁴

§ 311. By whom Errors must be Assigned—The proper party must assign error or the assignment will be unavailing. Thus, where a judgment was rendered against a township it was held that an assignment of errors by the trustee was of no avail and that the appeal must be dismissed.⁵ One party can not assign error for another unless there is a joint interest.⁶ The doctrine illustrated in the cases referred to rests on solid ground, for where there is no judgment against a party he has nothing to submit for review to the appellate tribunal. While there can be no doubt as to the soundness of the general doctrine there

¹ *Hanna v. Aebker*, 84 Ind. 411; *Gutperle v. Koehler*, 84 Ind. 237; *McWhinney v. Briggs*, 85 Ind. 535.

² *Alexander v. The Northwestern, etc., University*, 57 Ind. 466; *Indianapolis, etc., Co. v. Cincinnati, etc., R. Co.*, 45 Ind. 281; *Carney v. Street*, 41 Ind. 396; *Wesley v. Milford*, 41 Ind. 413.

³ *Linsman v. Huggins*, 44 Ind. 474.

⁴ *Bartholomew v. Preston*, 46 Ind. 286; *Patterson v. The Indianapolis, etc., Co.*, 56 Ind. 20. A joint assignment of errors in general terms must, as a general rule, be good as to all who join in it or it will be good as to none. *Hadley v. Milligan*, 100 Ind. 49.

⁵ *McIlwaine v. Adams*, 46 Ind. 580.

⁶ *Brown v. Miner*, 128 Ill. 148, 21 N. E. Rep. 223; *Paulsen v. Manske*, 126 Ill.

72, 18 N. E. Rep. 275; *Goodwin v. Fox*, 129 U. S. 601, 32 Law. Ed. 805; *Powell v. Sturdevant*, 85 Ala. 243, 4 So. Rep. 718; *Tripp v. Duane*, 74 Cal. 85, 15 Pac. Rep. 439. See, generally, *Smoot v. Boyd*, 87 Ky. 642, 9 S. W. Rep. 829; *Ahern v. McGeary*, 79 Cal. 44, 21 Pac. Rep. 540; *Elkin v. Gregor*, 30 S. C. 422, 9 S. E. Rep. 335; *Hiel v. Hiel*, 40 Kan. 69, 19 Pac. Rep. 340; *Martin v. Kanouse*, 2 Abbott Pr. 390; *O'Brien v. Brown*, 49 How. Pr. 109, 113; *Tracey v. First National Bank of Selma*, 37 N. Y. 523, *People v. Lynch*, 54 N. Y. 681. In *Grant v. Hubbell*, 2 Jones & S. (N. Y.) 224, it was held that a party can not complain of an order made before he came into court, but this doctrine, as we suppose, must be taken with some qualification.

may be some difficulty in giving it practical effect, inasmuch as it may in some instances be difficult to determine whether a judgment so far affects the interest of a party as to entitle him to have it reviewed. Instances of the kind indicated are, however, so very rare that they do not impugn the correctness of the general statement that it is only the parties against whom a judgment is rendered that can rightfully assign error, but there may be cases where the general rule can not be applied in all its strictness.¹

§ 312. **Intervenors**—Persons who become interested in a controversy, although not strictly parties to the original action, or suit, may, in some exceptional instances, become intervenors, and, as such, appeal and assign error. Thus, a creditor who has appeared in a creditor's action may assign error upon a ruling denying him a distributive share of the funds in the hands of the court.² So, as it has been held, an attorney who has been denied fees due him, and for which he is entitled to a lien, may assign error upon an order refusing an allowance.³ In a New York case the doctrine that a person interested in a controversy may appeal, has been applied to the case of a surety on an injunction bond, but this is a very doubtful decision.⁴ It may be well to say, to prevent misunderstanding, that where a party obtains a partial judgment, but not all that he is entitled to, the general rule will not operate to prevent him from assigning errors, provided, of course, he has taken the proper steps in the lower court.

§ 313. **Incidental Issues**—In the exceptional class of cases mentioned in the preceding paragraph the collateral issue (collateral in the sense of being incident to and connected with the general controversy, although not an integral part of it) must, of course, be presented to the trial court for decision in some

¹ *Hobart v. Hobart*, 86 N. Y. 636; *Louden v. Loudon*, 65 How. 411; *McKenzie v. Rhodes*, 13 Abbott's Pr. R. 337; *Attorney Gen. v. North Am. Life Ins. Co.*, 77 N. Y. 297, 6 Abb. (N. C.) 293.

² *McKenzie v. Rhodes*, 13 Abbott's Pr. R. 337; *Louden v. Loudon*, 65 How. Pr. R. 411.

³ *Hotchkiss v. Platt*, 7 Hun. 56, 2 Tidd's Pr. 1135; *Sholty v. McIntyre* (Ill.) 28 N. E. Rep. 42.

⁴ Anonymous, 18 Abb. Pr. 87. See *ante*, § 137.

appropriate mode, for the higher court can not take up the rulings on the collateral issues as an independent controversy; on the contrary it can not with propriety, or with right, adjudicate upon any questions save the rare ones which may be made on appeal for the first time, except those presented for decision in the court below. It is always necessary, therefore, to present these incidental questions to the trial court for decision and, on appeal, to assign as error the decisions on such questions, or, in the proper case, the refusal to make a decision. This conclusion results from the settled general principle that an appellate tribunal reviews decisions but does not, as a rule, decide original questions.¹

§ 314. Only Injured Parties can Assign Error—Errors can be assigned only by persons injuriously affected by the rulings upon which they assume to allege error.² This is, indeed, implied in what has already been said, but it may not be unprofitable to carry the implication into a full and express statement. It is not the duty of an appellate tribunal, nor, indeed, is it the right of such a tribunal, to entertain objections from one who has suffered no injury from the rulings or proceedings of which he assumes to make complaint. This rule is a very general one and its sweep is very wide. It is not changed or affected by the fact that the person who assumes the right to assign error was a party to a suit or action in which rulings were made that worked harm or prejudice to the rights of other parties.³

§ 315. Parties Privies may assign error—Authorities may be found in the text-books and the reports asserting that writs of

¹ *Raymond v. Butterworth*, 139 Mass. 471; *Wiley v. Lovely*, 46 Mich. 83; *Coleman v. Dobbins*, 8 Ind. 156; *Shannon v. Spencer*, 1 Blackf. 120; *Brownlee v. Hare*, 64 Ind. 311; *National Bank, etc., v. Dunn*, 106 Ind. 110; *Byington v. Comm'rs*, 37 Kan. 654, 16 Pa. Rep. 105; *Wetmore v. Plant*, 5 Conn. 541. See, also, *Moore v. Harland*, 107 Ind. 474.

² *Berghoff v. McDonald*, 87 Ind. 549; *Wiley v. Coovert*, 127 Ind. 559; 2 Ba-

con's Abr. 129; 1 Rob. Abr. 748; *Clawson v. Chicago, etc., R. Co.*, 95 Ind. 152. See, also, *Hamilton v. Barricklow*, 96 Ind. 398; *Mason v. Mason*, 102 Ind. 38.

³ *Chicago v. Cameron*, 120 Ill. 447, 451; *Gage v. Reid*, 118 Ill. 35; *Ransom v. Henderson*, 114 Ill. 528, 531; *Beal v. Harrington*, 116 Ill. 113, 119; *Farnan v. Borders*, 119 Ill. 228, 230; *Cool v. Peters, etc., Co.*, 87 Ind. 531. See, also, *Dawson v. Wilson*, 79 Ind. 485.

error may be sued out by persons who are privies to the record, and this general common law rule has been applied to a variety of cases.¹ It would seem to follow from this rule of the common law that privies to the record may appeal and assign error, and there can be little doubt that where the record brought up by the appeal shows the privity, this rule should be enforced under our statute or similar ones. But the difficulty lies in applying the common law rule to a case where the record brought before the appellate tribunal does not disclose the privity. It is generally true that a party can not establish his right to assign error by offering evidence of matters not apparent of record, but there are exceptions to the general rule, as, for instance, the familiar cases where the death of one of the parties makes it necessary to admit his representative, but in such cases there is no addition to the record proper, nor any contradiction. All that is done in such cases is to supply parties. There are cases where one of the original parties transfers his interest, or where it passes from him by operation of law in which the person who succeeds to that interest may, upon proper application, be permitted to assign errors and prosecute the appeal. Where, however, the party can enter the case in the trial court it is his duty to do so, otherwise he is in no situation to assert a right to assign errors. If he is not a party to the judgment or the privy of a party he is not bound by it and can not be prejudiced, so that there is really no ruling working him harm, and if he is not prejudiced there is no reason why he should be allowed to contest the validity of the judgment.

§ 316. The Assignment can not contradict the Record—A person not appearing of record to be a party to the suit or action can not appeal or assign error where his claim involves a contradiction of the record. If a right of appeal claimed by a party

¹ *City of Pensacola v. Reese*, 20 Fla. 437; *Townsend v. Davis*, 1 Ga. 495; *Watson v. Willard*, 9 Pa. St. 89; *Campbell v. Kent*, 3 P. & W. 72; *Godfrey's Case*, 11 Co. R. 45; *Randall's Case*, 2 Mod. R. 308; *Green v. Watkins*, 6 Wheat. 260. See, generally, *Townsend v. Davis*, 1 Ga. 495; *Dupree v. Perry*, 18 Ala. 34; *Harrington v. Roberts*, 7 Ga. 510; *Huner v. Reeves*, 2 Green (Iowa). 190; *Bayard v. Lombard*, 9 How. (U. S.), 530; *Thomas v. Wyatt*, 9 S. & M. 308; 2 *Bacon's Abridg.* 195; *ante*, §§ 137, 312.

is asserted upon matters contravening the record he can not succeed. This conclusion must result, or else it must be conceded that the record may be contradicted on appeal, and this, it is well agreed, can not be done.¹ Errors, as we have heretofore said, in substance, must be assigned upon the record, tried by the record and determined by the record.² A party can not make good his right to assign errors by alleging matters supplying deficiencies or changing the record made in the trial court.³ He may, of course, have the transcript truly exhibit the rulings and proceedings of the trial court, but he can not ask the appellate tribunal to add to or subtract from such rulings or proceedings, although he may, in some instances, show matters that have occurred since the record was made.

§ 317. A favorable Ruling can not be assigned as error—Embraced within the scope of the general principle that only the parties who are injured by the rulings of the trial court can assign errors, is the subsidiary rule that a party can not complain of an erroneous ruling in his favor.⁴ This seems so clear that it is singular that parties favored by a ruling should complain, and yet the adjudged cases show that complaint has been often made by such parties, but always without avail. Closely allied to the rule just stated is that which denies a party the right to make an erroneous ruling available which his own request procured or which was made at his instance.⁵ It is so manifest that it would be subversive of principle to permit a party to secure an erroneous ruling and then make it the ground for an

¹ *Cook v. Conway*, 3 Dana (Ky.), 454; *Shirly v. Lunenburgh*, 11 Mass. 379; *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114; *Clemson v. State Bank*, 1 Scam. (Ill.) 45. *John v. Clayton*, 1 Blackf. 54; *President of State Bank v. State*, 1 Blackf. 267; *Barker v. Hobbs*, 6 Ind. 385; *Robertson v. Caldwell*, 9 Ind. 514; *Hunter v. Leavitt*, 36 Ind. 141.

² *Kline v. Kline*, 49 Mich. 419; *Bingham v. Cabbott*, 3 Dall. (U. S.) 19; *Beach v. Packard*, 10 Vt. 96.

³ *Barndollar v. Cotton*, 5 Col. 29; *Wishmier v. State*, 110 Ind. 523; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309.

⁴ *Bethell v. Mathews*, 13 Wall. 1;

⁵ *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358. Upon the same principle it is held that a party can not successfully object to a judgment upon the ground that his own pleading is defective. *Henderson v. Barbee*, 6 Blackf. 26.

assault upon the judgment of the trial court, that it is hardly worth the while to cite authorities.

§ 318. **Joint Assignments**—Where several parties unite in one assignment of errors they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally and not jointly the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors alleged upon rulings which affect him alone and not those with whom he unites in the assignment. The rule that a joint assignment of errors must be good as to all who unite in it is in harmony with the general principle of pleading which requires a demurrer, an answer, or a motion, to be good as to all who join in it.¹

§ 319. **Exception to the general Rule**—To the rule that a joint assignment of errors must be good as to all who unite in it there is one well defined exception and that is this: where husband and wife are parties an assignment will be good as to both if it is good as to the wife.² This doctrine trenches upon the general rule and grows out of the peculiar relation of husband and wife, for, the old theory that the *baron* and *feme* constitute in law one person has not been entirely overthrown, notwithstanding the radical changes made by our statute.³ It is evident,

¹ Wall v. Bagby, 126 Ind. 372, 26 N. E. Rep. 60; Hawkins v. Heinzman, 126 Ind. 600, 25 N. E. Rep. 708; Arbuckle v. Swim, 123 Ind. 208; Powers v. Town of New Haven, 120 Ind. 185; Sparklin v. St. James Church, 119 Ind. 535; Orton v. Tilden, 110 Ind. 131, 10 N. E. Rep. 936; Hochstedler v. Hochstedler, 108 Ind. 506, 9 N. E. Rep. 467; Tucker v. Conrad, 103 Ind. 349; Hinkle v. Shelley, 100 Ind. 88; Walker v. Hill, 111 Ind. 223, 12 N. E. Rep. 387; Rogers v. Union, etc., Co., 111 Ind. 343, S. C. 60 Am. Rep. 701; Lake v. Lake, 99 Ind. 339; Robbins v. Magee, 96 Ind. 174; Boyd v. Pfeifer, 95 Ind. 599; Quick v. Brenner, 101 Ind. 230; Durham v. Craig, 79 Ind. 117; Becknell v. Becknell, 110

Ind. 42; Walls v. Baird, 91 Ind. 429; Williams v. Riley, 88 Ind. 290; Towell v. Hollweg, 81 Ind. 154; Teter v. Henders, 19 Ind. 93; Estep v. Burke, 19 Ind. 87; Kimbrell v. Rodgers, 90 Ala. 339, 7 So. Rep. 241.

² Stewart v. Babbs, 120 Ind. 568. This decision proceeds substantially upon the same ground on which rests the rule that a husband may unite in an action with his wife although the cause of action is in her.

³ Barnett v. Harshbarger, 105 Ind. 410; Johnson v. Jouchert, 124 Ind. 105, 107. See, generally, Harrell v. Harrell, 117 Ind. 94; Preston v. Fryer, 38 Md. 221; Gebb v. Rose, 40 Md. 87; Jenne v. Marble, 37 Mich. 319.

therefore, that the doctrine can prevail only to a limited extent and that it can not be extended. It forms an exception to a very general and necessary rule of practice and is not to be carried beyond the reason which gives it vitality.

§ 320. Curing Defects in the Assignment—It has been held that where a joint assignment is made which is not good as to all who join in it, the infirmity is cured if the parties for whom no error is alleged decline to join in the appeal.¹ No authorities are adduced in support of this conclusion nor are any reasons given. The ruling may, however, be upheld upon the ground that an assignment of errors may be amended, and that the refusal of the parties as to whom the assignment was bad to join in the appeal operated substantially as an amendment. It may also be said, in support of the decision, that it tends to promote justice without disturbing to any injurious extent the harmony of the system of appellate procedure. When the parties refused to join in the appeal they ceased to be appellants, leaving in court only those as to whom errors were well assigned, so that, in fact, there was no joint assignment good only as to part of those by whom it was made.

§ 321. Correcting the Assignment of Errors as to Parties—Where the appellants discover that their assignment of errors is not good because as to some who join in it errors are not well assigned, they may, under the decision to which we have referred, cure the infirmity by securing a refusal to join in the appeal from those with whom they erroneously united, but a refusal not secured before the case is taken up for consideration by the court would probably be unavailing. Promptness is required in kindred cases, and there is no reason why it should not be exacted in such cases as those under immediate mention. It would, at all events, be too late to attempt to heal the infirmity after a decision has been announced.² It is hardly necessary to

¹ *Cooper v. Hayes*, 96 Ind. 386, 390.

² *State v. Terre Haute, etc., Co.*, 64 Ind. 297. In this case the court, notwithstanding the strong showing made, refused to change the judgment of affirmance to one dismissing the appeal.

The reasoning of the court in support of the proposition that it has no discretion but must affirm the judgment is far from satisfactory, and certainly it is unsupported by authority.

suggest that the safe course, and the lawyer-like course, is to assign errors as the rule requires in the first instance, for a party who disregards settled rules is not in a situation to demand very much as a matter of right, but he must obtain relief, if he obtains it at all, rather as a matter of grace than as a matter of right.

§ 322. Naming Parties—The rule that the names of the parties must be stated in the assignment of errors has been uniformly and strictly enforced.¹ There is reason for this strictness. It tends to systematize the procedure, it compels the identification of parties and thus enables process to be issued against the proper persons. The rule is required by consistency, for a complaint in an appellate court, quite as much as a complaint, bill or declaration in the trial court, can not be complete without naming the parties to the suit or action.

§ 323. Exceptions to the Rule requiring names of Parties—An apparent exception to the rule requiring an assignment of errors to give the names of all the parties is created by a case holding that where a person is made a party to the action in the trial court it is not necessary to name him in the assignment of errors where it appears that he was not served with process in the trial court.² The exception is apparent rather than real, for if

¹ *Snyder v. State*, 124 Ind. 335; *Braden v. Leibenguth*, 126 Ind. 336, 25 N. E. Rep. 899; *Thoma v. State*, 86 Ind. 182; *Todd v. Wood*, 80 Ind. 429; *Louisville, etc., Co. v. Head*, 71 Ind. 176; *Kiley v. Perrin*, 69 Ind. 387; *Darnall v. Hurt*, 55 Ind. 275; *Lang v. Cox*, 35 Ind. 470; *Green River, etc., Co. v. Marshall*, 42 Ind. 470; *State v. Irish*, 42 Ind. 506; *Burke v. State*, 47 Ind. 528; *Peden v. Noland*, 45 Ind. 354; *State v. Delano*, 34 Ind. 52; *Brookover v. Forst*, 31 Ind. 255; *VanCleve v. Boler*, 34 Ind. 538; *Wickham v. Hess*, 38 Ind. 183; *Thomas v. Service*, 90 Ind. 128. See Supreme Court Rule VI. It is held by the Supreme Court of the United States that where

error is assigned by a party in a representative capacity the assignment should show that he has a right to prosecute an appeal in that capacity. *Green v. Watkins*, 6 Wheat. 260. This rule was approved and enforced in *Rundles v. Jones*, 3 Ind. 35, but we do not believe that it is applicable to our present system of procedure. In *Tapley v. McGee*, 6 Ind. 56, it was held that the question was waived by a joinder in error. We incline, however, to the opinion that the objection must be made by a proper denial of capacity and that it is waived by inaction as well as by a joinder in error in the usual form.

² *Wilstach v. Heyd*, 122 Ind. 574. This case, it may be remarked, supplies

there was no service at all, the party was not before the lower court, and it is clear that it can not be required of the appellant that he should bring before the appellate tribunal a person who was not a party to the action in the lower court. While it is the duty of the appellant to name all who were parties to the judgment in a just sense, it is not necessary for him to name those who were simply named in the complaint but who were never in court.

§ 324. **Groundwork of the Assignment**—In by far the greater number of cases the groundwork for the assignment of errors must be laid in the trial court by the objections and exceptions there presented, and if it is not properly constructed no valid assignment of errors can be founded upon it. Many cases correctly affirm that there is no valid specification of error, but give an insufficient reason, or, rather, an irrelevant one, for the conclusion asserted. Thus, it is often said that a specification that the “ judgment should have been for the defendant instead of for the plaintiff,” is bad for the reason that it is too general ; whereas, the true reason, or, at all events, the chief and influential reason, why it is bad, is because the proper specifications were not made in the trial court ; in other words, the groundwork was not properly laid. It is, beyond doubt, correct to say, as is frequently done, that a general assignment of errors is bad,² but it is not correct to say that the assignment is bad because it is too general in a case where it is bad for the reason

an illustration of the rule that parties must adhere to the theories upon which they proceed in the trial court. It was there said: “ It is well settled by the decisions of this court that a pleading must proceed upon some definite theory, and if not good upon that theory is not good at all. This is a very salutary and just rule, and should be especially adhered to by the appellate court.”

¹ *Ruffing v. Tilton*, 12 Ind. 259; *Hamrick v. Danville, etc., Co.*, 41 Ind. 170; *Galletly v. Barrackman*, 12 Ind. 279; *Abraham v. Chase*, 11 Ind. 513; *McFarland v. McFarland*, 40 Ind. 458;

Whitney v. Lehmer, 26 Ind. 503; *State v. Harper*, 38 Ind. 13; *Holmes v. Phenix, etc., Co.*, 49 Ind. 356; *Fall v. Hazelrigg*, 45 Ind. 576; *Sanxay v. Hungerford*, 42 Ind. 44.

² *Indianapolis, etc., Co. v. Doty*, 7 Ind. 580; *Davis v. Scott*, 13 Ind. 506; *Amick v. O'Hara*, 6 Blackf. 258, *King v. Wilkins*, 10 Ind. 216; *Boswell v. State*, 8 Ind. 499. There are, of course, many cases where the reason that an assignment of errors is bad is because it is too general. *Burbank v. Dyer*, 54 Ind. 392.

that no foundation was laid in the trial court by the proper specific objections, motions, or exceptions.

§ 325. Distinction between resembling Classes of Cases—It is evident that there is an essential difference between cases where the assignment of errors is bad because the proper specific objections were not presented to the trial court, and cases where it is bad because the specifications of error are too general, for, in the one case, there can be no amendment on appeal, whereas, in the other, the defect may be cured by the proper amendment.¹ Where a party is required to present specific objections to the trial court, he is confined to the objections there presented, and can not add to or change them on appeal.² But where the mistake consists wholly in making the specification of error too general, as, for instance, assigning that a demurrer was sustained to an answer of several paragraphs instead of properly specifying each paragraph,³ the mistake may be rectified on appeal by amending the assignment of error as the rules of procedure require. The instance just given of a ruling on demurrer to an answer composed of several paragraphs serves to illustrate the distinction we are endeavoring to mark and enforce, for, if the demurrer had been addressed to all of the paragraphs, and some of them were good, then nothing that could be done in the appellate court could rectify the mistake in demurring to an entire answer, when the demurrer should have been to the several paragraphs distributively. What is wholly and exclusively part of the appellate procedure may, in the proper case and upon due application, be amended or changed by order or leave of the appellate tribunal,⁴ but what is part of the trial court procedure can not be altered on appeal, hence it is important that the pleadings of the court of appellate jurisdiction should be carefully discriminated from those of the court in which the original jurisdiction resides.

§ 326. Specifications of Error Defective because too general—Specifications of error may unquestionably be too general in

¹ Supreme Court Rule III.

len v. Clark, 49 Ind. 77; Starnes v.

² Temple v. Lasher, 39 Ind. 203; State, 61 Ind. 360.

Griesel v. Schmal, 55 Ind. 475; McMull-

³ Bolin v. Simmons, 81 Ind. 92.

⁴ Supreme Court Rule III.

the true sense of the term,¹ but where they each respectively properly specify a ruling made upon pleadings, motions, objections or exceptions, the specification is sufficiently definite in cases where the objections are required to be specifically made below and are there made in due form. Thus a specification of error that the "court gave instructions numbered —," is insufficient, not, however, simply because it is too general, but because the objection should be specifically made in the trial court.² Specifications of error may, it is sufficiently evident from the bare statement, be ill for more reasons than one. The rule deducible from the decisions and supported by principle is that where a specification of error definitely and certainly designates a ruling made upon specifications properly framed in the trial court, all subordinate questions within the scope of the original specifications are presented to the appellate tribunal for consideration and decision. Such a specification may not, of course, present an error requiring a reversal, but it will present an error in such a manner as to call the ruling of the trial court in review. Obviously there is a distinction between the mode of presenting a question for consideration and presenting a ruling which will require a reversal of the judgment, and here we are only concerned with the question whether the alleged error is presented in due form and manner, not whether it is of such a character as to require the appellate tribunal to reverse the judgment. It may be well enough to add that the rule we indicate is essential to prevent a violation of the rule prohibiting multifariousness and useless prolixity as well as to secure clearness, harmony and precision.

§ 327. Meaning of the rule requiring Specific Assignments—The rule that the assignment of errors must be specific does not imply

¹ *Smith v. Ryan*, 83 Ind. 152; *Lawless v. Harrington*, 75 Ind. 379; *Foster v. Bringham*, 99 Ind. 505; *Clayton v. Blough*, 93 Ind. 85; *Ray v. Detchon*, 79 Ind. 56. etc., *Co. v. The Studebaker, etc.*, 117 Ind. 416; *Richardson v. Seybold*, 76 Ind. 58; *Bane v. Ward*, 77 Ind. 153; *Hege v. Newsom*, 96 Ind. 426; *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42; *Williams v. Riley*, 88 Ind. 290; *LaFollette v. Higgins*, 109 Ind. 241; *Daunhauer v. Hilton*, 82 Ind. 531; *Kissel v. Anderson*, 73 Ind. 485; *Austin v. Earhart*, 88 Ind. 182.

² *Pennsylvania Co. v. Gallentine*, 77 Ind. 322. As will be hereafter shown specifications that properly form causes in a motion for a new trial can not be made specifications of error. *Queen*,

that errors fully and properly specified by the appropriate pleading, or motion, in the trial court must be again specified in the assignment of errors made on appeal; on the contrary the rule is that where errors are properly specified in the trial court it is improper to repeat the specifications on appeal. What the law requires to be done in the trial court can not be done on appeal, and it is not necessary to specifically repeat on appeal what was well specified below. Erroneous rulings upon pleadings must be specified in the trial court, except in the rare cases where they may be assailed in the first instance in the assignment of errors.¹ Demurrers, motions and exceptions are the usual modes of presenting objections to the process and pleadings. A motion for a new trial with causes specifically and definitely assigned, is the appropriate mode of bringing in review the rulings upon matters pertaining to the trial. A motion for a *venire de novo* is a proper mode of directing attention to a defective verdict. A motion for judgment on answers to special interrogatories is the correct method of procedure where it is desired to secure judgment upon the answers on the ground that they control the general verdict. A motion to modify a judgment, or specific exceptions to a decree, may bring in review questions respecting the judgment or decree. This outline, rough and indistinct as it is, answers our immediate purpose, which is, first, to enforce the general proposition that errors that must be specified in the trial court can not be effectively again specified on appeal, and, second, to prepare the way for a discussion in detail of the mode of assigning errors upon the rulings of the trial court.

§ 328. **Errors respecting Jurisdiction of the Person**—It is natural, as well as convenient, to begin with the mode of assigning errors upon rulings respecting jurisdiction of the person, but, as other phases of that general question are elsewhere treated, we shall in this place speak only of that phase of the subject connected with objections to the process. Jurisdiction of the person is essential to the validity of judicial proceedings and

¹ The question of jurisdiction of the subject is not here considered, as it is fully discussed in the chapter on Questions that may first be made on appeal, *post*, Chapter XXIII.

whether jurisdiction is obtained over the person depends upon whether notice, or summons, has been issued and served as the law requires. Objections to the form and substance of the process where there is process and service must as a general rule be made in the trial court,¹ and, according to the general principle heretofore stated, all such specifications as are necessary to clearly present the questions sought to be raised must be made in the trial court since no additional specifications can be made on appeal. No ground, or cause, for setting aside the process, or its service, can be added to those stated in the trial court. A defective or incomplete motion can not be aided or cured by the assignment of errors.²

§ 329. Defective Trial Court Process—It is in accordance with the general rule that motions, objections or the like constitute the groundwork of the specifications of error that it is held that where the defendant is served with process he must first seek relief from a judgment rendered against him by default by a proper application addressed to the trial court.³ The proceeding in the trial court must, in such cases, conform to the law, and the appellate court, as a general rule, although not always, simply reviews the question as presented by the record and determines whether the trial court did or did not err in dis-

¹ *Clegg v. Patterson*, 32 Ind. 135; *Whiteside v. Adams*, 26 Ind. 250, 252; *Evansville, etc., Co. v. Lawrence*, 29 Ind. 622; *Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. Rep. 820. The decision in the case of *Helphenstine v. Vincennes National Bank*, 65 Ind. 582, is a good illustration of the true rule upon this subject. For analogous decisions, see *Barnes v. Roemer*, 39 Ind. 589; *Torr v. Torr*, 20 Ind. 118; *Round v. State*, 14 Ind. 493.

² One reason why objections to process or its service should be made in the trial court is that it may be there amended in many instances, so that it would be unjust to permit a defendant to lie by and make his objection available on appeal. *State v. Davis*, 73 Ind. 359.

³ *Barnes v. Conner*, 39 Ind. 294; *Strader v. Manville*, 33 Ind. 111; *Clegg v. Fithian*, 32 Ind. 90; *Ratlif v. Baldwin*, 29 Ind. 16; *Goldsberry v. Carter*, 28 Ind. 59; *Nutting v. Losance*, 27 Ind. 37; *Skeen v. Huntington*, 25 Ind. 510; *DeArmond v. Adams*, 25 Ind. 455; *Frasier v. Hubble*, 13 Ind. 432; *Harlan v. Edwards*, 13 Ind. 430; *Blair v. Davis*, 9 Ind. 236. This principle applies to a case where a party assumes to contest the amount of damages assessed on default. *O'Dell v. Carpenter*, 71 Ind. 463; *Barnes v. Bell*, 39 Ind. 328. In harmony with the general rule that only injured parties can complain, it is held that only a party prejudiced can attack a judgment rendered on default. *Knott v. Taylor*, 99 N. C. 511, 6 Am. Rep. 547.

posing of the application to be relieved from the consequences of the default. The ruling of the trial court must, of course, be sustained unless there was prejudicial error.¹

§ 330. Application to Trial Court where process or service is defective—There is some confusion in the decisions upon the subject of relief from judgments rendered on default, for, in one case, at least, the statement is made that in all cases where a judgment is rendered upon default the defendant may appeal and assign error without taking any steps to be relieved in the trial court.² It would be a palpable violation of principle to permit a party over whose person jurisdiction has been obtained

¹ As to what an applicant must show, see *Rupert v. Martz*, 116 Ind. 72; *Center Tp. v. Board*, 110 Ind. 579; *Beatty v. O'Connor*, 106 Ind. 81; *Wills v. Browning*, 96 Ind. 149; *Birch v. Frantz*, 77 Ind. 199; *Ammerman v. State*, 98 Ind. 165; *Jonsson v. Lindstrom*, 114 Ind. 152; *Lee v. Basey*, 85 Ind. 543; *Slagle v. Bodmer*, 75 Ind. 330; *Williams v. Kessler*, 82 Ind. 184; *Lawler v. Couch*, 80 Ind. 369; *Clandy v. Caldwell*, 106 Ind. 256; *Newcome v. Wiggins*, 78 Ind. 306; *Morris v. Buckeye Engine Co.*, 78 Ind. 86; *Brumbaugh v. Stockman*, 83 Ind. 583; *Rogers v. Overton*, 87 Ind. 410; *Nietert v. Trentman*, 104 Ind. 390; *Coon v. Welborn*, 83 Ind. 230; *Joerns v. LaNicca*, 75 Iowa, 705, 38 N. W. Rep. 129; *Weymouth v. Gregg (Mich.)*, 41 N. W. Rep. 243; *Jean v. Hennessy*, 69 Iowa, 373; *Kreite v. Kreite*, 93 Ind. 583; *Monroe v. Paddock*, 75 Ind. 422. The case of *Nichols v. Nichols*, 96 Ind. 423, is very much limited by *Nietert v. Trentman*, *supra*.

² *Baldwin v. Humphrey*, 75 Ind. 153. This statement is, perhaps, justified by the remarks of the court in *Odell v. Carpenter*, 71 Ind. 463, but the cases cited by no means warrant the broad statement. The case of *Kyle v. Kyle*, 55 Ind. 387, does not support it. In

that case the point decided is exhibited by this language of the opinion: "But the more recent rule is, that where the court below has rendered judgment against a party without having acquired jurisdiction over him, he not having appeared to the action, he may at once appeal to the Supreme Court, without having applied to the court below to set the judgment aside." The case of *Strader v. Manville*, 33 Ind. 111, decides that where there is no cause of action the question may be first made on appeal, and so does *Wright v. Norris*, 40 Ind. 247. *Cochnower v. Cochnower*, 27 Ind. 253, asserts that where there is no process there is no jurisdiction of the person, and that the question may be made on appeal. It is expressly said that the decision is not in conflict with *Blair v. Davis*, 9 Ind. 236, *Harlan v. Edwards*, 13 Ind. 430, or *Cincinnati, etc., R. R. Co. v. Calvert*, 13 Ind. 489. *Abdill v. Abdill*, 26 Ind. 287, applies only to infant defendants. *Bristor v. Galvin*, 62 Ind. 352, decides that where there is no jurisdiction of the person because no service of process, the question may be first made on appeal. It is quite clear that no one of these cases goes to the extent asserted in *Baldwin v. Humphrey*, *supra*.

to assign as error a ruling unchallenged in the trial court, although, if there appropriately questioned, it might be available on appeal. To permit a party who suffers a default in a case where there is jurisdiction of the subject and of the person to make an original objection to process on appeal, would be unjust to the plaintiff and lead to mischievous results. A defendant who suffers a default would be in a much better situation than one who makes an active defense if such were the rule. A defendant desirous of delay and of vexing his adversary would, it is obvious, reap unfair advantage from such a doctrine. Strong and satisfactory arguments may be readily arrayed against the doctrine, but not one of plausibility, much less of real strength, in its favor.¹

§ 331. The difference between cases where there is no Jurisdiction and cases where Notice is defective—The confusion which some of the cases have created is due to the failure to discriminate between instances where there is no jurisdiction of the person because no process or no service, and cases where there is process and service but some defect or irregularity. There is, as has been suggested, a clear and well defined distinction between the two classes of cases, and the fundamental principles of procedure forbid the confounding of the two classes for the purpose of bringing them under one general rule. It is one thing to frame a rule for a case where there is no jurisdiction of the person and quite another to frame a rule for a case where there is jurisdiction, although an error subsequently intervenes. The distinction is, indeed, recognized in the very case which seems to deny it, for it is there held that where there is service of process no question as to the amount of the recovery can be first made on appeal.²

¹ The case of *Baldwin v. Humphrey*, 75 Ind. 153, is cited in *Old v. Mohler*, 122 Ind. 594, 597, in support of the proposition that where there is an entire want of a cause of action, the complaint may be first assailed on appeal, although there has been a default. This is, however, very far from approving the statement that even though there is juris-

diction still there may be an attack upon the judgment without any prior proceedings in the trial court. That statement does not express the law.

² *Baldwin v. Humphrey*, 75 Ind. 153. This distinction was fully recognized and enforced in *Barnes v. Bell*, 39 Ind. 328, where the case of *Skeen v. Huntington*, 25 Ind. 510, is approved. In

§ 332. **Cases where there is no Service**—There is reason for holding that where the record shows that there was no service of process there can be no valid judgment and that the question may first be presented on appeal.¹ In so far, therefore, as our cases hold that such a question may first be made in the appellate court, they can not be said to be radically wrong, although there is some reason supporting the cases which asserted that even where there was no process the objection must first be presented by an application made to the trial court. But the rule that the question may be first made on appeal, has been unduly extended in some cases, for the rule has been carried beyond the reason which alone gives it even the semblance of strength. Where there is process or notice purporting to be such as the law requires, and in form and substance such as is required by law, then, although the process may be defective an objection should be made below. This is in harmony with the closely resembling cases, which hold that where there is some notice, although defective, it is sufficient to sustain a judgment against a collateral attack.² It is also in harmony

Skeen v. Huntington it was said: "The question of service we can not consider as it has been ruled by this court that where a judgment is taken by default, a motion to set aside the default, or proceedings for relief from the judgment, or to review, it must precede an appeal." In support of this statement the court cited: *Blair v. Davis*, 9 Ind. 236; *Harlan v. Edwards*, 13 Ind. 430; *Frasier v. Hubble*, 13 Ind. 432; *Kirby v. Robbins*, 13 Ind. 470. See, also, *Yancey v. Tetter*, 39 Ind. 305; *Gray v. Dickey*, 20 Ind. 96. See, also, *Searle v. Whipperman*, 79 Ind. 424.

¹ *Rany v. Governor*, 4 Blackf. 2; *Miller v. Bottorf*, 6 Blackf. 30; *Klinger v. Brownell*, 5 Blackf. 332; *Miles v. Buchanan*, 36 Ind. 490; *New Albany, etc., Co. v. Welsh*, 9 Ind. 479; *Cochnower v. Cochnower*, 27 Ind. 253; *Cole v. Allen*, 51 Ind. 122; *Brooks v. Allen*, 62 Ind. 401, 403; *Abdill v. Abdill*, 26 Ind. 287; *Houk v. Barthold*, 73 Ind. 21; *Bris-*

tor v. Galvin, 62 Ind. 352; *Crane v. Kimmer*, 77 Ind. 215; *Strader v. Manville*, 33 Ind. 111; *Searle v. Whipperman*, 79 Ind. 424, 426. See, generally, *Wheeler v. Edinger*, 11 Iowa, 409; *McCraney v. Childs*, 11 Iowa, 54; *Winslow v. Anderson*, 3 Dev. & Bat. (L.) 9, 32 Am. Dec. 651; *Drew v. Claypool*, 61 Mich. 233, 28 N. W. Rep. 78; *Miller v. Burton*, 121 Ind. 224, 23 N. E. Rep. 84.

² *McAlpine v. Sweetser*, 76 Ind. 78; *Muncey v. Joest*, 74 Ind. 409; *Hume v. Conduitt*, 76 Ind. 598; *Stout v. Woods*, 79 Ind. 108; *Oppenheim v. Pittsburgh, etc., Co.*, 85 Ind. 471; *Million v. Board*, 89 Ind. 5, 12; *McCormick v. Webster*, 89 Ind. 105; *Brown v. Goble*, 97 Ind. 86, 89; *Jackson v. State*, 104 Ind. 516; *Kleyla v. Haskett*, 112 Ind. 515; *Hackett v. State*, 113 Ind. 532; *Lake Shore, etc., Co. v. Cincinnati, etc., Co.*, 116 Ind. 578; *Bass v. City of Fort Wayne*, 121 Ind. 389; *Morrow v. Weed*, 4 Iowa, 77; *Bonsall v. Isett*, 14 Iowa, 309;

with the rule that where there is process and service, objections not made below to the form of the judgment or the amount of recovery can not be successfully specified as error on appeal.¹ Some of the cases go beyond the line of principle, and also oppose authority in holding that, although there is some notice and some service, the question of the sufficiency of the notice or service may be first made on appeal.² This ruling violates many of the principles we have stated, and contravenes many of the authorities referred to, and it also conflicts with the settled doctrine that the authority to judge at all is jurisdiction, whether the judgment be right or wrong. It also conflicts with the accepted doctrine that where there is process sufficient upon its face to invoke the exercise of judgment upon its sufficiency, the judgment is effective, for, though it may be erroneous, it is not void.³

Ballinger v. Tarbell, 16 Iowa, 491; *Hendrick v. Whittemore*, 105 Mass. 23; *Cook v. Darling*, 18 Pick. 393; *Finneran v. Leonard*, 7 Allen, 54; *Wright v. Marsh*, 2 Greene (Iowa), 94; *Paine v. Mooreland*, 15 Ohio, 435; *Borden v. State*, 6 Eng. (Ark.) 519; *Sheldon v. Wright*, 5 N.Y. 497; *Delaney v. Gault*, 30 Pa. St. 63; *Callen v. Ellison*, 13 Ohio St. 446; *People v. Hagar*, 52 Cal. 171.

¹ *Searle v. Whipperman*, 79 Ind. 424.

This case very clearly shows the fallacy of the reasoning in *Berkshire v. Young*, 45 Ind. 461; *Davidson v. King*, 49 Ind. 338 and *Emmett v. Yandes*, 60 Ind. 548, and, beyond cavil, establishes the true doctrine. See, generally, *Woods v. Brown*, 93 Ind. 164.

² *Kyle v. Kyle*, 55 Ind. 387. In stating the general rule that where there is no jurisdiction of the person there can be no judgment, the opinion in the case cited does not radically depart from principle, but it does depart from principle in deciding that where there is a legal notice and service by an unauthorized person, the question may be first made on appeal. It seems clear that there is, in such a case, a question

upon which the trial court has authority to pass and which it must decide, and that the utmost that can be said is that as an erroneous decision it is reviewable upon appeal if objection is first made below. *Catterlin v. City of Frankfort*, 87 Ind. 45; *Board of Commrs., etc., v. Hall*, 70 Ind. 469. If the notice is such as to inform the party that there is an action pending, it would seem that he ought to object to its sufficiency in the trial court. *Nysewander v. Lowman*, 124 Ind. 584; *Quarl v. Abbett*, 102 Ind. 233; *Goodell v. Starr*, 127 Ind. 198. See, generally, *Pickering v. State*, 106 Ind. 228; *Argo v. Barthand*, 80 Ind. 63; *Ricketts v. Spraker*, 77 Ind. 371; *Prezinger v. Harness*, 114 Ind. 491; *Johnson v. State*, 116 Ind. 374; *Otis v. DeBoer*, 116 Ind. 531.

³ *Knox County v. Aspinwall*, 21 How. (U. S.) 537; *Coloma v. Eaves*, 92 U. S. 484; *Douglass Co. v. Bolles*, 94 U. S. 104; *Bissell v. City of Jeffersonville*, 24 How. (U. S.) 287; *Evansville, etc., Co. v. City of Evansville*, 15 Ind. 395; *Cauldwell v. Curry*, 93 Ind. 363; *Town of Cicero v. Williamson*, 91 Ind. 541; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Jackson v. State*, 104 Ind. 516;

on appeal, must be first appropriately presented to the trial court.¹

§ 336. **Rulings on Pleadings Generally**—In considering specifications of error founded on rulings upon the pleadings it is quite as well, perhaps, to begin with motions addressed to the pleadings, such as a motion to compel the party to file an abstract of title, to file a bill of particulars, to make his pleading more definite and certain, or the like, since such motions precede, in strict order, demurrers, pleas, or answers.² A motion of the class mentioned is a special motion, and, as a general rule, should specify the grounds upon which it is founded.³ Where the motion does specify the grounds there is neither necessity nor propriety in repeating them on appeal. If the grounds are well specified below a specification indicating with clearness and certainty the particular motion on which the ruling was made is all that is proper. If this motion was not sufficiently specific as originally filed its deficiencies can not be supplied on appeal.

§ 337. **Rulings on Demurrers**—As causes for demurrer must be properly stated in the demurrer itself, it is only necessary that the specifications in the assignment of errors should designate with clearness and certainty the particular ruling of which

¹ *Coffin v. Evansville, etc., Co.*, 7 Ind. 413.

² *Hart v. Walker*, 77 Ind. 331.

³ *City of New Albany v. White*, 100 Ind. 206; *Louisville, etc., Co. v. Crunk*, 119 Ind. 542; *Greenman v. Cohee*, 61 Ind. 201; *Cobble v. Tomlinson*, 50 Ind. 550; *Bundy v. Pool*, 82 Ind. 502; *Gray v. Stiver*, 24 Ind. 174; *Kent v. Lawson*, 12 Ind. 675; *Lynch v. Jennings*, 43 Ind. 276; *Beard v. State*, 57 Ind. 8; *Hancock v. Heaton*, 53 Ind. 111; *Hablichtel v. Yambert*, 75 Iowa, 539. 39 N.W. Rep. 877; *Barney v. Hartford*, 73 Wis. 95, 40 N.W. Rep. 581. As illustrating the general rule may be cited the case of *Walker v. Steele*, 121 Ind.

436, where it is held that the record must show the grounds of a motion to strike out part of a pleading. See, generally, *Ratliff v. Stretch*, 117 Ind. 526, 20 N.E. Rep. 438; *Fordyce v. Merrill*, 49 Ark. 277, 5 S.W. Rep. 329; *Hurst v. Ash Grove*, 96 Mo. 168, 9 S.W. Rep. 631. What the motion to make more certain should point out. *Fischer v. Coons*, 26 Neb. 400, 42 N.W. Rep. 417. The remedy for uncertainty is by motion, not demurrer. *Moorman v. Shockney*, 95 Ind. 88; *Betts v. Quick*, 114 Ind. 165; *Thomas v. Merry*, 113 Ind. 83; *Nowlin v. Whipple*, 89 Ind. 490; *Pittsburgh, etc., Co. v. Hixon*, 110 Ind. 225; *Watt v. Pitman*, 125 Ind. 168.

a review is sought. Where the demurrer is a distributive one, that is, one addressed to each paragraph of a complaint, answer, or reply, the specifications should be directed to the ruling on each paragraph. The general principle which underlies the entire system of procedure requires that where there are several rulings each should be separately challenged. This is in consonance with the accepted doctrine that where there is a joint or undistributed objection to several pleadings the objection will fail unless the objection is valid as to all the pleadings to which it is addressed. The safe rule, as well as the logical rule, is to specify errors distributively upon each paragraph on which a ruling is made.¹

§ 338. **Interrogatories to Parties**—Interrogatories to parties are parts of the pleading and are not matters connected with the trial. As rulings on such interrogatories are rulings on the pleadings, such rulings should be specified as independent errors, for they are not embraced in a specification alleging error in overruling a motion for a new trial. The practice of propounding interrogatories is borrowed from the old chancery system, and is, in effect, the statutory substitute for the bill of discovery. In substance, there is no essential difference between the chancery and statutory mode of procedure.²

§ 339. **Habeas Corpus Cases**—Instances of a class different from those growing out of ordinary civil actions but resting upon the same general principle are supplied by *habeas corpus* cases. In that class of cases it is held that while there must be a specific assignment of errors it is, nevertheless, sufficient if the specifications of error point out with clearness and designate with certainty the ruling made in the trial court. It will be sufficient although they do not go into minute details. To illustrate our meaning and to prevent a broader construction than we desire our words to receive, we say that where the appropriate excep-

¹ *Bolin v. Simmonds*, 81 Ind. 92; *Higgins v. Kendall*, 73 Ind. 522. is closed. *Sherman v. Hogland*, 73 Ind. 472. See, generally, *Wheeler v.*

² *Cates v. Thayer*, 93 Ind. 156; *Reed Reitz*, 92 Ind. 379; *Fitch v. Citizens' National Bank*, 97 Ind. 211; *Hill v. Nisbet*, 100 Ind. 341. Interrogatories are required to be filed with the pleadings, that is, prior to the time the issue

tion is reserved below it presents the question when followed by a proper specification of error.¹ A petition for a writ of *habeas corpus* can not be first assailed by the assignment of errors, for the reason that the proceeding is a peculiar one and is governed by rules unlike those which prevail in ordinary civil actions,² but its peculiarities do not extend so far as to render it necessary to repeat in the specifications of error the points involved in the exceptions taken on the trial. If the exceptions there taken are properly presented, all subsidiary questions are involved in the rulings upon them, and by properly assigning such rulings for error, all subsidiary questions embraced in them are properly brought before the appellate tribunal for review.

§ 340. **Identifying the Ruling Complained of**—In specifying the ruling upon the pleading which it is the design of the party to present to the appellate tribunal for review, the particular ruling must be definitely and appropriately designated. It will not do to designate any other ruling than the particular one which the party desires reviewed.³ This rule is of important influence in cases where the party desires to present a question upon the failure of the trial court to carry back a demurrer to one pleading and sustain it to an antecedent pleading, as, for instance, in the case of a failure to carry back to the complaint a demurrer to the answer. In such a case it is not sufficient to specify as error that the court erred in sustaining the demurrer to the answer, for the law requires a specification of the particular ruling.⁴

¹ *McGlennan v. Margowski*, 90 Ind. 150. A motion to quash the writ tests the sufficiency of the petition, and, in accordance with the principle we have stated, a specification that the court erred in sustaining or in overruling the motion to quash will properly present the question on appeal.

² *McGlennan v. Margowski*, 90 Ind. 150; *Baker v. Gordon*, 23 Ind. 204; *Cunningham v. Thomas*, 25 Ind. 171; *Milligan v. State*, 97 Ind. 355.

³ *State v. Weaver*, 123 Ind. 512. The record must show the particular ruling

complained of, and the specification of error must clearly designate the specific ruling. Thus, a ruling upon a motion for new trial generally will not support a specification assigning as error a ruling upon a motion for a new trial upon an issue made upon a counter-claim or cross-complaint. *Klinger v. Smith*, 29 N. E. Rep. 364.

⁴ *Peters v. Banta*, 120 Ind. 416; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Stockwell v. State*, 101 Ind. 1; *Williams v. Stevenson*, 103 Ind. 243. These decisions do not impinge upon the rule

§ 341. **Objections to the mode of Impaneling the Jury**—Objections to the mode of impaneling the jury must be made in the trial court in order to form the basis of a specification in the assignment of errors.¹ This rule is strictly analogous to that established by the later cases wherein it is held that objections to the appointment of a special judge must be opportunely presented to the trial court.² It is evident that no other rule can be sanctioned without a radical departure from principle, although some of the earlier cases indicate a different view. The general doctrine of waiver is incidentally involved in questions respecting the impaneling of juries, as it is, indeed, in very many phases of procedure, for a failure to seasonably and appropriately object is a waiver which the parties are not always at liberty to retract.³

§ 342. **Rulings on Verdicts**—The line between appellate procedure and trial court practice, as in many other instances, is a very thin and indistinct one in respect to the method of questioning verdicts, and it is not always easy to say where the subject properly belongs. It can not, in truth, be said that the

that a bad answer is good enough for a bad complaint, for they are not directed to that phase of the subject. A defendant may, of course, parry an attack upon his answer by showing the insufficiency of the complaint.

¹ *Dolan v. State*, 122 Ind. 141; *Doolittle v. State*, 93 Ind. 272; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433.

² *Cargar v. Tee*, 119 Ind. 536; *Bowen v. Swander*, 121 Ind. 164; *Schlunger v. State*, 113 Ind. 295; *Bartley v. Phillips*, 114 Ind. 189; *Greenwood v. State*, 116 Ind. 485; *Littleton v. Smith*, 119 Ind. 230; *Hayes v. Sykes*, 120 Ind. 180; *State v. Whitney*, 7 Oregon, 386. See, generally, *Fassinow v. State*, 89 Ind. 235; *Kennedy v. State*, 53 Ind. 542; *Barnes v. State*, 28 Ind. 82; *Walter v. Walter*, 117 Ind. 247; *Hyatt v. Hyatt*, 33 Ind. 309; *Rudd v. Woolfolk*, 4 Bush. 555; *Grant v. Holmes*, 75 Mo. 109;

Harper v. Jacobs, 51 Mo. 296; *Territory v. Bryson* 9 Mont. 32, 22 Pac. Rep. 147.

³ *Henny Buggy Co. v. Patt*, 73 Iowa, 767, 35 N. W. Rep. 587; *Stevenson v. Felton*, 99 N. C. 58, 5 S. E. Rep. 399; *Cole v. Terrell*, 71 Tex. 549, 9 S. W. Rep. 668. Demand for jury should be seasonably made. *Thorp v. Reilly*, 57 N. Y. Sup. Ct. 589, 8 N. Y. Sup. 493; *Sternberger v. Bernheimer* (N. Y.), 24 N. E. Rep. 311. Upon the general subject of demanding a jury, see, *Gleaves v. Davidson*, 85 Tenn. 380, 3 S. W. Rep. 348; *East Tennessee, etc., Co. v. Martin*, 85 Tenn. 134, 2 S. W. Rep. 381; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. Rep. 380; *Foster v. Hinson*, 76 Iowa, 714, 39 N. W. Rep. 682; *In re Hooker's Estate*, 75 Iowa, 377, 39 N. W. Rep. 652. See Special Findings and Special Verdicts.

subject can be fully understood without blending the rules which obtain in the trial court and in the appellate tribunal, for the attack in the trial court is the basis of the specifications in the assignment of errors. It is for this reason that it is proper to speak, although not at length, of the objections which may be urged against a verdict, as well as of the rule by which a verdict is to be interpreted or construed. Immaterial defects, or unimportant inaccuracies, will not prevail to overthrow a verdict, either general or special; on the contrary, if the verdict is so full and intelligible as to support a judgment it will be upheld.¹ A verdict must receive a liberal construction and all parts of it,² at least in so far as they relate to the same subject, must be taken into consideration; to consider it in fragmentary parts would, it is evident, violate the familiar rule applicable to pleadings, instructions and the like, since that well-known rule forbids dissection and attacks in detail. If the verdict is sufficiently certain as against the party who assumes to complain his complaint will not be heeded.³ In strictness, a motion which assumes to challenge the sufficiency of a verdict should specify the defects which are assumed to exist.⁴ It is probably true that some of the cases indicate that a different course may be safely pursued, but the object of the code is to secure a clear specification of the grounds upon which a party proceeds and to fully present those objections to the trial court, so that to maintain harmony and carry into effect the spirit of the code it should be held that objections must be specific. Another reason supports this conclusion and that is that the ruling on a motion should be specified in the assignment of errors, and not the particular grounds upon which the motion is based.

§ 343. Specifications in cases of rulings on Verdicts—Indepen-

¹ *Beggs v. State*, 122 Ind. 54, 23 N. E. Rep. 693; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309; *Bonewits v. Wygant*, 75 Ind. 41; *Lentz v. Martin*, 75 Ind. 228; *Peed v. Brenneman*, 72 Ind. 288; *Ridenour v. Beekman*, 68 Ind. 236; *Hershman v. Hershman*, 63 Ind. 451; *Merrick v. State*, 63 Ind. 327; *Breckley v. Weghorn*, 71 Ind. 497; *Trout v. West*,

29 Ind. 51; *Marcus v. State*, 26 Ind. 101; *Smith v. Jeffries*, 25 Ind. 376; *Boxley v. Collins*, 4 Blackf. 320; *Moore v. Read*, 1 Blackf. 177; *State v. McNamara*, 100 Mo. 100, 13 S. W. Rep. 938.

² *Woodard v. Davis*, 127 Ind. 172; *Baldwin v. Burrows*, 95 Ind. 81.

³ *Clark v. Brown*, 70 Ind. 405.

⁴ *Deatty v. Shirley*, 83 Ind. 218.

dent specifications of error can not be made upon verdicts, for there must be some motion challenging them in the trial court.¹ A motion for a new trial generally brings forward for review all questions except such as relate to the form and character of a general verdict, but where the form or sufficiency of a general verdict is sought to be questioned, the appropriate motion addressed to the verdict itself, and not, as a general rule, to matters preceding or following it, must be made in the court of original jurisdiction. The appropriate motion is for a *venire de novo*.² If such a motion is made,³ then, all that need be done is to specify the ruling on the motion in the assignment of errors. A motion for a *venire de novo*, it may not be improper to add, simply reaches defects apparent on the face of the record.⁴

§ 344. **Rulings on Judgments**—Independent specifications of error presenting original objections to a judgment or decree are, as a general rule, unavailing, for the rule is that objections to a judgment or decree must be presented to the trial court and a decision secured, or else a decision asked and denied. Where the proper steps have been taken in the trial court the specifications of error must be made upon the rulings of that court. This is in harmony with the general doctrine that, wherever it is practicable, parties must give the trial court a seasonable opportunity to review its rulings. Where a judgment fails to follow the verdict the question should, as a general rule, be first presented to the trial court.⁵ It is probable that there are some

¹ *Kamerick v. Castleman*, 29 Mo. App. 658; *Dockerty v. Huston*, 125 Ind. 102, 25 N. E. Rep. 144.

² *Bunnell v. Bunnell*, 93 Ind. 595; *Carver v. Carver*, 83 Ind. 368; *Thayer v. Burger*, 100 Ind. 262; *Ridenour v. Miller*, 83 Ind. 208; *Baughan v. Baughan*, 114 Ind. 73; *Bartley v. Phillips*, 114 Ind. 189.

³ It must be made before judgment. *McClintock v. Theiss*, 74 Ind. 200; *Deatty v. Shirley*, 83 Ind. 218. Does not serve the purpose of a motion for a new trial. *Glantz v. City of South Bend*, 106 Ind. 305.

⁴ *Dolan v. State*, 122 Ind. 141. The rule in this State is different from that of the common law, for, although a verdict does not find upon all the issues, it is not vulnerable to an attack by a motion for a *venire de novo*. *Board of Commissioners v. Pearson*, 120 Ind. 426, 16 Am. St. R. 325.

⁵ *Berkey, etc., Co. v. Hascall*, 123 Ind. 502; *Skaggs v. State*, 108 Ind. 53; *Scott v. Minneapolis, etc., Co.*, 42 Minn. 179; *Baker v. Moor*, 84 Ga. 186, 10 S. E. Rep. 737; *Bell v. Mansfield (Ky.)*, 13 S. W. Rep. 838. In *Scott v. Minneapolis, etc., Co.*, *supra*, it was held that where a judg-

exceptions to this general rule, but it is certainly always safest to present objections to the trial court, for it is very seldom indeed that they can be made with success as original questions on appeal.

§ 345. **Mode of objecting to Judgments**—The mode of objecting to a judgment often approved by this court is by a motion to modify.¹ In many instances and in a variety of cases it has been held that such a motion is necessary in order to reserve a question for review on appeal. Thus, in one case, it was held that where a personal judgment was erroneously rendered the failure to make the proper motion in the trial court precluded the complaining party from making the error available by specifying it in the assignment of errors.² So, where the court goes beyond the issues, the proper objection must be appropriately presented to the trial court.³ A case of a different class, but one forcibly illustrating the rule, is that wherein it was held that in order to present a question upon a judgment containing an order revoking the license of a liquor seller, an objection must be properly made in the court of original jurisdiction.⁴ Where it is sought to question a judgment erroneously provid-

ment was entered by the clerk without any order of the court that the failure to object below prevented a consideration of the question on appeal. As sustaining this doctrine the court cited *Eaton v. Caldwell*, 3 Minn. 134; *Oldenberg v. Devine*, 40 Minn. 409, 42 N.W. Rep. 88; *Lundberg v. Single Men's Endowment Association*, 41 Minn. 505, 43 N. W. Rep. 394; *Savage v. State*, 19 Fla. 561.

¹ *Clark v. Wilson*, 77 Ind. 176; *Evans v. Feeny*, 81 Ind. 532; *Stephenson v. Ballard*, 82 Ind. 87; *Martin v. Martin*, 74 Ind. 207; *Terry v. Shively*, 93 Ind. 413; *City of Greenfield v. State*, 113 Ind. 597; *Baddeley v. Patterson*, 78 Ind. 157; *Earle v. Simons*, 94 Ind. 573; *Merritt v. Pearson*, 76 Ind. 44; *Jenkins v. Rice*, 84 Ind. 342; *Landwerlen v. Wheeler*, 106 Ind. 523; *Kissell v. Anderson*, 73 Ind. 485; *Smith v. Kyler*, 74 Ind.

575; *Becknell v. Becknell*, 110 Ind. 42; *Carrothers v. Carrothers*, 107 Ind. 530; *Johnson v. Unversaw*, 30 Ind. 435; *Pierce v. Wilson*, 48 Ind. 298; *Mahoney v. Robbins*, 49 Ind. 146; *Ebberson v. Redding*, 22 Ind. 232; *Stout v. Cary*, 110 Ind. 514.

² *Cockrum v. West*, 122 Ind. 372; *Rardin v. Walpole*, 38 Ind. 146. See, also, *Smith v. Dodds*, 35 Ind. 452; *Jemison v. Walsh*, 30 Ind. 167.

³ *Landers v. George*, 49 Ind. 309. See, generally, *McCormick v. Spencer*, 53 Ind. 550; *Miles v. Buchanan*, 36 Ind. 490; *Buchanan v. Berkshire, etc., Co.*, 96 Ind. 510; *Buell v. Shuman*, 28 Ind. 464; *Teal v. Spangler*, 72 Ind. 380; *Smith v. Tatman*, 71 Ind. 171; *Norddyke, etc., Co. v. Dickson*, 76 Ind. 188; *Terry v. Shively*, 93 Ind. 413; *Ingel v. Scott*, 86 Ind. 518.

⁴ *Douglass v. State*, 72 Ind. 385.

ing for a waiver of appraisal laws the objection must be first presented to the lower court.¹

§ 346. **Original Objections to Judgments**—The true rule, true because it is based on principle and harmonizes with kindred rules, is that the objections to a judgment or decree must be specified with reasonable certainty and definiteness in the lower court. The failure to there make the proper specifications would, if such specifications were permitted to be made on appeal, lead to a transgression of the fundamental doctrine that where opportunity offers specific objections must be presented to the trial court, and it would also lead to a violation of the rule designed to avoid prolixity in specifying errors in the assignment. The cases which are most consistent with principle are those which hold that the specific objections must be first presented to the trial court.² Objecting in a general way is no more than asserting that the party does object, and, surely, nothing of practical worth can be accomplished by such a course, for it leaves the court to hunt for the real objections, if any there are. Not only must the objections to a decree or

¹ *Johnson v. Prine*, 55 Ind. 351; *Lewis v. Edwards*, 44 Ind. 333; *Atkisson v. Martin*, 39 Ind. 242; *O'Brien v. Peterman*, 34 Ind. 556; *Watts v. Green*, 30 Ind. 98.

² *Stout v. Curry*, 110 Ind. 514; *Scotton v. Mann*, 89 Ind. 404; *Benefiel v. Aughe*, 93 Ind. 401; *Horman v. Hortmer*, 128 Ind. 353; *Mansfield v. Shipp*, 27 N. E. Rep. 427; *Jenkins v. Rice*, 84 Ind. 342; *Indianapolis, etc., Co. v. Smythe*, 45 Ind. 322; *McClain v. Sullivan*, 85 Ind. 174; *Bayless v. Glenn*, 72 Ind. 5. It was held in *Griffin v. Reis*, 68 Ind. 9, that where the objection is apparent on the face of the decree a general exception is sufficient. One of the cases, *Cubberly v. Wine*, 13 Ind. 353, cited in *Griffin v. Reis*, was expressly, and, as we think, correctly overruled in *Thompson v. Davis*, 29 Ind. 264. With the fall of *Cubberly v. Wine* must fall the

case of *Wainscott v. Silvers*, 13 Ind. 497. Another of the cases cited in *Griffin v. Reis*, *Piel v. Brayer*, 30 Ind. 332, is not at all in point. In the case of *Knarr v. Conway*, 42 Ind. 260, no question was made or decided regarding the method of objecting to the decree. The decision in *Searle v. Whipperman*, 79 Ind. 424, is in principle opposed to the doctrine of *Griffin v. Reis*, and so are the cases first cited in this note, as well as many others. *American Ins. Co. v. Gibson*, 104 Ind. 336, and cases cited, p. 342; *Tachau v. Fiedeldey*, 81 Ind. 54; *Shoaf v. Joray*, 86 Ind. 70; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350. It is safe, therefore, to affirm that the case we have criticized must be deemed to be overruled in so far as it affects the question of the mode of presenting objections to a decree.

judgment be specific, but the objections must also be properly brought into the record or they will not be regarded.¹

§ 347. **Causes for new trial not assignable as error**—It has been held in very many cases that rulings which properly form the basis, grounds, or causes, for a new trial, can not be independently assigned as error.² This holding is in accordance with principle, inasmuch as it gives the trial court an opportunity to review its own rulings and correct its own errors. It also gives consistency to procedure and secures harmony, because it adheres to the fundamental principle that where objections are required to be made in the trial court there they must be first made, and there made so fully that they cover all the questions involved in the ruling challenged on appeal.³ A counterpart of the rule just stated is supplied by the doctrine deducible from the cases which hold that rulings properly assigned as causes, or reasons, for a new trial are brought before the appellate tribunal for review by a specification of error that the trial court erred in overruling the motion for a new trial.⁴ The office of the motion is to fully present the reasons or causes

¹ McClain v. Sullivan, 85 Ind. 174; Adams v. LaRose, 75 Ind. 471; Peoples Savings, etc., Co. v. Spears, 115 Ind. 297; Forsythe v. Kreuter, 100 Ind. 27; Pennsylvania Co. v. Niblack, 99 Ind. 149; Stelzer v. LaRose, 79 Ind. 435; Marquess v. LaBaw, 82 Ind. 550; Quill v. Gallivan, 108 Ind. 235.

² Allen v. State, 74 Ind. 216; Smith v. Kyler, 74 Ind. 575; Todd v. Jackson, 75 Ind. 272; Cole v. Kidd, 80 Ind. 563; Bake v. Smiley, 84 Ind. 212; Bolin v. Simmons, 81 Ind. 92; Hutts v. Shoaf, 88 Ind. 395; Kernodle v. Gibson, 114 Ind. 451; Davis v. Montgomery, 123 Ind. 587; Robbins v. Magee, 96 Ind. 174; Daunhauer v. Hilton, 82 Ind. 531; Hege v. Newsome, 96 Ind. 426; Houston v. Briner, 59 Ind. 25; Lyman v. Buckner, 60 Ind. 402; Claflin v. Dawson, 58 Ind. 408; Watson v. Piel, 58 Ind. 566; Wallis v. Anderson, etc., Co.,

60 Ind. 56; Wiley v. Barclay, 58 Ind. 577; Jones v. Doe, 1 Ind. 109; Priddy v. Dodd, 4 Ind. 84.

³ Hill v. Jamieson, 16 Ind. 125; Fuller v. Indianapolis, etc., Co., 18 Ind. 91; Leever v. Hamill, 57 Ind. 423; Woodfield v. Barbee, 18 Ind. 320; Garver v. Daubenspeck, 22 Ind. 238; Keyser v. Wells, 60 Ind. 261; Watson v. Piel, 58 Ind. 566. An assignment of errors can not be made to serve the purposes of a motion for a new trial. Hays v. Walker, 90 Ind. 105.

⁴ Grant v. Westfall, 57 Ind. 121; Leever v. Hamill, 57 Ind. 223; Douglass v. Blankenship, 50 Ind. 160; Galvin v. State, 56 Ind. 51. The proper specification in every instance where causes are required to be stated in a motion for a new trial is on the ruling denying the motion. Bolin v. Simmons, 81 Ind. 92; Bane v. Ward, 77 Ind. 153.

for a new trial, and once presented they need not be repeated, as the specification on the ruling denying the motion brings all the causes properly assigned in the motion to the attention of the appellate tribunal.

§ 348. **What matters are not assignable as reasons for a new trial**—Causes improperly assigned in a motion for a new trial can not be regarded, and rulings upon demurrers or motions addressed to the pleadings can not be made causes for a new trial.¹ Rulings on the pleadings do not pertain to the trial in such a sense as to make it proper to assign them as causes for a new trial and hence it will accomplish nothing to incorporate them in the motion. It is correctly held, as is evident from the considerations just stated, that rulings on the pleadings must form the basis for independent and distinct specifications of error.

§ 349. **What should be made Independent Specifications of error**—While the principle that all rulings other than those made upon the pleadings must be specified in a motion for a new trial is a sweeping one, still, there are exceptions composed of instances which it is very difficult to classify. Thus where an application for a change of judge in a proceeding for the appointment of a receiver is denied the ruling denying the change may be specified as an independent error.² The reason assigned for this decision is that there was no opportunity to present the question by a motion for new trial. This reason is a sound one and may be taken as a standard by which to determine whether

¹ *Irwin v. Smith*, 72 Ind. 482; *Davis v. Pool*, 67 Ind. 425; *Miles v. Buchanan*, 36 Ind. 490; *Cincinnati, etc., Co. v. Washburn*, 25 Ind. 259; *Gray v. Stiver*, 24 Ind. 174; *City of New Albany v. White*, 100 Ind. 206; *Patterson v. Scottish American Co.*, 107 Ind. 497; *Hamilton v. Elkins*, 46 Ind. 213; *Marshall v. Beeber*, 53 Ind. 83; *Indianapolis, etc., Co. v. Stout*, 53 Ind. 143; *Line v. Huber*, 57 Ind. 261; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Denman v. McMahan*, 37 Ind. 241; *Ohio, etc., Co. v. Hemberger*, 43 Ind. 462; *Gibson v. Garreker*, 82 Ga. 46, 9 S. E. Rep. 124; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. Rep. 451; *Milliken v. Ham*, 36 Ind. 166; *Marks v. Trustees, etc.*, 56 Ind. 288; *De Barry-Baya, etc., Co. v. Austin*, 76 Ga. 306. A motion in arrest of judgment falls within this rule. *Shore v. Taylor*, 46 Ind. 345; *Firestone v. Daniels*, 71 Ind. 570; *Allen v. State*, 74 Ind. 216; *Todd v. Jackson*, 75 Ind. 272.

² *Shoemaker v. Smith*, 74 Ind. 71.

a ruling shall be specified as an independent error, for if there is no opportunity, that is, no legal opportunity, to embrace it in a motion for a new trial, no other course can be pursued by the appellant than that of making the ruling the basis of an independent specification of error. Belonging to this anomalous class of cases is the one wherein it is held that a ruling refusing to appoint a guardian *ad litem* is not a cause for a new trial and hence the ruling may be independently specified.¹ To the same class may be assigned the case which holds that a motion to set-off a judgment may form the basis of an independent specification.²

§ 350. **Independent Specifications—When proper**—Where the award of a new trial will not reach the ruling supposed to be erroneous the ruling should be made the basis of an independent specification of error. It seems clear that if the granting of a new trial will not rectify the mistake committed in ruling upon a motion, application, or the like, the ruling should not be assigned as a cause for a new trial, since nothing could be accomplished by embracing it in the motion. Some of the cases seem to trench somewhat upon this rule but there are others which declare and enforce it. Thus, a refusal to remand a case to a justice of the peace for trial is not a cause for new trial and the ruling should form the basis of an independent specification in the assignment of errors.³ Overruling a motion to stay proceedings brought to foreclose a mortgage in a State court where the mortgagor has a pending petition in bankruptcy is not a cause for new trial and should, therefore, be independently assigned for error.⁴ It is difficult to lay down any general rule which will not be greatly broken upon by exceptions, but it may safely be said that the general rule is this: If

¹ *Evans v. State*, 58 Ind. 587. It is, of course, to be understood that the proper motion must be made in the trial court, for, under the general rule so often referred to, it can not be first made on appeal.

² *McAllister v. Willey*, 60 Ind. 195.

³ *Tibbetts v. O'Connell*, 66 Ind. 171.

⁴ *Markson v. Haney*, 47 Ind. 31. In

Vawter v. Gilliland, 55 Ind. 278, it was said by the reporter that: "An erroneous ruling upon a motion made prior to the trial of a cause is not a ground for a new trial." It is very clear that this statement is entirely too broad; it is, indeed, not supported by the opinion in the case in which it appears.

the ruling is connected with the trial procedure and is not made upon the pleadings, or is not made upon independent questions not relating to the trial, or is not made upon the verdict, or upon answers of the jury to interrogatories, or does not affect the form of the judgment or decree, it should be specified as a cause or reason for a new trial. But the rule even as stated is a general one burdened with exceptions.

§ 351. **Specifications of the motion for a new trial**—The rule that a specification that the court erred in overruling the motion for a new trial is all that is ordinarily required in the assignment of errors is easy of application in all cases where it is clear that the rulings challenged are such as pertain to the trial and form causes or reasons for a new trial, but it is not always easy to determine what rulings should be made the basis of the specifications in a motion for a new trial. The cases upon the general subject go very far in the direction of holding that all rulings, not made on the pleadings, but made in the course of the proceedings although not directly connected with the trial, must be specified in the motion for a new trial, and can not be specified as independent errors. Thus, it is held that a ruling upon an application for a change of judge or for a change of venue must be specified as a cause for new trial, and can not be made a specification of error.¹ So, in the case of a ruling upon a motion for continuance, the ruling must be assigned as a cause for a new trial or it will not be available on appeal.² There is, it is evident, no direct connection between what is strictly trial procedure and many of the rulings which are held to be so connected with the trial as to make it necessary and proper to incorporate them in a motion. For instance, an application for a change of venue may be made and overruled

¹ *Horton v. Wilson*, 25 Ind. 316; *Knarr v. Conaway*, 53 Ind. 120; *Krutz v. Howard*, 70 Ind. 174; *Wiley v. Barclay*, 58 Ind. 577; *Walker v. Heller*, 73 Ind. 46. It may not be out of place to say that the remark in *Krutz v. Howard*, *supra*, that when a sufficient affidavit for a change is made the court has no jurisdiction, can not be regarded as express-

ing the law. *State v. Wolever*, 127 Ind. 306.

² *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310; *Bratton v. Bratton*, 79 Ind. 588; *Arbuckle v. McCoy*, 53 Ind. 63; *Carr v. Eaton*, 42 Ind. 385; *Scoville v. Chapman*, 17 Ind. 470; *Kent v. Lawson*, 12 Ind. 675; *Westerfield v. Spencer*, 61 Ind. 339.

and yet the trial proper may not be entered upon until one or more terms have intervened. It is, however, no great strain upon consistency to give a very liberal effect to the term trial, for a motion for a new trial is thus made to bring in review before the trial court many rulings and afford it an opportunity to correct mistakes. This is quite important and is a practical consideration justly exerting a controlling influence. In further illustration, and as evidence of the correctness of our statement that the court inclines to extend to the utmost the doctrine that specifications must be made in a motion for a new trial, may be adduced the cases which hold that the refusal to compel more specific answers to interrogatories addressed to a jury must be assigned as a cause for a new trial and can not properly be made a separate specification in the assignment of errors.¹ The cases illustrating and enforcing the doctrine embodied in our statement are very numerous, and of great variety.²

§ 352. Trial where Issues of Law are undecided—In other cases, the rule respecting the assignment of rulings as causes for a new trial is carried very far. The cases we have in mind are those which hold that a failure to object to a trial where a demurrer is pending and undecided³ is unavailing unless challenged in the trial court. The earlier cases seem undecided as to the mode of questioning the ruling, some of them intimating that it might be done either by a motion in arrest of judgment or by a motion for a new trial.⁴ It appears clear to us that the

¹ *Staser v. Hogan*, 120 Ind. 207, 211; *Bedford, etc., Co. v. Rainbolt*, 99 Ind. 551; *West v. Cavins*, 74 Ind. 265; *Ogle v. Dill*, 61 Ind. 438; *Patterson v. Lord*, 47 Ind. 203.

² *Western Union Tel. Co. v. Frank*, 85 Ind. 480; *Neff v. Reed*, 98 Ind. 341, 345 (partially overruling *Dukes v. Working*, 93 Ind. 501); *Meranda v. Spurlin*, 100 Ind. 380, 388; *Racer v. Baker*, 113 Ind. 177; *McDonald v. Stader*, 10 Ind. 171.

³ That it is error to try a case where there is an issue of law undecided is asserted in *Gray v. Cooper*, 5 Ind. 506; *Waldo v. Richter*, 17 Ind. 634; *Ander-*

son v. Weaver, 17 Ind. 223; *The Cincinnati, etc., Co. v. McFarland*, 22 Ind. 459; *King v. State*, 15 Ind. 64; *Perrin v. Johnson*, 16 Ind. 72; *Kegg v. Welden*, 10 Ind. 550. See *Hansher v. Hansher*, 94 Ind. 208.

⁴ *Haun v. Wilson*, 28 Ind. 296; *Miles v. Buchanan*, 36 Ind. 490, 500. In other cases it is held that a motion for a new trial presents the question. *Anderson v. Weaver*, 17 Ind. 223; *Gray v. Cooper*, 5 Ind. 506. See, also, *Kegg v. Welden*, 10 Ind. 550; *Waldo v. Richter*, 17 Ind. 564.

intimations that it might be done in either mode are clearly wrong inasmuch as there is such a wide difference between the two motions. To show the essential difference it is only necessary to mention one important phase of it, and that may be done by suggesting that a motion in arrest cuts off a motion for a new trial.¹ We venture to suggest that a motion in arrest is not the proper mode of presenting the question, for the question ought, upon principle, to be presented before trial, or else all objections should be regarded as waived. This conclusion is supported by the cases which hold that parties by going to trial without objection waive the formation of issues.² The rule which best harmonizes with decisions in analogous cases requires that objections should be specifically stated before entering upon the trial, and that the ruling on the objections should be assigned as one of the causes for a new trial. This rule is fair to the court and to the parties and is required by considerations affecting the consistency of the system of procedure. There is seldom any reason for creating exceptions to the settled and salutary rule which requires that objections should be specific and should be opportunely presented. To permit parties to make questions of the kind we have under immediate mention would, it may be added, be an indefensible violation of the rule prohibiting parties from taking the chance of success on the trial and afterwards interposing an objection that might quite as easily have been made before the trial began.

§ 353. **Amendment of the Assignment of Errors**—Amendments of the assignment of errors can not be made after the cause is submitted except upon leave of court.³ The application for

¹ McKinney v. Springer, 6 Ind. 453; Doe v. Clark, 6 Ind. 466; Hord v. Corporation of Noblesville, 6 Ind. 55; Bep-ley v. State, 4 Ind. 264; Rogers v. Maxwell, 4 Ind. 243; Mason v. Palmerton, 2 Ind. 117; Gillespie v. State, 9 Ind. 380; Weatherhead v. Bray, 7 Ind. 706; Cincinnati, etc., Co. v. Case, 122 Ind. 310.

² June v. Payne, 107 Ind. 307; Johnson v. Briscoe, 92 Ind. 367; City of

Warsaw v. Dunlap, 112 Ind. 576; Hartlep v. Cole, 101 Ind. 458; Trentman v. Eldridge, 98 Ind. 525; Helm v. First National Bank, 91 Ind. 44; Chambers v. Butcher, 82 Ind. 508; Hose v. Allwine, 91 Ind. 497; Farmers Loan and Trust Co. v. Canada, etc., Co., 127 Ind. 250. See "Holding parties to Trial Court Theories," *post*, Chapter XXIV.

³ Rule IV.

leave is required to be in writing and to show that due care and diligence were exercised in preparing the assignment. Ten days' notice of the application must be given.

CHAPTER XVII.

APPEAL BONDS.

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| § 354. Power to exact a bond. | § 368. Estoppel of the sureties. |
| 355. Nature of appeal bonds. | 369. By whom the bond should be approved. |
| 356. The bond is statutory. | 370. Informal or irregular approvals. |
| 357. Rule where there is no jurisdiction of the matter in which the bond is executed. | 371. Approval may be implied. |
| 358. The bond is aided by the statute. | 372. Effect of the approval. |
| 359. Construction of appeal bonds—General rule. | 373. Evidence of filing and approval. |
| 360. Recovery limited by the penalty. | 374. The bond as essential to the effectiveness of an appeal. |
| 361. Interest beyond the penalty. | 375. Bond not ordinarily essential to jurisdiction. |
| 362. The obligation of the bond. | 376. Appearing without objecting—Waiver. |
| 363. Mode of executing the bond. | 377. Amending defective bonds. |
| 364. Form and substance of the bond. | 378. Motion to dismiss because of defective bond. |
| 365. Right of appellee to require a well framed and properly executed bond. | 379. Promptness required in asking leave to amend. |
| 366. Authority of trial court to fix the penalty and approve the sureties — Conclusiveness of the order of approval. | 380. Enforcement of the bond. |
| 367. Demanding a new bond—Practice. | 381. What will release sureties. |
| | 382. Surety's right of subrogation. |
| | 383. Measure of recovery. |

§ 354. Power to exact a Bond—The fundamental principle that the right of appeal to an appellate tribunal is not an inherent or absolute one¹ necessarily leads to the conclusion that the legis-

¹ *Bowman v. Lewis*, 101 U. S. 22, 25 Law. ed. 992; *Hayes v. Missouri*, 120 U. S. 68, 30 Law. ed. 578. In *Sullivan v. Haug*, 82 Mich. 548, 10 Lawyer's Rep. Anno. 263, it was said: "The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases and un-

der what circumstances and from what courts an appeal may be taken." *Schooner Constitution v. Woodworth*, 2 Ill. 511; *Ward v. People*, 13 Ill. 635; *Ex parte McCardle*, 7 Wall. 506; *Clark v. Raymond*, 27 Mich. 456; *Prout v. Berry*, 2 Gill. (Md.) 147; *State v. Northern Central R. Co.*, 18 Md. 103. See, *ante*, Chapter V, "What May be Appealed From." But where a right of appeal is given by

lature may, within constitutional limits, regulate the mode of procedure and prescribe the acts that must be done by a party who desires to perfect an appeal. As the subject is a legislative one the discretion of the legislature can not be controlled by the courts although the courts may adjudge enactments which violate the constitution to be void. Within the limits of its constitutional powers the legislature may make any condition or prescribe any terms it deems proper. It is, therefore, within the power of the legislature to exact a bond as a condition of the exercise of the right of appeal and to prescribe the form and terms of the obligation. The power has often been exercised in this State, as in the case of appeals from judgments of justices of the peace, appeals in term and appeals from interlocutory orders and decrees.

§ 355. Nature of Appeal Bonds—It is said by a text-writer that an appeal bond is an official bond,¹ but this is true only in a limited and qualified sense. An appeal bond is, it is true, an obligation prescribed by statute and it is given in the course of judicial proceedings, but it is not executed to secure the performance of official duties nor to give the State or any of its instrumentalities a right of action for a breach of official duty.² The principal object of the law in requiring an appeal bond is to secure an individual litigant from loss. The State or its instrumentalities may, no doubt, enforce an appeal bond in many instances but not in any purely governmental capacity. Where the State, or its municipalities, can enforce an appeal bond it

law it is not in the power of the judiciary to deny or to restrict it. *Heffren v. Jayne*, 39 Ind. 463, 470; *Martin v. Martin*, 6 Blackf. 321; *Robinson v. Roberts*, 16 Fla. 156.

¹ Murfree on Official Bonds, § 36.

² The term "appeal bond" is a generic one and, as ordinarily used, includes bonds that are strictly appeal bonds as well as supersedeas bonds. We conform to the usual practice and here employ the term "appeal bond" as a generic one including both kinds of bonds. There

is, however, a radical difference between the two kinds of bonds, and the term "appeal bond" is sometimes misleading, inasmuch as it creates the impression that a bond is always essential to an appeal. It is true that a bond is often essential to the appeal, but, as will be hereafter shown, it is not generally essential to the effectiveness of the appeal, although it is indispensably necessary to secure a supersedeas or stay of proceedings.

is ordinarily because the bond is executed to it as a party to the judgment appealed from and in all such cases the State, or its organ, asserts a contract right and not a governmental one.¹ A bond executed to secure a stay of proceedings, or to perfect an appeal, is a contract vesting in the obligee a right of action in the event that its conditions are broken. The fact that it is executed in the course of judicial proceedings and to the approval of a judicial or ministerial officer does not make it strictly an official bond. It lacks many of the incidents of such a bond as, for instance, its mere execution does not ordinarily create a lien upon the property of the obligor, nor does the lien fasten upon the property at the time the action on it is commenced. It is not given the extraordinary effect of an official bond. It is executed in a particular instance and is not a general or continuous obligation.

§ 356. The Bond is Statutory—An appeal bond regularly executed in the course of judicial proceedings because required by law is a statutory bond. As the bond is statutory the provisions of the statute must be given consideration in determining the effect of the obligation. It is, indeed, a general rule that the law enters as a silent but influential factor into all contracts.² This general rule must, it is obvious, apply with peculiar force to a bond executed by a party because he is bidden by an express statute to execute it as a condition to his obtaining aid from the judicial tribunals of the State.

¹ This proposition rests upon the well known rule that where a State enters into a contract it lays aside its attributes and prerogatives as a sovereign and acts substantially as an individual citizen. Its contracts are interpreted as are the contracts of individuals. *Hans v. Louisiana*, 134 U. S. 1; *Hartman v. Greenhow*, 102 U. S. 672, 679; *Poindexter v. Greenhow*, 114 U. S. 270; *Keith v. Clark*, 97 U. S. 454; *Murray v. Charleston*, 96 U. S. 432; *Carr v. State*, 127 Ind. 204, 11 Law. Anno. Rep. 370; *Georgia, etc., Co. v. Nelms*, 71 Ga. 301; *Lowry v. Francis*, 2 Yerg. 534; *Grogan v. San Francisco*, 18 Cal. 590.

² *Long v. Straus*, 107 Ind. 94; *Coggeshall v. State*, 112 Ind. 561; *Carr v. State*, 127 Ind. 204, 11 Law. Anno. Rep. 370, 372; *Foulks v. Falls*, 91 Ind. 315, 320; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288. In the case first cited it was said: "All contracts have imported into them legal principles which can no more be varied by parol evidence than the strongest and clearest express stipulations."

§ 357. Rule where there is no Jurisdiction of the matter in which the Bond is executed—It is generally held that statutory bonds executed in a matter where there is no jurisdiction of the subject are not enforceable, but the doctrine has not met with decided or uniform approval.¹ The rule is at best a harsh one and in many instances is productive of injustice, so that, as it seems to us, it is one to be restricted rather than enlarged. The authoritative decisions do, indeed, confine the rule to cases where there is an entire want of jurisdiction of the subject, and refuse to extend it to cases where there is nothing more than a defect, although it is such a defect as would warrant a dismissal upon an appropriate and timely objection.² It does not always follow that a bond taken without authority is void, since there are cases in which a bond attempted to be given under a statute may be ineffective as a statutory bond and yet enforceable as a common law bond.³ There is a disposition, and it is a

¹ *Caffrey v. Dudgeon*, 38 Ind. 512, S. C. 10 Am. Rep. 126; *Ham v. Greve*, 41 Ind. 531; *State v. McLaughlin*, 77 Ind. 335; *State v. Younts*, 89 Ind. 313; *Olds v. State*, 6 Blackf. 91; *Wilson v. Hobday*, 4 M. & S. 121; *Commonwealth v. Jackson*, 1 Leigh. 485; *Sherry v. Foreman*, 6 Blackf. 56; *Byers v. State*, 20 Ind. 47; *Benedict v. Bray*, 2 Cal. 251. See, also, *Sheeley v. Wiggs*, 32 Mo. 398, 405; *Deardorf v. Ulmer*, 34 Ind. 353; *Garnet v. Rogers*, 52 Mo. 145; *Smith v. St. Louis, etc., Co.*, 53 Mo. 338; *Hessey v. Heitkamp*, 9 Mo. App. 36. The rule was applied to a case wherein the bond was not filed within the time limited by statute in *Moore v. Damon*, 4 Mo. App. 111. It is to be said of *Deardorf v. Ulmer*, that it carries the rule very far and that its scope is much limited by subsequent decisions, if indeed, some of its declarations are not completely overthrown. *Fawcner v. Baden*, 89 Ind. 587, 590, and cases cited in the following note. See, also, *Eddy v. Beal*, 34 Ind. 159. *Memmler v. Roberts*, 81 Ga., 659, 8 S. E. Rep. 525, supplies an example

of the just application of the general doctrine stated in the text.

² *Trueblood v. Knox*, 73 Ind. 310, 311; *Sammons v. Newman*, 27 Ind. 508; *Carver v. Carver*, 77 Ind. 498; *Bugle v. Myers*, 59 Ind. 73; *Wiseman v. Lynn*, 39 Ind. 250; *Peele v. State*, 118 Ind. 512, 517; *Lucas v. Shepherd*, 16 Ind. 368; *Gray v. State*, 78 Ind. 68; *Harbaugh v. Albertson*, 102 Ind. 69; *Cunningham v. Jacobs*, 120 Ind. 306. In *Stevenson v. Miller*, 2 Litt. (Ky.), 306, 310, and *Gudtner v. Kilpatrick*, 14 Neb. 347, the rule that a bond is void where there is no jurisdiction is opposed and limited. The doctrine we have indicated in the text as the correct one is sustained by the decision in the case of *Robertson v. Smith* (Ind.), 28 N. E. Rep. 857.

³ *Turner v. Armstrong*, 9 Brad. (Ill. App.) 24; *Sheppard v. Collins*, 12 Ia. 570; *Barnes v. Webster*, 16 Mo. 258; *Williams v. Coleman*, 49 Mo. 325; *Cunningham v. Jacobs*, 120 Ind. 306. A bond taken in violation of law is inoperative, but a bond is not necessarily void where it is executed under a stat-

commendable one, on the part of the courts, to enforce bonds given in legal proceedings wherever it appears that the party whose duty it was to execute a bond has received benefit from the bond, although it may not be well executed and although there may be some defect of a jurisdictional nature but not of such a character as to completely deprive the tribunal of jurisdiction.¹ Weight is attached—justly, as we believe—by the better considered cases to the fact that the bond has yielded the principal obligor beneficial consideration. But upon this point the decisions are conflicting. The conclusion stated is in some instances promoted by an application (and, possibly, expansion), of the doctrine of estoppel.² The principle that where an appeal bond operates as the parties intended it should operate, and secures all the rights that a perfect bond could secure, the obligors will be held liable is often applied, and so applied as to make the obligation effective against all the obligors, sureties as well as principals. By virtue of this manifestly sound and equitable rule courts are enabled to disregard errors and irregularities even of a jurisdictional nature, and give such effect to appeal bonds as makes them fully subserve the purposes for which they were executed by the obligors.³

§ 358. The Bond is aided by the Statute—The statute under which parties assume to execute an appeal bond may properly be resorted to in order to enable the court to give just effect to the provisions of the instrument. That statute, even without

ute but, is not enforceable as a statutory bond. *Baker v. Board*, 53 Ind. 497. See, generally, *Pennsylvania, etc., Co. v. Cook*, 123 Pa. St. 170, 16 Atl. Rep. 762; *Pray v. Wasdell*, 146 Mass. 324; *Goodwin v. Bunzl*, 50 N. Y. Superior Ct. 441.

¹ *Willis v. Rivers*, 80 Ga. 556, 7 S. E. Rep. 90; *Com. v. Wetzel*, 84 Ky. 537, 2 S. W. Rep. 123; *Smith v. Biscailuz*, 84 Cal. 344, 21 Pac. Rep. 15; *Riley v. Mitchell*, 38 Minn. 9, 35 N. W. Rep. 472.

² *Trueblood v. Knox*, 73 Ind. 310, 311; *Carver v. Carver*, 77 Ind. 498; *Beeman v. Banta*, 113 N. Y. 615; *Hartlep v. Cole*,

120 Ind. 247; *Buchanan v. Milligan*, 125 Ind. 332; *Riley v. Mitchell*, 38 Minn. 9, 35 N. W. Rep. 472; *Robertson v. Smith (Ind.)*, 28 N. E. Rep. 857. The principle asserted by the cases referred to in this and in the preceding note is a general one and governs to a great extent all statutory bonds or undertakings.

³ *Easter v. Acklemire*, 81 Ind. 163; *Jones v. Droneberger*, 23 Ind. 74; *Ham v. Greve* 41 Ind. 531; *State v. Britton*, 102 Ind. 214; *Smock v. Harrison*, 74 Ind. 348; *Railsback v. Greve*, 58 Ind. 72.

the aid of the statute expressly providing that defects shall not vitiate a bond given pursuant to law, may exert an important influence upon the question of the effectiveness and meaning of the bond. Defects may often be cured, ambiguities removed and obscurities cleared away, by considering the provisions of the statute under which the bond was executed, the purpose it was intended to subserve and the object it did actually accomplish.¹ But the examination is not to be confined to the statute under which the obligors assumed to execute the bond. The curative statute is broad and comprehensive, and heals defects in bonds executed in the course of legal proceedings.²

§ 359. Construction of Appeal Bonds—General rule—Independently of the curative statute, the construction of bonds required by law to be executed to the approval of public officers should be liberal in favor of the obligees. This doctrine was long since declared and the reasons upon which it rests exhibited.³ The reports contain many cases wherein the rule of liberal construction is asserted and enforced.⁴

§ 360. Recovery limited by the penalty—It is an elementary rule that courts can not make contracts for parties but can only give effect to a contract according to the agreements and stipulations embodied in the instrument evidencing the contract. This rule forbids the court from substituting entirely different provisions for those written in an appeal bond. Defects and

¹ *Stevenson v. State*, 71 Ind. 52; *Yeakle v. Winters*, 60 Ind. 554; *State v. Berg*, 50 Ind. 496.

² *Ward v. Buell*, 18 Ind. 104; *Opp v. Ten Eyck*, 99 Ind. 345, 346; *Sturgis v. Rogers*, 26 Ind. 1; *Hudelson v. Armstrong*, 70 Ind. 99; *Fuller v. Wright*, 59 Ind. 333; *Black v. State*, 58 Ind. 589; *Cook v. State*, 13 Ind. 154; *Gavisk v. McKeever*, 37 Ind. 484; *Dunn v. Crocker*, 22 Ind. 324; *Corey v. Lugar*, 62 Ind. 60. The cases of *Malone v. McClain*, 3 Ind. 532, and *Epstein v. Greer*, 85 Ind. 372, can not be fully accepted as expressive of the law.

³ *Conner v. Paxson*, 1 Blackf. 207.

⁴ *McCarty v. State*, 1 Blackf. 240; *Dyer v. Bradley*, 88 Cal. 590, 26 Pac. Rep. 511; *Smith v. Nescatunga*, 36 Kan. 758, 14 Pac. Rep. 246; *Baldrige v. Penland*, 68 Tex. 441, 4 S.W. Rep. 565; *Peoples Co. v. Babinger*, 40 La. 247, 4 So. Rep. 82; *Acker v. Alexandria, etc., Co.*, 84 Va. 648, 5 S. E. Rep. 688; *Field v. Schricher*, 14 Iowa, 119; *Gay v. Parpart*, 101 U. S. 391; *Kountze v. Omaha Co.*, 107 U. S. 378; *Matthews v. Morrison*, 13 R. I. 309.

imperfections may be supplied but a new and different contract can not be framed by the courts.¹ In some cases this rule has been very strictly enforced and the parties held closely to the words of the instrument,² but, as we have already indicated, there is no reason for an illiberal, narrow, or technical construction of appeal bonds.³ It has, however, long been the doctrine of our court that sureties can not be held liable beyond the penalty expressed in the bond in cases where a penalty is fully designated. The rule is otherwise where no penalty is designated, for in such a case the law will hold the "obligors liable to the extent required by the statute."⁴ It is not easy in any case to uphold the doctrine that the penalty is an absolute limitation in view of the statutory provision that the obligors shall be bound "to the full extent contemplated by law."⁵ It is, at all events, difficult to find a sufficient reason for allowing the penalty to fully control in cases where the bond clearly recites the judgment appealed from, and the record shows the judgment to be for a fixed and clearly designated sum.⁶ It would seem that in such a case the obligation should be deemed to secure the payment of the sum fixed by the judgment named or described, since it is plainly the purpose of the statute that the bond shall afford such security. Where the judgment appealed from is not for any fixed and designated sum it may

¹ *Sturgis v. Rogers*, 26 Ind. 1.

² *Boulden v. Estey Organ Co. (Ala.)*, 9 So. Rep. 283; *Jones v. Woodstock Iron Co.*, 90 Ala. 545, 8 So. Rep. 132; *Garrett v. Shove*, 15 R. I. 538, 9 Atl. R. 901; *Frevert v. Swift*, 19 Nev. 400, 13 Pac. Rep. 6. See, also, *Figures v. Dunklin*, 68 Tex. 645, 5 S.W. Rep. 503; *Jackson v. Relf*, 24 Fla. 198, 4 So. Rep. 534; *Frees v. Baker (Tex.)*, 6 S.W. Rep. 563; *Harmon v. Herndon*, 99 N. C. 477, 6 S. E. Rep. 411.

³ It is not to be expected that public officers will as vigilantly and carefully guard the interests of a party as the party would himself do, and it is with reason that many of the courts assert

that the rule for the construction of an appeal bond should be liberal.

⁴ *Ward v. Buell*, 18 Ind. 104; *King v. Brewer*, 19 Ind. 267; *Sharpe v. Harding*, 21 Ind. 334; *Graeter v. De Wolf*, 112 Ind. 1.

⁵ R. S. 1881, § 1221.

⁶ In *Opp v. Ten Eyck*, 99 Ind. 345, 348, it was said, in speaking of the statute, "The force and effect of this section is to cure defects and supply omissions in the class of bonds named, whether the defects be of form or substance, and to hold the obligors, both principals and sureties, to the full extent of the law requiring the bond." This seems sound doctrine, but not easily reconciled with other decisions.

well be held that the penalty limits the liability on the bond, but where the bond recites the purpose for which it was executed, describes the judgment and shows it to be for a fixed sum, there is difficulty in sustaining the doctrine of some of the cases that the penalty limits the recovery. There is strong reason for condemning a doctrine which bends the recitals and statements of the bond, aided as they are by statute, to the single clause designating the penalty.

§ 361. **Interest beyond the penalty**—The rule declared by the cases referred to in the preceding paragraph does not, however, go to the extent of denying a recovery for interest which accrues subsequent to the execution of the bond. We think that interest upon the sum covered by the bond which accrues after the execution of the bond, may be recovered, although to award it may increase the liability of the obligors beyond the sum designated as the penalty. The effect of the statute is, at the very least, to make the bond a security for the sum covered by the penalty, and the interest on that sum attaches as an incident of the principal. It seems clear that it can not be justly affirmed that a party is liable for a principal sum and yet not liable for an inseparable incident of the principal. The doctrine we assert may be enforced without departure from former decisions, and it is certainly strongly fortified by authority.¹ We do not say that the bond should be so construed as to give a right to costs and interest which accrued before its execution in cases where the penal clause fixes a definite and specific sum and thus limits, as our cases hold, the liability of the obligors; what we do say is that interest and costs which accrue after the execution of the bond are incidents not so provided for or covered by the penalty as to exclude the right to recover such interest and costs. The penal clause should not, as we think, be permitted to overreach

¹ *Ives v. Merchants' Bank*, 12 How. U. S. 159; *United States v. Arnold*, 1 Gall. 348; *Crane v. Andrews*, 10 Col. 265; *Brainard v. Jones*, 18 N. Y. 35; *Washington, etc., Co. v. Colton*, 26 Conn. 42; *Carter v. Thorn*, 18 B. Mon. 613; *Pitts v. Tilden*, 2 Mass. 118; *Baker v. Morris*, 10 Leigh, 284; *Marshall v. Minter*, 43 Miss. 666; *Fraser v. Little*, 13 Mich. 195; *Hughes v. Hughes*, 54 Pa. St. 240; *Allen v. Grider*, 24 Ark. 271; *Roulain v. McDowall*, 1 Bay. 490; *Smedes v. Hooghtaling*, 3 Caines, 48.

all other considerations and provisions, and rigidly establish the measure of liability. The penalty of an ordinary bond measures the liability up to the time of breach but does not extend further, so that it is simply the limit of the liability at the time the condition of the obligation is broken, and certainly there is no reason for applying a more liberal rule in favor of obligors to appeal bonds. We may say, in conclusion, that we understand it to be affirmed by our decisions and by those of other courts,¹ that a recovery upon an appeal bond can not exceed the penalty of the bond in a case where the claim is wholly based upon something which occurred prior to the execution of the bond, but we do not understand that this rule applies to a claim such as that of one who asserts a right to interest accruing subsequent to the breach, and there is, certainly, no sufficient reason for the extension of the rule which gives such force to the penal clause and so little to the provisions of the statute requiring the bond, to the statements in the body of the bond itself, as well as to the provisions of the healing statute. In view of the fact that there can be little or no difficulty in ascertaining the object the parties intended the bond to accomplish, and of the broad healing statute, there is reason for a limitation of the rule, or, at all events, for a refusal to further extend its operation.

§ 362. **The Obligation of the Bond**—An appeal bond is not an obligation binding the obligors to pay the judgment appealed from at all events, but it is, it may be said in a general way, a contract undertaking that the party appealing shall prosecute his appeal to a favorable judgment in the appellate tribunal. If the judgment from which the appeal is prosecuted is reversed, the obligors are relieved from liability.² Where the appellant fails to prosecute his appeal to effect the bond is operative al-

¹ *Graeter v. De Wolf*, 112 Ind. 1; *Wilder*, 13 Fed. Rep. 707; *Farrar v. Leggett v. Humphreys*, 21 How. U. S. United States, 5 Peters, 373, 385.
² *Ring v. Mississippi River Bridge Co.*, 57 Mo. 496; *Staley v. Howard*, 7 Mo. App. 377. See *Sauer v. Griffin*, 67 Mo. 654.
United States v. Rickett, 2 Cranch C. C. 553; *Bank of Mount Pleasant v. Sprigg*, 1 McLean, 178; *Lawrence v. United States*, 2 McLean, 581; *The Wanata*, 5 Otto, 600, 617; *Wallace v.*

though the appeal is disposed of by an order of dismissal.¹ The sureties become liable when the judgment of affirmance, or other judgment fully adverse to the appellant, takes effect, and the obligee is not bound to first exhaust the property of the principal obligor.² In general the effect of an appeal bond is to bind the obligors, one and all, to perform the order or judgment affirmed,³ but this is a general doctrine and can not be applied in every instance, since much depends upon the substantive provisions of the bond or undertaking filed in the particular case.⁴ It is, indeed, not possible to lay down a general rule that will justly apply to all cases, for there are cases where the appeal presents questions not involved in the principal judgment or decree. Thus, in the case of an appeal by a junior mortgagee, against whom no personal judgment is rendered, it would be manifestly unjust to hold that the appeal bond bound him and his sureties to pay the claim of the senior mortgagee.⁵ It is upon the same general principle as that involved in the class of cases to which we have just referred that it is

¹ *Wood v. Thomas*, 5 Blackf. 553; *Legate v. Marr*, 8 Blackf. 404; *Davis v. Sturgis*, 1 Ind. 213; *Reeves v. Andrews*, 7 Ind. 207; *Keitzinger v. Reynolds*, 11 Ind. 545; *Blair v. Kilpatrick*, 40 Ind. 312. In *Gavisk v. McKeever*, 37 Ind. 484, it is held that a failure to perfect an appeal is a breach of the bond. This is correct upon the ground that if the judgment below remains effective the appellant has neither performed what the judgment required nor prosecuted his appeal to effect. See, generally, *Stelle v. Lovejoy*, 125 Ill. 352, 354; *Pass v. Payne*, 63 Miss. 239; *Coon v. McCormick*, 69 Iowa, 539. But where an appeal is dismissed for some defect in taking it and a second is taken and successfully prosecuted we suppose that the obligors would not be liable for the amount of the judgment subsequently reversed.

² *Railsback v. Greve*, 58 Ind. 52. This principle was applied in a case

where the decree affirmed bound specific property. *Staley v. Howard*, 7 Mo. App. 377.

³ *Hinkle v. Holmes*, 85 Ind. 405; *Ross v. Swiggett*, 16 Ind. 433; *Hodge v. Hodgdon*, 8 Cush. 294; *Erickson v. Elder*, 34 Minn. 370; *Whitehead v. Thorp*, 22 Iowa, 425. See, generally, *Mason v. Smith*, 11 Lea. (Tenn.) 67, 69; *Matlock v. Bank of Tennessee*, 7 Yerg. (Tenn.) 90, 95.

⁴ *Reitan v. Goebel*, 35 Minn. 384; *Sturgis v. Rogers*, 26 Ind. 1.

⁵ *Willson v. Glenn*, 77 Ind. 585; *Hinkle v. Holmes*, 85 Ind. 405; *Scott v. Marchant*, 88 Ind. 349. If the appeal of a junior mortgagee keeps the senior mortgagee out of his money, then it seems that the former should recover interest that accrues subsequent to the appeal. If, however, the appeal of the junior mortgage does not delay the enforcement of the senior lien, it would not be just to hold him for interest.

held that, although the right to the possession of land is involved in an action in which a judgment appealed from is rendered, a bond which covers only the money judgment rendered in the action will authorize a recovery only for the principal, interest and costs of such judgment, and that *mesne* rents and profits can not be recovered in an action upon the bond.¹ A bond may, however, be so framed as to bind the obligors for the payment of rents and profits. That a bond may be so framed as to cover rents and profits is, indeed, expressly provided by the statute.² But the statute applies only where possession is retained or held during the pendency of the appeal.

§ 363. Mode of Executing the Bond—The courts generally apply a very liberal rule to matters respecting the signing of the bond and the like. The place where the names of the obligors are signed to the bond is held to be of no importance provided it can be inferred that the signers intended to bind themselves as obligors.³ It is held that the appellants need not sign the instrument if it be signed by the sureties.⁴ It is, of course, the right of an appellee to require that the bond be executed by such surety, or sureties, as the law requires, and the failure of the appellant to furnish a bond with such surety, or sureties, would, in a case where the bond is essential to the appeal, entitle the appellee, upon motion, to a dismissal of the appeal,⁵

¹ *Carver v. Carver*, 115 Ind. 539.

² R. S. 1881, § 638. The statute provides that a bond covering waste and damage to property, as well as *mesne* rents and profits, may be required of a party who retains possession of the property pending the appeal. It would undoubtedly be the right of the appellee, upon a proper application, to compel the execution of a bond in conformity to the requirements of the statute.

³ *Coyle v. Crevy*, 34 La. Ann. 339.

⁴ *Thom v. Savage*, 1 Blackf. 51; *Covert v. Shirk*, 58 Ind. 264; *Hinkle v. Holmes*, 85 Ind. 405; *Cody v. Filley*, 4 Col. 342. See, generally, *Hedges v. Armistead*, 60 Texas, 276; *Gage Co. v. Fulton*, 16 Neb. 5; *Wood v. Wayne*,

etc., 48 Mich. 641; *Seward v. Corneau*, 102 U. S. 161; *Parks v. Hazlerigg*, 7 Blackf. 536; *State v. Soudriette et al.*, 105 Ind. 306; *Cooke v. Crawford*, 1 Texas, 9, 46 Am. Dec. 93.

⁵ *Indianapolis, etc., R. Co. v. Beam*, 63 Ind. 490; *Indianapolis, etc., R. Co. v. Beam*, 64 Ind. 597; *McVey v. Heavensridge*, 30 Ind. 100. An attorney may be bound as surety notwithstanding a rule of court prohibiting attorneys from becoming sureties on such instruments. *Ohio, etc., v. Hardy*, 64 Ind. 454; *Banter v. Levi*, 1 Chit. 713; *Harper v. Tahourdin*, 6 M. & S. 383. Bond not effective until delivered. *Covert v. Shirk*, 58 Ind. 264. Not invalidated because it appears to be dated subsequent to approval.

but if the appellee does not object, a bond without a surety will be deemed sufficient.

§ 364. **Form and Substance of the Bond**—As we have heretofore shown, the rules of the unwritten law, as well as the provisions of the statute, require that the construction of the bond shall be liberal for the purpose of giving it the effect the parties intended it to have, and this principle of construction reaches matters of substance as well as matters of form. The statute in terms applies both to matters of form and substance.¹ There can, of course, be little, if any difficulty, in stating or understanding the general rule, but there is sometimes difficulty in applying the rule to a particular instance. Thus, while a bond may bind the obligors to pay the judgment, it is held that it does not bind them to pay it without relief from the valuation or appraisal laws.² So, a bond given in an appeal by one party will not bind the sureties to answer for the result of an appeal taken by other parties.³ On the other hand, one who signs as surety is bound, although he was not the surety designated in the order of the court.⁴

§ 365. **Right of the Appellee to require a well framed and properly executed Bond**—The question as to the validity and effectiveness of a bond assumes a different form in a case where the obligors seek to escape liability from that which it wears in a case where the appellee appropriately and opportunely de-

James v. Woods, 65 Miss. 528, 5 So. Rep. 106.

¹ R. S. 1881, §§ 657, 658, 1221. *Ante*, §§ 358, 359.

² Ham v. Greve, 41 Ind. 531. See, generally, Dingle v. Strawn, 36 Ill. App. 563; Crumley v. McKinney (Texas), 9 S. W. Rep. 157; Chateaugay, etc., Co. v. Blake, 35 Fed. Rep. 804; Carver v. Carver, 115 Ind. 539, 18 N. E. Rep. 37; Gerald v. Gerald, 31 S. C. 171, 9 S. E. Rep. 274; United States v. Drapier (D. C.), 18 Wash. L. J. 532; Scott v. Milton (Fla.), 7 So. Rep. 32; Bartlett's Appeal, 82 Me. 210.

³ Sturgis v. Rogers, 26 Ind. 1, 12. See Ward v. Buell, 18 Ind. 104; Rice v. Rice, 13 Ind. 562; Burchard v. Cavins, 77 Tex. 365, 14 S. W. Rep. 388; Meade v. Bartlett, 77 Tex. 366, 14 S. W. Rep. 388.

⁴ Buchanan v. Milligan, 125 Ind. 332. See, generally, Guez v. Dupuis, 152 Mass. 454, 25 N. E. Rep. 740; Granier v. Louisiana, etc., Co., 42 La. Ann. 880, 8 So. Rep. 614; Allison v. Gregory (Texas), 15 S. W. Rep. 416; Anderson v. Board (Minn.), 48 N. W. Rep. 1022.

mands a bond properly worded and executed. The cases are radically different and are governed by very different rules. It is obvious that an appellee who properly and duly demands a bond executed in conformity to the requirements of the law occupies a very different position from that occupied by parties who seek to defeat a recovery upon the bond. Defects not available to defeat a recovery on the bond may be sufficient to entitle an appellee to a new bond.¹ An appellee is not bound to incur the risk, or the expense of an action upon an imperfect bond, and hence he may, by a seasonable and appropriate application, require that one conforming to the law shall be executed, while, on the other hand it is, in strictness, the duty of the party who prosecutes the appeal to execute and file such a bond as the law requires. But even upon the demand of the appellee an order will not be granted requiring a new bond where there is simply an immaterial defect or omission in the bond.²

§ 366. **Authority of Trial Court to fix the Penalty and approve the Sureties—Conclusiveness of the order of approval**—Where the authority to fix the penalty of a bond is vested in the trial court the higher court will not review the action of the lower court in fixing the penalty, unless that action is specifically challenged in the trial court and an exception to its ruling appropriately taken and saved. Ordinarily the action of the trial court in fixing the penalty of the bond concludes the parties,³ but we

¹ *Ruschaupt v. Carpenter*, 63 Ind. 359; *Harper v. Archer*, 4 Sm. & Mash. 99, S. C. 43 Am. Dec. 472; *James v. Roberts*, 78 Tex. 670, 15 S. W. Rep. 11; *Frank v. Thomas*, 35 Ill. App. 547. See, generally, *Richardson v. Richardson*, 83 Mich. 653, 47 N. W. Rep. 500; *Corey v. Lugar*, 62 Ind. 60.

² *Carmichael v. Holloway*, 9 Ind. 519; *McCall v. Trevor*, 4 Blackf. 496; *Winters v. Hughes*, 3 Utah, 438, 24 Pac. Rep. 907; *Moore v. Alerton* (Texas), 15 S. W. Rep. 70; *Murphy v. Consolidated, etc., Co.*, 32 Ill. 612. See, upon the general subject, *Forbes v. Porter*, 23 Fla. 47, 1 So. Rep. 336; *Mahlman v.*

Williams (Ky.), 12 S. W. Rep. 335; *Southern, etc., Co. v. Staley* (Texas), 13 S. W. Rep. 480; *Howard v. Russell*, 75 Texas, 171, 12 S. W. Rep. 525; *Littell v. Bradford*, 8 Blackf. 185; *Ridabock v. Levy*, 8 Paige, 197, 35 Am. Dec. 682; *Shelton v. Wade*, 4 Tex. 148, 51 Am. Dec. 722.

³ It is, of course, only where the law commits to the trial court the duty of fixing the penalty and approving the sureties that the rule applies. Where the appeal is in term and the procedure is under the statute governing such appeals authority over such matters exists in the trial court. R. S. 1881, § 638.

suppose that if the appellee should properly and seasonably present his objection to the ruling of the trial court, it would be subject to review upon appeal when properly presented. It would, however, not be subject to review as part of the main controversy, but it may be made a matter for review by due objection in the trial court followed by the appropriate proceedings. This is so upon the general principle that rulings of a trial court may be presented on appeal, and for the further reason that the appellate tribunals have power to supervise the proceedings of trial courts. But where no objection is presented to the trial court and no decision is requested, or obtained, then the higher court can not disturb the ruling, nor, indeed, can it review the ruling unless the question is properly saved and duly presented on appeal. The general doctrine applies in cases where sureties are accepted by the trial court pursuant to the authority conferred by law.¹ But the rule is a general one and subject to exceptions. If, for instance, the sureties should become insolvent after their acceptance by the trial court, it seems quite clear that the higher court may require a new bond. In such a case the appellate tribunal acts upon a state of facts different from that acted upon by the trial court, so that, after all, the exception is apparent rather than real. It must be in the power of an appellate tribunal to make such orders when conditions change, for when the case gets into that court it is completely out of the jurisdiction of the lower court, and that court can take no steps in the case. It may be added that while it is true that a broad discretion is vested in the trial court in such matters, it is also true that an abuse of the discretion will authorize the appellate tribunal to interfere in case the rulings of the trial court are appropriately brought before it for review.²

¹ *Midland Railway Co. v. Wilcox*, 111 Ind. 561; *Eureka Steam Heating Co. v. Sloteman*, 67 Wis. 118; *Bradley v. Galt*, 5 Mackey (D. C.), 317; *Jerome v. McCarter*, 21 Wall. 17; *Ex parte French*, 100 U. S. 1; *Martin v. Hazard Powder Co.*, 93 U. S. 302; *New Orleans Co. v. Albro Co.*, 112 U. S. 506. But see

Stafford v. Union Bank, 16 How. 275.

² The action of the trial court will, however, be sustained unless it is clearly shown that there was an abuse of discretion. It is a well settled rule that where ruling is made in the exercise of a discretionary power the appellate tribunals will interfere only where it is

§ 367 **Demanding a New Bond—Practice**—Where the appellee desires that the appellant be compelled to file a new bond, because the sureties have become insolvent,¹ or, because the bond is defective, the proper course for him to pursue is to file a motion stating the relief sought and the grounds upon which he bases his right to relief, and give ten days' notice of the motion to the appellant. If a question of fact is presented, then, affidavits must be filed with the motion, for so the rules of the court require. It may not be out of place to say that it is within the power of the court in cases where a motion is made to dismiss an appeal, to require a new bond and fix a time for filing it, and to decline to dismiss until default of the appellant to file a bond under the order. This has been the practice in cases where the appellant was free from culpable negligence. The safe course for the appellant where the bond is materially defective or the sureties are insolvent is to promptly meet the motion to dismiss by the tender of a new bond, for, granting time after the motion to dismiss is considered is a matter of grace and not of duty on the part of the court.

§ 368. **Estoppel of the Sureties**—As a general rule sureties are estopped by the recitals of the bond. Under this general rule they are interdicted from denying that an appeal has been taken, except where the bond is void.² The judgment against the principal affirmed on appeal is conclusive upon the sureties.³ They are said by some of the courts to be regarded as strangers to the judgment, and, therefore, precluded from attacking it except for fraud. It is evident that if the judgment were not regarded as conclusive settled principles would be violated and litigation be almost interminable. The principle is a general one and is sound, since to permit a party who by words or

clearly made to appear that the discretion was abused in the particular instance.

¹ *Ruschaupt v. Carpenter*, 63 Ind. 359.

² *Adams v. Thompson*, 18 Neb. 541; *Meserve v. Clark*, 115 Ill. 580. See, also, *McMinn v. Patton*, 92 N. C. 371; *Bowen v. Reed*, 34 Ind. 430.

³ *Hydraulic, etc., Co. v. Neumeister*, 15 Mo. App. 592; *McCormack v. Hubbell*, 4 Mont. 87. But while it is true that the surety is estopped by the judgment, it is also true that he is not bound by the recital of the bill of exceptions that he executed the bond. *Hydraulic, etc., Co. v. Neumeister*, *supra*.

conduct declares that he has appealed to deny that he did take an appeal would be to violate elementary principles.¹

§ 369. **By whom Bond should be Approved**—There seems to be some diversity of opinion upon the subject of the strictness with which the statutory provisions respecting the approval of appeal bonds must be observed. It is substantially agreed that the bond must be approved by the officer or tribunal designated unless the approval is impliedly or expressly waived.² It is evident that where an officer or tribunal is specifically designated the provision should be complied with in cases where the party for whose benefit the bond is executed insists upon a compliance with the law, since, to hold otherwise would be to declare that the courts may put upon one officer a duty enjoined by law upon another officer.³ A bond expressly required to be executed to the approval of an officer designated by statute can not, in strictness, be said to be legally approved when the approval is made by some other officer, for it is clear that only

¹ *Krall v. Libbey*, 53 Wis. 292. The court, in the case cited, discriminated the case from *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107, and *Mann v. Ætna Ins. Co.*, 38 Wis. 114, and said: "For here the sureties absolutely bound themselves to pay this very judgment, and why should they not stand by their undertaking. Under the circumstances we certainly see no merit in their demand to open the judgment and retry the cause. Were there any pretense that its affirmance was procured through collusion of the parties to it, the sureties would stand on different ground." The cases of *Way v. Lewis*, 115 Mass. 26, and *Cutler v. Evans*, *Ibid.* 27, were cited. In *Wachstetter v. State*, 42 Ind. 166, it was said of an appellant: "He can not appeal in fact and have all the benefit to be derived therefrom and then be heard to say because of some informality in his proceedings to obtain the appeal, he never appealed at all, and thereby es-

cape the consequences of his appeal. The appellant affirmed by his acts and conduct that he appealed and had the benefit of his appeal. He can not now be heard to affirm the contrary."

² *Burk v. Howard*, 15 Ind. 219; *Jones v. Droneberger*, 23 Ind. 74; *Scotten v. Divilbiss*, 46 Ind. 301; *McCloskey v. Indianapolis, etc., Co.*, 87 Ind. 20; *O'Reilly v. Edington*, 96 U. S. 724; *Haskins v. St. Louis, etc., Co.*, 109 U. S. 106; *First National Bank v. Omaha*, 96 U. S. 737; *Putnam v. Boyer*, 140 Mass. 235; *Averil v. Dickerson*, 1 Blackf. 3; *Hardin v. Owings*, 1 Bibb. (Ky.) 214; *Knight v. People*, 11 Col. 308, 17 Pac. Rep. 902. That an express approval may be waived seems to be the prevailing doctrine. *Buchanan v. Milligan*, 125 Ind. 332.

³ But the position of the obligees is not the same as that of the obligors, and to the latter the rule does not always apply.

the officer appointed by law has authority to approve.¹ It is the right of a party to have a bond approved by the officer designated by law, for the reason that if that officer is guilty of negligence an action may lie upon his official bond, whereas, if one who has no authority at all in the premises undertakes to approve a bond there would probably be no liability on his official bond. But however this may be, it can not be doubted that a party who duly asserts his rights is entitled to have the law substantially obeyed. It is, of course, competent for the one party to waive an approval,² and, on the other hand, a party who has received a benefit from the bond, or who has been the cause of injury or delay to another, may be estopped to make any question as to the approval of the bond.

§ 370. **Informal or Irregular Approvals**—It is not just, nor is it consistent with principle, to apply the same rule to the obligors and the obligees in an appeal bond in cases where the law has not been followed in approving the appeal bond, for there is an important difference in the positions of the respective parties.³ Much of the confusion that exists is owing to the failure to observe the difference in the position of the parties, and, in a

¹ The general principle is illustrated by the case of *Crumley v. Hickman*, 92 Ind. 388, wherein it was held that a bond required to be executed in one tribunal could not be executed in another. See, also, *Shepherd v. Dodd*, 15 Ind. 217; *McVey v. Heavenridge*, 30 Ind. 100; *Scotten v. Divilbiss*, 46 Ind. 301. These cases mark the difference between submitting a bond to a tribunal not authorized to take or approve it and the cases where an insufficient bond is filed with the proper officer. It is obvious that there is a material difference between submitting a bond to an officer having no authority to accept it, and the errors of an officer clothed with general authority in such matters.

² An approval of a bond by the party or his attorney is sufficient. *Goodwin v. Fox*, 120 U. S. 775. We suppose

that the approval by the party would preclude him from objecting to the bond upon any ground except that of fraud or mistake.

³ Upon the general subject see, *Clapp v. Freeman*, 16 R. I. 344; *Hemstead v. Cargill* (Minn.), 48 N. W. Rep. 686; *Chemin v. The city of Portland*, 19 Ore. 512, 24 Pac. Rep. 1038; *McCracken v. The Superior Court*, 86 Cal. 74, 24 Pac. Rep. 845; *Pacific, etc., Co. v. Bolton*, 89 Cal. 154, 26 Pac. Rep. 650; *Hanaw v. Bailey*, 83 Mich. 24. Waiver of objection to the approval of the bond. *Winona, etc., Co. v. First National Bank*, 33 Ill. App. 630. Withdrawal of objections. *Manning v. Gould*, 90 N. Y. 476, 64 How. Pr. 429, 3 Civ. Pro. 58, reversing 47 N. Y. Sup. Ct. 387; *Ginsburg v. Kuntz*, 15 N. Y. Supp. 237.

great measure, this confusion may be dissipated by clearly marking the line between the cases where the obligees seasonably and appropriately object to the mode of approval and the cases where the obligors after an affirmance seek to escape liability. If a bond is specifically and promptly objected to there is reason for declaring that the appellant is in fault for not substantially pursuing the course prescribed by law, but where the appeal is prosecuted to a final termination the sureties have little or no reason to complain that their principal did not strictly follow the law. It is not easy to perceive any just reason for relieving sureties because of errors in the approval of the bond, for it is not unreasonable to require them to take care that the principal does what the law commands.¹ Even where objections are presented in due season and form by the appellee, it is only substantial and probably injurious departures from the mode prescribed by statute that should be permitted to prevail. Harmless errors are disregarded elsewhere in procedure and so they should be in proceedings relative to the approval of appeal bonds. Our decisions indicate that the court considers the true rule to be that departures from the statute which do no injury may be disregarded.² Other courts declare and enforce the same general doctrine.³ It is, indeed, not easy to find any valid reason for heeding errors in the proceedings of parties or officers under statutes (such as ours), which everywhere declare that unsubstantial and harmless errors and irregularities shall be disregarded.

¹ *Granger v. Parker*, 142 Mass. 186. Where the failure to have the bond approved by the proper officer is attributable to the fault of the party who prosecutes the appeal—as it generally is—it would be suffering him to take advantage of his own wrong to relieve him from liability.

² *McCrorry v. Anderson*, 103 Ind. 12; *Miller v. O'Reilly*, 84 Ind. 168; *Ante*, § 366. Analogous cases declare and illustrate the general principle. *State v. Trout*, 75 Ind. 563; *Ensley v. McCorkle*, 74 Ind. 240; *Stone v. State*, 75 Ind. 235; *Hawes v. Pritchard*, 71 Ind. 166; *Miller v. McAllister*, 59 Ind. 491.

³ *Asch v. Wiley*, 16 Neb. 41; *Kimbrough v. Pitts*, 63 Ga. 496; *Holly v. Perry*, 94 N. C. 30; *Taylor v. State*, 16 Texas App. 514. But some of the courts require that the provisions of the statute be followed with considerable strictness. *Travis v. Travis*, 48 Hun. 343; *Julian v. Rodgers*, 87 Mo. 229; *Henderson v. Benson*, 41 Miss. 218; *Dunkel v. Wehle*, 13 Abb. N. Cas. 478. It is held by some of the courts that the approval of the officer extends simply to the sufficiency of the sureties, not to form or substance of the bond. *People v. Leaton*, 25 Ill. App. 45; *People v. Leaton*, 121 Ill. 666.

§ 371. **Approval may be Implied**—It is not always necessary that the officer charged with the duty of approving a bond should do so expressly, for an approval may be implied from circumstances.¹ As an approval may be implied it must necessarily follow that an approval may be proved by parol, and that the parties are not limited to written evidence. So it has been held.² This is in harmony with the doctrine that the filing of a paper in a case may be proved by parol, for it is the act and not the mere indorsement that controls.³ The cases establishing the doctrine just stated are so closely analogous to the cases wherein the question concerns the approval of an appeal bond that they may be properly considered as establishing the general doctrine here stated.

§ 372. **Effect of the Approval**—Where the trial court is vested with authority over the subject its approval of a bond extends both to the sufficiency of the bond and the solvency of the sureties. As we have elsewhere shown, the judgment of the court in such a case prevails on appeal unless there is a clear abuse of discretion or the trial court has acted upon an erroneous principle.⁴ Where a ministerial officer approves a bond the approval goes only to the sufficiency of the sureties and does not make an instrument valid and effective that in law is inoperative.⁵ We suppose that the approval of a bond by the trial court is not absolutely conclusive even as to the form and effect of the instrument, for it seems clear that if a bond radically insufficient should be approved, the appellee might, by the appropriate procedure, call in review the action of the trial court.

§ 373. **Evidence of Filing and Approval**—Unless the evidence of the filing or approval of an appeal bond is required by statute to be in writing, parol evidence of the filing or approval is compe-

¹ Ohio, etc., *R. R. Co. v. Hardy*, 64 Ind. 454; *Hanaw v. Bailey*, 83 Mich. 24.

² *Woodburn v. Fleming*, 1 Blackf. 4; *Miller v. O'Reilly*, 84 Ind. 168; *McCloskey v. Indianapolis, etc., Co.*, 87 Ind. 20.

³ *Naylor v. Moody*, 2 Blackf. 247; *Engleman v. State*, 2 Ind. 91; *Bishop v. Cook*, 13 Barb. 326; *Johnson v. Crawfordsville, etc.*, 11 Ind. 280; *Miller v. O'Reilly*, 84 Ind. 168, 169.

⁴ *Ante*, § 366.

⁵ *People v. Leaton*, 25 Ill. App. 45; *Harris v. Regester*, 70 Md. 109, 16 Atl. Rep. 386; *People v. Leaton*, 121 Ill. 666.

tent. Where the statute imperatively requires written evidence, that evidence must, of course, be produced. But where there is no such statutory requirement the question is one of fact, and evidence admissible upon similar questions of fact may be heard.¹ In truth, the real and meritorious question in such cases is whether the bond was or was not approved, and the mode of approval is not of controlling importance, except, perhaps, in cases where the mode is definitely prescribed by statute or by a rule of court.

§ 374. The Bond as essential to the effectiveness of an Appeal— In a former chapter we incidentally considered the subject of appeal bonds and stated as our conclusion that where a bond is required by the statute, as one of the steps to be taken in perfecting an appeal, then it is essential to the effectiveness of the appeal, but where it is not required an appeal may be prosecuted without filing a bond.² Whether a bond is or is not essential to an effective appeal is to be determined from the statute governing appeals in the particular class of cases, for in many cases there may be an appeal without a bond, while in others a bond is required. In the majority of cases a bond is only required where a supersedeas or stay of proceedings is sought, but this is by no means a universal rule. As we shall hereafter see, an appeal does not ordinarily operate to stay proceedings on the judgment, but in order to have that effect it must usually be supplemented by other proceedings. Confusion is avoided by keeping clearly in mind these general rules:

¹ *Woodburn v. Fleming*, 1 Blackf. 4; *McCloskey v. Indianapolis, etc., Co.*, 87 Ind. 20; *Miller v. O'Reilly*, 84 Ind. 168; *McCrary v. Anderson*, 103 Ind. 12. In *Woodburn v. Fleming*, *supra*, it was said: "Whether the bond was executed in the clerk's office or not is a plain question of fact. Although the bond does not show the place where the bond was executed, yet if the appellants can prove by other evidence that they are within the law the court will permit them to do so; if they can not, the motion to dismiss must be sus-

tained." This general doctrine was asserted in *Simpson v. Minor*, 1 Blackf. 229. See, also, *Frazer v. Smith*, 6 Blackf. 210; *Lacy v. Fairman*, 7 Blackf. 558. In speaking of the filing of an instrument it was said in *State v. Foulkes*, 94 Ind. 493, 496: "The indorsement is not the material thing; the act of depositing the paper with the proper officer is the essential element of the act of filing."

² *Ante*, Chapter XIII, "Modes of Appeal in Civil Actions."

1. That a bond is not ordinarily essential to the effectiveness of an appeal unless made so by the statute.¹ 2. A bond is ordinarily required to secure a stay of proceedings. These, we repeat, are general rules to which there are exceptions, but we need not note the exceptions as the fact that these rules prevail is all that we desire to here make clear, inasmuch as this serves our immediate purpose, which is, to mark the distinction between the effectiveness of an appeal to secure a review of the rulings of the trial court and its effectiveness in staying proceedings on the judgment.

§ 375. **Bond not ordinarily essential to Jurisdiction**—As a general rule a bond is not essential to appellate jurisdiction although a bond may be required by the statute which confers the right of appeal as one of the steps in the procedure. But, in saying that a bond is not ordinarily essential to jurisdiction, we do not mean to be understood as implying that a bond is never essential to the effectiveness of an appeal, nor do we mean to imply that a bond may not be made essential to jurisdiction. Where a bond is made essential to jurisdiction then the failure to file it may be fatal.²

§ 376. **Appearing without Objecting—Waiver**—In the very great majority of cases an appearance without objecting to the failure to file a bond operates as a waiver. The party who desires to take advantage of the failure to file the proper appeal bond should move for a dismissal of the appeal and give notice of the motion.³ Ordinarily a dismissal may be prevented by interposing

¹ As we have elsewhere said, it is within the power of the legislature to prescribe the conditions upon which appeals may be taken and prosecuted.

² *Mygatt v. Ingham*, Wright (Ohio), 176; *McLana v. Russell*, 29 Texas, 127; *Law v. Nelson* (Col.), 24 Pac. Rep. 2; *Thompson v. Thompson*, 24 Wis. 515; *Wood v. Wall*, 5 La. Ann. 179; *Clinton v. Phillips*, 7 T. B. Monroe, 118; *Young v. Mason*, 8 Ill. 55; *Steamboat Lake of the Woods v. Shaw*, 2 Greene (Iowa), 91; *French v. Snell*, 37 Me. 100; *Commonwealth v. Durham*, 22 Pick. 11;

State v. United States, 8 Blackf. 252. See, generally, *Stafford v. Union Bank of Louisiana*, 16 How. (U.S.) 135; *Silsby v. Foote*, 20 How. (U. S.) 290; *Hardaway v. Biles*, 1 Sm. & M. (Miss.) 657; *Skidmore v. Davies*, 10 Paige, 316.

³ *Critchell v. Brown*, 72 Ind. 539; *Murdock v. Brooks*, 38 Cal. 596; *Kirkpatrick v. Cooper*, 89 Ill. 210; *Cothren v. Connaughton*, 24 Wis. 134; *Thompson v. Lea*, 28 Ala. 453; *Blake v. Lyon*, etc., Co., 75 N. Y. 611; *Dillingham v. Skein*, Hempst. 181. Notice of such a motion is required by Rule XIV.

an offer to file a bond accompanied by an appropriate tender of a bond duly executed,¹ but where a time is imperatively designated within which a bond must be filed a failure to file the bond within the time will be fatal to the particular appeal,² unless the effect of the failure be obviated by some valid excuse.³

§ 377. **Amending Defective Bonds**—A defective appeal bond may be supplied by one framed and conditioned as the statute requires, and when the defects are seasonably and appropriately remedied the appeal will not fail.⁴ Where the parties act in good faith and with reasonable promptness the courts deal with them liberally. The courts, it has been often said, are reluctant to permit an appeal to fail where there has been no culpable fault, although there may be some errors or irregularities.

§ 378. **Motion to Dismiss because of Defective Bond**—A motion to dismiss an appeal because of a defect in the bond, or, because of a failure to file it as the law requires, should be reasonably specific.⁵ The rules of good pleading require that motions of this character should fully and clearly point out the defects or irregularities so that the adverse party may be informed what questions he is expected to meet. These rules also require that the defects or irregularities specified should be regarded as the only ones upon which the complaining party will insist, and to them he should be held.

§ 379. **Promptness Required in Asking Leave to Amend**—Where an objection to a bond is made and the appellant desires to remedy the defects or irregularities, he should proceed with

¹ *Anson v. Blue Ridge, etc., Co.*, 23 How. 1; *Swasey v. Adair*, 83 Cal. 136; *Deen v. Hemphill*, *Hempst.* 154.

² *King v. McCann*, 25 Ala. 471; *Mays v. King*, 28 Ala. 690.

³ *Brobst v. Brobst*, 2 Wall. 96; *Seymour v. Freer*, 5 Wall. 822. See, generally, *Thomas v. Georgia, etc., Co.*, 38 Ga. 222.

⁴ *Seward v. Corneau*, 102 U. S. 161;

O'Reilly v. Edington, 96 U.S. 724; *Territory v. Milroy*, 7 Mont. 559, 19 Pac. Rep. 209; *Miller v. O'Reilly*, 84 Ind. 168; *Murphy v. Steele*, 51 Ind. 81. Bonds may often be amended or replaced. *Morrison v. State*, 40 Ark. 448; *Grant v. Connecticut, etc., Co.*, 28 Wis. 387; *Pitnam v. Myrick*, 16 Fla. 401; *McClelland v. Allison*, 34 Kan. 155.

⁵ *Bazzo v. Wallace*, 16 Neb. 293.

reasonable promptness and diligence. While the courts are, as we have said, very liberal in allowing amendments,¹ still, they will not permit them where the appellant is guilty of laches. If the request is properly and seasonably made a bond may be substituted for one previously filed.² Leave to amend or to file a new bond should be asked.³

§ 380. **Enforcement of the Bond**—In one of the decisions⁴ a very strict rule is laid down respecting the enforcement of appeal bonds, and if that decision be followed to its logical consequences it is necessary for a plaintiff in an action upon an appeal bond to aver that the penalty of the bond was fixed by the court, for, according to that decision, the averment of approval by agreement of parties does not dispense with an order fixing the penalty. We venture to suggest that the decision goes too far, inasmuch as it completely ignores the doctrine of estoppel and attaches no importance to the agreement of the parties.⁵ It is impossible to resist the conclusion that the court

¹ As illustrating the rules and practice generally, see, *Hawthorne v. East Portland*, 12 Ore. 210; *George v. Lutz*, 35 Texas, 694; *Ferguson v. Dent*, 29 Fed. Rep. 1; *Kerr v. Martin*, 122 Pa. St. 436, 15 Atl. Rep. 860; *Branger v. Buttrick*, 30 Wis. 153; *Gilbank v. Stephenson*, 30 Wis. 155; *Gavisk v. McKeever*, 37 Ind. 484; *O'Sullivan v. Connors*, 22 Hun. 137; *Carroll v. Jacksonville*, 2 Ill.App. 481; *McIlhaney v. Holland*, 111 Pa. St. 634. Excuse for not filing in time, what is. *Architectural, etc., Co. v. Brooklyn*, 85 N. Y. 652.

² *State v. Thompson*, 81 Mo. 163; *Russell v. Bartlett*, 9 Wis. 556; *Helden v. Helden*, 9 Wis. 557.

³ *Pulte v. Wayne Circuit Judge*, 47 Mich. 646.

⁴ *Buchanan v. Milligan*, 68 Ind. 118. The only case cited is *Ham v. Greve*, 41 Ind. 531, but that case does not support the conclusion asserted. In *Ham v. Greve*, *supra*, there was no question of waiver. The court there said, in speak-

ing of the case of *Jones v. Droneberger*, 23 Ind. 74, that, "We are not required in the present case to decide to what extent defects may be waived by the obligee in an appeal bond, as the party who sues on such a bond must either show that it has been executed according to the statute or that such defect has been either expressly or by implication waived." See op. p. 537.

⁵ *Goodwin v. Fox*, 120 U. S. 775. It seems clear that where the parties agree to the sufficiency of a bond the obligors can not take advantage of defects after an affirmance of the judgment appealed from. The recital of the bond that there was an appeal estops the parties from denying that fact, and the complaint in the case cited averred that the judgment had been affirmed. The bond was the foundation of the complaint and was a proper exhibit. As it was a proper exhibit its recitals were of controlling effect. *Avery v. Dougherty*, 102 Ind. 443; *Watson, etc., Co. v. Casteel*,

in the case under examination lost sight of the doctrines of waiver and estoppel, and thus, as we believe, fell into error. We think that where the plaintiff in an action upon an appeal bond states facts showing that the bond was taken pursuant to the statute or that compliance with the statute was waived by agreement, that there was an affirmance of the judgment from which the appeal was prosecuted, and that the judgment has not been paid, he shows a *prima facie* right of action.¹ It is, as all the well considered cases show,² the policy of the law to uphold appeal bonds and not to suffer them to be treated as of no effect where there is a waiver, an estoppel, or a substantial compliance with the statute. We suppose it to be clear that the court would not entertain a motion to dismiss an appeal in a case where the appellee has agreed to the sufficiency of the bond, and, certainly, there is much less reason for denying a motion to dismiss in such a case than there is for adjudging the bond valueless upon the demand of the obligors.

§ 381. **What will release Sureties**—It is said in some of the cases that whatever releases the principal releases the surety,³ but it seems to us that this is a broader statement of the rule than can be safely made. We are strongly inclined to the opinion that the discharge of the principal under a bankrupt law or an insolvent's act would not release the surety, but at present it is not important to consider this question since we have no law of that kind. It may, however, be safely said that the general rule is that whatever releases the principal releases the surety. The rule, like most general rules, is, doubtless, subject to exceptions. But it does not follow that the principal must be released in order that the sureties shall be discharged, for

73 Ind. 296; *Lentz v. Martin*, 75 Ind. 228. It was properly held that the transcript did not aid the pleading. *Huff v. City of La Fayette*, 108 Ind. 14; *Huseman v. Sims*, 104 Ind. 317.

¹ *Buchanan v. Milligan*, 125 Ind. 332.

² *Adams v. Thompson*, 18 Neb. 541; *Singer Manf. Co. v. Barrett*, 94 N. C. 219; *State v. Byrd*, 93 N. C. 624; *Miller v. Holding*, 5 Houst. (Del.) 494; *Ray*

v. Ray, 1 Idaho (N. S.) 705; *Blake v. Lyon*, 75 N. Y. 611; *Mix v. People*, 86 Ill. 329; *Dyer v. Bradley*, 89 Cal. 557, 26 Pac. Rep. 511. It may be true that the complaint in *Buchanan v. Milligan*, 68 Ind. 118, is lacking in certainty, but the remedy for such a defect is by motion and not by demurrer.

³ *Cook v. King*, 7 Ill. App. 549.

the principal may remain bound and the sureties released. Thus, a change in the judgment appealed from made by agreement of the appellant and the appellee and without the consent of the sureties, will release them.¹ If time is given the principal without the consent of the surety the latter is released. The instances to which we have referred are nothing more than examples of the familiar doctrine that a surety has a right to stand upon his contract, and that a contract for an extension of time made with the principal without the surety's consent exonerates him from liability. It is barely necessary to suggest that performance by the surety, or due tender of performance, where a tender can be well made,² or a reversal of the judgment, will release the surety.

§ 382. **Surety's Right of Subrogation**—A surety in an appeal bond who fully discharges the obligation which rested upon the principal obligor is not only relieved from liability, but he is also entitled to be subrogated to the rights of the creditor whose claim he pays. This doctrine is impliedly asserted in all of the cases referred to in the note to the preceding section; it is, indeed, the groundwork of the reasoning, and it is expressly asserted in others. The doctrine has been declared and enforced by our own court.³ A reversal of the judgment in whole operates, of course, as a release of the sureties, and, as it has

¹ *Leonard v. Gibson*, 6 Ill. App. 503.

² In *Sharp v. Miller*, 57 Cal. 415, it was held that where there was a valid tender and refusal it was equivalent to payment and released the sureties. The court cited *Solomon v. Reese*, 34 Cal. 28, 36; *Hayes v. Josephi*, 26 Cal. 535. There is much force in the reasoning of the court in the last named case, for as the surety is entitled to be subrogated and to proceed without delay against the principal the refusal of the creditor to accept the money is prejudicial. The authorities sustain the doctrine. *Joslyne v. Eastman*, 46 Vt. 258; *Lewis v. Van Dusen*, 25 Mich. 351; *Hampshire, etc., Bank v. Billings*, 17 Pick.

87; *Post v. Losey*, 111 Ind. 75, 60 Am. Rep. 677; *Musgrave v. Glasgow*, 3 Ind. 31; *Wilson v. McVey*, 83 Ind. 108, citing *Brandt on Suretyship*, 296; *Spurgeon v. Smitha*, 114 Ind. 453, and auth. p. 456.

³ *Peirce v. Higgins*, 101 Ind. 178. In *Opp v. Ward*, 125 Ind. 241, it was held that a guarantor for the performance of a contract upon which judgment was obtained against the principal and from which the latter had unsuccessfully appealed, was entitled, after paying the judgment creditors, to be subrogated to their rights and, by virtue of such subrogation, could maintain an action upon the bond against the surety.

been held, the reversal of a judgment in part operates to release the sureties to the extent that it relieves the principal.

§ 383. **Measure of Recovery**—There is little difficulty in determining the amount of the recovery where the judgment appealed from is for a designated sum of money, for the surety ordinarily becomes bound for principal, interest and costs of the judgment he undertakes to pay.¹ This is the general rule, but the rule is subject to the exceptions, heretofore noted, that the recovery can not exceed the penalty of the bond and that entirely new and substantial stipulations can not be imported into the bond by the courts. The general rule is not affected by the fact that there may be some other security for the debt.² It is the general rule in all classes of cases that the bond, if properly framed, covers actual loss. But it is often difficult to determine what shall be considered an actual loss within the meaning of the law. Attorneys' fees are not recoverable in an action on the bond.³ Rents and profits of land may, under our statute, be recovered in action upon the bond,⁴ but, as held in a case already referred to, not in excess of the penalty expressly named in the bond. Rents and profits for property of which the obligor retains possession may be recovered in a case where the appeal operates to stay proceedings upon a bond properly framed, for so our statute provides.⁵ The statute to which we refer embraces both real and personal property and gives a comprehensive effect to an appeal bond framed in accordance with its provisions. While the statute is to be taken into consideration in construing a bond purporting to be executed pursuant to its provisions,⁶ it can not, according to the doctrine of our cases, control the express terms and conditions

¹ *Graham v. Swigert*, 12 B. Mon. 522; *Ward*, 125 Ind. 241, 244; *Stults v. Ives v. Merchants' Bank*, 12 How. (U. S.) 159; *Sessions v. Pintard*, 18 How. (U. S.) 106; *Talbot v. Morton*, 5 Litt. 326; *Many v. Sizer*, 6 Gray, 141.

² *Sessions v. Pintard*, 18 How. (U. S.) 106.

³ *Noll v. Smith*, 68 Ind. 188.

⁴ *Opp v. Ten Eyck*, 99 Ind. 345; *Hays v. Wilstach*, 101 Ind. 100; *Opp v.*

⁵ R. S. 1881, § 638.

⁶ *Ante*, §§ 358, 359, 360. It is difficult, if, indeed, it is not impossible, to conceive how a bond framed in substantial conformity to the statute referred to in the preceding note can be controlled by the clause designating the penalty.

of the bond.¹ The provisions of the statute are mandatory, for they are expressed in very strong and explicit words, and, in the proper case, it is the right of the appellee to demand that there shall be no stay of proceedings unless a bond, such as the statute prescribes, is executed.²

¹ *Ante*, § 360, note.

² The provisions of the statute to which especial reference is made read thus: "And if the appeal is taken from a judgment for the recovery of real property, or the possession thereof, by the party against whom the judgment for the recovery is rendered, then the condition of the bond shall further provide, that the appellant shall also pay all damages which may be sustained by the appellee for the *mesne* profits, waste or damage to the land during the pendency of the appeal, and if from a judgment for the recovery or return of per-

sonal property, or for such property or its value, then that if he deliver or return the property he will also pay the reasonable value of its use, and any damage it may sustain during the pendency of an appeal." R. S. 1881, § 368. There is some obscurity in the language of the statute, but there can be no doubt as to its general scope and character. While it may be difficult to give a construction to some of the words employed, there can be none in determining the chief object intended to be accomplished.

CHAPTER XVIII.

STAY OF PROCEEDINGS—SUPERSEDEAS.

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| <p>§ 384. Bond required to secure stay of proceedings.</p> <p>385. Effect of an appeal in term.</p> <p>386. Stay by order of appellate tribunal.</p> <p>387. Supersedeas—Definition.</p> <p>388. Application for a supersedeas—Brief.</p> <p>389. Effect of a supersedeas—Generally.</p> <p>390. Stay obtained by one of several appellants—Effect of.</p> <p>391. Supersedeas does not confer a right to do what decree forbids.</p> <p>392. Effect of a supersedeas upon self-executing judgments.</p> | <p>§ 393. Effect of a supersedeas where the judgment is self-executing in part.</p> <p>394. Duration of the stay in appeals from final judgments.</p> <p>395. Duration of the stay in appeals from interlocutory orders.</p> <p>396. Sureties on a supersedeas bond.</p> <p>397. No liability where there is no injury, and no promise to pay the judgment.</p> <p>398. Trial court can not control a supersedeas.</p> <p>399. Setting aside a supersedeas—Practice.</p> <p>400. Motions to dismiss an appeal and motions to vacate a supersedeas.</p> |
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§ 384. **Bond required to secure Stay of Proceedings**—It is a general rule of wide sweep that there can be no stay of proceedings where there is no bond or undertaking. An appeal does not necessarily stay proceedings, for there may be an effective appeal, and, yet, the right to enforce the judgment or decree appealed from remain unimpaired. This doctrine prevails in our State and in many other jurisdictions.¹ It is safe to say that the rule is that in all appeals from judgments in ordinary civil actions a stay of proceedings is granted only where the

¹ Jones v. Droneberger, 23 Ind. 74; 339, 361; Kitchen v. Randolph, 93 U. S. 86; Burt v. Hoettinger, 28 Ind. 214; Ruschaupt v. Carpenter, 63 Ind. 359; Heaton v. Knowlton, 65 Ind. 255; Burk v. Howard, 15 Ind. 219; Espy v. Balkum, 45 Ala. 256; Central Union, etc., Co. v. Andrews, 34 Kan. 563; Eakle v. Smith, 24 Md. 339, 361; Kitchen v. Randolph, 93 U. S. 86; Sage v. Central R. Co., 93 U. S. 412; Hickox v. Elliott, 28 Fed. Rep. 117. But merely filing a bond does not constitute an appeal. Pratt v. Western Stage Co., 26 Iowa, 241. A bond may be waived. Wilson v. Dean, 10 Ark. 308.

proper bond or undertaking is filed. There are, as we have seen, cases where special statutory provisions give a stay of proceedings without a bond; there are others, as appeals from interlocutory judgments, and appeals in term, where a bond is essential to the effectiveness of the appeal, but, as a general rule, a bond is essential to a stay of proceedings and only essential where that is the object sought to be accomplished.

§ 385. **Effect of an Appeal in Term**—An appeal in term duly perfected operates as a stay of proceedings in ordinary civil actions, except, possibly, in cases especially provided for in a peculiar statutory provision.¹ The statute expressly makes an appeal in term operate as a stay of proceedings in ordinary cases, and there is no room for doubt upon the general question.² The filing of the bond is held to be a condition precedent to a right to insist upon a stay.³ In the case referred to in the note the court declared that it is the filing of the bond which consummates the appellee's right to a stay of execution and ties the hands of the appellant. But it was declared in equally emphatic terms in another case that, "An appeal prayed for in term time and perfected within the time limited suspends all further proceedings."⁴ It may be affirmed that where an appeal in term is perfected by the performance of the acts required to make such an appeal effective, the appeal of its own force and vigor operates as a stay of proceedings. It is implied that the transcript must be filed in the higher court within sixty days after the bond is filed as that act is essential to the effectiveness of the appeal. If the transcript is not filed within the time limited the appellee may have execution by complying with the provisions of the statute, but the failure to

¹ R. S. 1881, § 631. This provision reads thus: "The appeal in such case shall not stay proceedings upon the judgment unless so ordered by the Supreme Court or some judge thereof." The case referred to is that of "a reserved question of law" under section 10. It is difficult to determine whether this peculiar provision restricts those of

section 638 or not, but it would seem that it has that effect.

² R. S. 1881, § 638.

³ *Mitchell v. Gregory*, 94 Ind. 363, citing *Burk v. Howard*, 15 Ind. 219; *Jones v. Droneberger*, 23 Ind. 74; *Ham v. Greve*, 41 Ind. 531, and *Willson v. Binford*, 54 Ind. 569.

⁴ *June v. Payne*, 107 Ind. 307.

file the transcript does not preclude the appellant from perfecting an appeal upon notice.¹

§ 386. **Stay by order of the Appellate Tribunal**—The only mode by which a stay of proceedings can be procured in ordinary civil actions, except by perfecting an appeal in term, is by obtaining an order from the appellate tribunal having jurisdiction, or from one of the judges of such tribunal.² It is but stating this doctrine in another form to say that there is only “one instance in which, in view of the appeal, the proceedings in the lower court can be stayed ‘without the order of the Supreme Court or a judge thereof in vacation,’ namely: ‘When the appeal is granted during the term, and bond filed with such penalty and surety as the court shall approve, within such time as the court shall direct.’”³ To obtain a stay of proceedings in cases where there is not a perfected term appeal the appellant must file a bond either with the clerk of the trial court or the clerk of the Supreme Court as the appellate tribunal may direct, but, wherever the bond is filed, the order staying the proceedings on the judgment or decree from which the appeal is prosecuted must be obtained from the proper appellate tribunal or one of its members.⁴

§ 387. **Supersedeas—Definition**—The order of the court or judge evidenced by the certificate of the clerk is commonly called a supersedeas.⁵ Originally the term “supersedeas” as used in legal procedure, signified a writ issued as a command to stay ordinary proceedings at law.⁶ It means, it may be said

¹ R. S. 1881, § 638, 639.

² *Burk v. Howard*, 15 Ind. 219; *Mitchell v. Gregory*, 94 Ind. 363; *June v. Payne*, 107 Ind. 307.

³ *Burk v. Howard*, 15 Ind. 219, 221. Since the creation of the Appellate Court by the legislature, the power to issue a supersedeas is not vested exclusively in the Supreme Court or its judges, for the authority to issue such writs or orders is, by necessary implication, conferred upon that tribunal.

⁴ R. S. 1881, §§ 641, 642; *Mills v. Conner*, 1 Blackf. 2; *Northern Ind. R.*

Co. v. Michigan Central R. Co., 2 Ind. 670.

⁵ The word “supersedeas” is now so thoroughly anglicized that we think it unnecessary to italicize it as a foreign word.

⁶ *Perteet v. People*, 70 Ill. 171, 177. In strictness the word means to set aside or annul, but this is not the meaning ordinarily assigned it in appellate procedure. *Williams v. Bruffy*, 102 U. S. 248; *Smith v. Western Union Tel. Co.*, 83 Ky. 269, 271; *Sage v. Central R. Co.*, 93 U. S. 412, 417.

in a general way, as now usually employed, an order or command issued from an appellate tribunal interdicting proceedings upon a judgment or decree from which an appeal is prosecuted. It issues as an incident of an appeal but is not always an inseparable incident.

§ 388. **Application for a Supersedeas—Brief**—As a supersedeas is an incident of an appeal it can not be issued until an appeal has been filed. It is not necessary that the appeal should be perfected by notice, for it has been the uniform practice to issue the supersedeas at the inception of the jurisdiction of the tribunal having power to order the stay. Jurisdiction must, however, exist in the tribunal from which the supersedeas is asked. As jurisdiction must exist in the tribunal and as an assignment of errors is essential to jurisdiction no supersedeas can issue until the transcript is filed and an assignment of errors duly made.¹ An application for a supersedeas must be accompanied by a brief referring to the record by pages and lines and pointing out the errors upon which the appellant relies.² But, as the supersedeas brief is only intended to show that the appeal is not a vexatious one entirely destitute of merit, no great strictness is required, nor does such a brief, unless full enough to meet the requirement of the law and the rules of practice, dispense with a full brief upon the merits of the case. The brief filed with an application for a supersedeas is for a temporary purpose, that is, to satisfy the court or judge that a stay of proceedings should be ordered; it is not required for the purpose of securing a reversal. Nor does the court in granting a supersedeas intimate any decision upon the merits of the appeal.³

§ 389. **Effect of a Supersedeas—Generally**—An order of supersedeas issued by an appellate tribunal does not undo or set

¹ *Henderson v. Halliday*, 10 Ind. 24. This case, as we have elsewhere shown, has been steadily followed. See *Lawrence v. Wood*, 122 Ind. 452; *Bacon v. Withrow*, 110 Ind. 94; *Smythe v. Boswell*, 117 Ind. 365, and authorities cited p. 367. In *Lawrence v. Wood*, *supra*, the case of *Harshman v. Armstrong*, 43 Ind. 126, is shown not to be

of controlling authority. See, generally, *Kendall v. Wilkinson*, 4 E. & B. 680.

² Rule XX.

³ *The Northern Ind. R. Co. v. Michigan Central R. Co.*, 3 Ind. 8; *The Northern, etc., Co. v. Michigan Cent. Co.*, 2 Ind. 670.

aside what has been done by the trial court, but, in general, it simply checks, or stays, further proceedings on the judgment or decree appealed from and, hence, is essentially preventive.¹ Our code adds something,—and that of a very material nature,—to the effect ordinarily assigned to an order of supersedeas for it declares that a levy made upon execution shall be relinquished.² This provision extends the operation of the order and, of necessity, makes ineffective acts done under and founded exclusively upon the levy unless, possibly, in cases where the writ has fully performed its functions prior to the stay.³ As a general rule a supersedeas operates only upon the decree or judgment from which the appeal is prosecuted and does not affect the rights of persons not directly bound by such judgment or not bound by it as privies in blood or estate. Thus, it does not suspend the collection of the fees and costs of officers or witnesses by a fee bill.⁴

§ 390. Stay obtained by one of Several Appellants—Effect of—Where a judgment several in its effect is rendered against more than one, a stay obtained by one does not operate in favor of all. A bond securing a stay for one will not confer a right upon the others. If the plaintiff so elects he may issue execution against those who have not obtained a stay of proceedings.⁵

§ 391. Supersedeas does not confer a right to do what the Decree forbids—Where a decree specifically forbids a party from doing a designated act he can not by obtaining a supersedeas acquire a right to do the forbidden act. Thus, a supersedeas confers no right to do an act prohibited by a decree awarding an in-

¹ *Northwestern, etc., Co. v. Landes*, 6 Ind. 525; *Buchanan v. Logansport, etc., Co.*, 71 Ind. 265, 268; *Schleble v. Slagle*, 89 Ind. 323, 328; *Brooks v. Harris*, 41 Ind. 390; *State v. Krug*, 94 Ind. 366; *Blackburn v. Crowder*, 108 Ind. 238, 241.
² *R. S. 1881*, § 642.
³ *Porter v. Parker*, 6 Texas, 23.
⁴ *Mackison v. Clegg*, 83 Ind. 135.
⁵ *Freeman on Executions*, § 32.

¹ *Northwestern, etc., Co. v. Landes*, 6 Minn. 564; *Mayor, etc., v. Shaw*, 14 Ga. 162; *Low v. Adams*, 6 Cal. 277; *Curtis v. Root*, 28 Ill. 367; *State v. Kirkpatrick*, 54 Iowa, 373; *Runyon v. Bennett*, 4 Dana, 598, S. C. 29 Am. Dec. 431; *Board of Commissioners v. Gorman*, 19 Wall. 661, 664. The supersedeas does not impair the validity of the judgment. *Mull v. McKnight*, 67

junction forbidding the act.¹ It is obvious that to assign to a supersedeas such force as would make it so operate as to give a party power to do what the decree prohibits would make it a remedy creating affirmative rights of a positive nature rather than a preventive order or writ. This would be to completely transform one remedy into another of an essentially different class. To adjudge that a supersedeas can create a positive and affirmative right would be, in effect, to annul the decree of the lower court before a hearing upon the merits is had, and this the policy of the law prohibits. The principles declared in analogous cases forbid that the merits of an appeal should be determined upon a preliminary application, and they forbid, also, that the judgment of the trial court should be nullified without a consideration of the merits in due course and upon full argument.

§ 392. **Effect of a Supersedeas upon Self-Executing Judgments—**Where a judgment or decree executes itself, that is, where no act of a ministerial officer is necessary to put it into effect, the supersedeas does not alter the state of things created by the judgment from which the appeal is prosecuted.² This doctrine is strikingly illustrated by the case wherein it was held that a judgment suspending an attorney from practice executes itself, except as to costs, and the granting of a supersedeas only suspends the right to enforce collection of costs, and does not allow the attorney to practice pending the appeal.³ In another

¹ *State v. Chase*, 41 Ind. 356; *Central Union, etc., Co. v. State*, 110 Ind. 203; *Hawkins v. State*, 126 Ind. 294; *Heinlen v. Cross*, 63 Cal. 44; *Sixth Avenue, etc., Co. v. Gilbert, etc., Co.*, 71 N. Y. 430; *Graves v. Maguire*, 6 Paige Ch. 379; *Robertson v. Davis*, 14 Minn. 554.

² *Padgett v. State*, 93 Ind. 396, 397; *Walker v. Heller*, 73 Ind. 46, 51. In *Graves v. Maguire*, 6 Paige Ch. 379, Chancellor Walworth said: "The effect of an appeal after the proper steps have been taken to render it a stay of proceedings upon the order or decree appealed from, is to leave the proceedings in the situation they were at the

time of perfecting such appeal, but not as they were before the order or decree appealed from was entered." See, also, *Burrall v. Vanderbilt*, 1 Bosw. 643; *Clark v. Clark*, 7 Paige Ch. 607; *Burr v. Burr*, 10 Paige Ch. 166; *Cook v. Dickerson*, 1 Duer, 679; *First National Bank v. Rogers*, 13 Minn. 407.

³ *Walls v. Palmer*, 64 Ind. 493. What is said in the case cited as to suspending right to collect costs must upon the authority of *Mackison v. Clegg*, 83 Ind. 135, be understood to mean costs of the parties and not fees of witnesses or officers.

case it was held that an appeal from an order refusing to admit a will to probate, although so perfected as to operate as a supersedeas, did not preclude a party from proceeding to obtain partition pending the appeal, notwithstanding the fact that in the event of a reversal the party would not be entitled to partition.¹ A still later case enforces this principle. In the case to which we refer a judgment in partition was declared to be self-executing and it was adjudged that an appeal which operated as a supersedeas did not preclude the parties from securing partition pursuant to the order.²

§ 393. **Effect of Supersedeas where the Judgment is Self-Executing in Part**—It follows as a necessary conclusion from the general doctrine that a supersedeas operates to stay an execution but does not operate upon a self-executing judgment, that where the judgment in part requires an execution for its enforcement and in another part does not require such a writ, the supersedeas may operate only upon part of the judgment. This doctrine has been directly asserted by our court,³ and, as we shall show further on, in discussing the particular topic, exerts an important effect upon the rights and liabilities of the sureties in a supersedeas bond. But a self-executing judgment may be stayed and the situation as fixed by the judgment appealed from remain unchanged, as, for instance, where an unsuccessful appellant is enabled by a stay of proceedings to retain possession of personal property, for, in such a case, an action would lie upon the bond for loss resulting from the depreciation of the property pending the appeal.

¹ *Burton v. Burton*, 28 Ind. 342. In the case cited it was said: "The only effect of an appeal to this court is to stay execution upon the judgment from which the appeal was taken. In all other respects the judgment until annulled or reversed is binding upon the parties as to every question directly decided." This statement is correct but subject to the exception that a supersedeas operates under our statute to relinquish a levy.

² *Randles v. Randles*, 67 Ind. 434.

In *Carver v. Carver*, 115 Ind. 539, 542, in speaking of a judgment such as that under discussion, it was said: "It was not possible to institute any proceeding upon the judgment aside from the execution, and, therefore, the supersedeas and bond did not stay any proceeding except an execution." *Hayes v. Hayes*, 75 Ind. 395, supports the doctrine of the text, and the decision in *Meyer v. State*, 125 Ind. 335, extends the doctrine.

³ *Carver v. Carver*, 115 Ind. 539.

§ 394. **Duration of the Stay in Appeals from Final Judgments**—A stay of proceedings in cases of appeals from final judgments continues until the case is fully disposed of by the appellate tribunal and the opinion certified to the clerk of the trial court. The statute declares that it shall operate until “the final determination of the case, unless otherwise ordered by a court or judge thereof,”¹ but as the statute also gives sixty days in which to file a petition for rehearing, and as the clerk is not authorized to officially issue the necessary certificate to the clerk of the trial court until the time for filing a petition has expired, except in cases specially enumerated, it is evident that the judgment of affirmance or reversal is not such a final determination of the case as would entitle the appellee to treat the stay as at an end and sue upon the bond.

§ 395. **Duration of the Stay in Appeals from Interlocutory orders**—The statute limits the stay in cases of appeals from interlocutory orders to thirty days, but provides that it may be extended by the court or one of its judges.² As the right to a stay is created and governed by statute³ its effectiveness can not endure beyond the period designated by the legislature, unless there is an order duly extending the time. It is necessary, therefore, to apply to the court, or one of its judges, whenever a stay for a longer time than that fixed by the statute is desired. It is

¹ R. S. 1881, §§ 662, 5828; Rule XXXVIII. In *Railsback v. Greve*, 49 Ind. 271, it was held that a complaint on a bond must show when the judgment was affirmed or when the opinion and affirmance were filed in the office of the clerk of the trial court. It was there said: “There was no right to proceed to collect or demand payment of the affirmed judgment until after the sixty days given for filing the petition had expired and a certified copy of the opinion and judgment of affirmance had been filed in the office of the clerk below.” The court cited *Poppenhusen v. Seeley*, 41 Barb. 450. In *Heshion v. Scott*, 94 Ind. 570, a somewhat

different doctrine seems to be laid down, but that case evidently did not receive very careful consideration.

² R. S. 1881, § 648.

³ In *Sage v. Central R. Co.*, 93 U. S. 412, 417, it was said: “A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.” *Hogan v. Ross*, 11 How. 294, 297; *Railroad Co. v. Harris*, 7 Wall. 574; *Slaughterhouse Cases*, 10 Wall. 273, 289, 291; *Kitchen v. Randolph*, 3 Otto, 86, 88; *Goddard v. Ordway*, 4 Otto, 672; *Arnold v. Frost*, 9 Benedict, 267, 269.

within the power of the court to prolong the time upon its own motion, but it is not bound to do so in the absence of an application, nor is it, of course, always bound to do so upon petition or motion.

§ 396. **Sureties on Supersedeas Bonds**—What was said in discussing the rights and liabilities of parties and sureties to appeal bonds is applicable to supersedeas bonds.¹ It is, indeed, true that in almost every decision of our court upon the subject of appeal bonds, the instruments considered were, in effect, supersedeas bonds, that is, they were bonds executed to obtain a stay of proceedings upon the judgment appealed from. In common acceptation the term "appeal bond" means the same thing as a supersedeas bond,² and it is often true that a bond is both an appeal bond and a supersedeas bond. As the subject of the rights and liabilities of parties and sureties has been so fully considered little remains to do here, but there are, nevertheless, some special matters that merit attention, and those matters may be here appropriately considered. It is evident, it may be said at the outset, that a surety is not, as a general rule, liable for anything more than costs in a case where the appeal is prosecuted from a self-executing judgment. It is true that there may be instances where the appeal from a self-executing judgment causes some special injury to the appellee for which he would be entitled to recover, but such cases form exceptions to the general rule.³ Where part of the judgment appealed from is self-executing and part is not, there can be no difficulty in holding that if the stay operates upon the part which is not self-executing and thereby causes loss to the obligee, he may maintain an action on the bond. Where the stay operates upon the entire judgment there can, of course, be no doubt that if injury results to the obligee from the delay he is entitled to a recovery. If, however, the supersedeas bond does not stay proceedings to the injury of the appellee he is

¹ *Ante*, Chap. XVII, "Appeal Bonds." *Keen v. Whittingen*, 40 Md. 489; *Wood*

² *Ante*, § 355, note. *v. Fulton*, 2 Harr. & G. 71; *Blonheim*

³ *United States v. Addison*, 6 Wall. *v. Moore*, 11 Md. 365; *Chamberlain v. 291; Lawler v. Alton*, 8 Irish L. 160; *Applegate*, 2 Hun. 510.
Graham v. Swigert, 12 B. Mon. 522;

not entitled to recover merely because he elected not to enforce his rights under the judgment pending the appeal.¹ We have said that compensation is recoverable for actual loss or injury caused by the stay of proceedings from the sureties on the bond, and this is the doctrine of the adjudged cases, but in applying the doctrine some diversity of opinion has been exhibited. In a case of our own it was held that where one in possession of personal property unsuccessfully appeals and the property depreciates pending the appeal the loss resulting from such depreciation is an element of damages.² An unsuccessful appeal in a case where the appellant retains possession of the land in controversy pending the appeal entitles the obligees in the supersedeas bond to recover *mesne* rents and profits.³

§ 397. **No liability where there is no injury and no promise to pay the judgment**—The general rule is that where the stay of proceedings does not operate to the injury of the appellee and there is no promise to pay a money judgment no actual damages beyond costs, are recoverable. This proposition seems so plain as to hardly merit statement but its statement may, at least, be excused because it serves as a preface to a consideration of some incidental matters that are not unimportant. One of these matters is that the rule respecting the description or identification of the judgment which the obligors undertake to pay in the event that the appeal is not successful is very liberal, inasmuch as it asserts that no great particularity of description

¹ *Carver v. Carver*, 115 Ind. 539. We are not here, it may be well enough to say, referring to the effect of a promise to pay a designated judgment. As to the effect of such a promise, see *Crane v. Andrews*, 10 Col. 265, 15 Pac. Rep. 331; *Miner v. Rodgers*, 65 Mich. 225, 31 N.W. Rep. 845; *Fitzgerald v. Wellington*, 37 Kan. 460, 15 Pac. R. 582.

² *Hinkle v. Holmes*, 85 Ind. 405.

³ *Opp v. Ten Eyck*, 99 Ind. 345; *Hays v. Wilstach*, 101 Ind. 100; *Craig v. Encey*, 78 Ind. 141; *Cahall v. Citizens, etc., Association*, 74 Ala. 539. Under

former statutes a different doctrine was held. *Malone v. McClain*, 3 Ind. 532; *Epstein v. Greer*, 85 Ind. 372, is not authority under the statute now in force. R. S. 1881, § 638. See *Opp v. Ten Eyck*, *supra*. In *Sherry v. State Bank of Indiana*, 6 Ind. 397, it was held that obligors were liable for *mesne* profits and they could not set off the value of improvements made by the principal obligor pending the appeal. See, generally, *Estey, etc., Co. v. Runnels*, 67 Mich. 310, 34 N. W. Rep. 581.

is required.¹ Another of the incidental matters referred to is this : where a recovery is sought beyond costs and nominal damages in a case where there is no undertaking, implied or express, to pay the judgment, actual injury must be shown, and in some instances special damages must be averred and proved. If an appellant does no affirmative act causing actual injury to the appellee he may be liable for nominal damages and for costs, and where there is a promise to pay the judgment, for the principal and interest due upon it. This rule is not affected by the fact that the appellant may have a right to pursue a course that, if actually pursued, would secure him benefit and cause loss to the appellee. Thus, a stay of proceedings which would enable a party to obtain possession of land or to retain possession already held by him would not authorize a recovery for the use of the land unless in the one case possession was taken or in the other possession was retained.² The general doctrine is asserted and enforced by the cases wherein it was held that if a party does not in fact obtain a supersedeas there is no liability on the bond, although he was entitled to a supersedeas had he elected to avail himself of his right.³ It seems to us that the cases last referred to carry the doctrine to its utmost verge, and that it may well be doubted whether they do not carry it beyond the true line. If the appellee should enforce his judgment notwithstanding the appellant's right to a stay, then, doubtless, there would be no liability on the bond beyond nominal damages and costs, but if the appellee should treat the bond as having effected the purpose for which it was executed and await the result of the appeal it would seem clear that if the bond contained an undertaking to pay the judgment appealed from, he might enforce it against the obligors in the

¹ *Williams v. Sims* (Texas), 16 S. W. Rep. 786; *Jones v. Malloy* (Texas), 15 S. W. Rep. 198; *James v. Roberts*, 78 Tex. 670; *Witten v. Caspary* (Texas), 15 S. W. Rep. 47; *Phelps v. Daniel*, 86 Ga. 363, 12 S. E. Rep. 584; *Dyer v. Brady*, 88 Cal. 590, 26 Pac. Rep. 511. See *Richardson v. Richardson*, 82 Mich. 305, 46 N. W. Rep. 670.

² *Carver v. Carver*, 115 Ind. 539. As to the right and measure of a recovery under the provisions of section 638 of the code, see *ante*, § 383.

³ *Reed v. Lander*, 5 Bush. 598; *Whitehead v. Boorum*, 7 Bush. 399; *Wade v. First National Bank*, 11 Bush. 697.

event of a breach of the condition to prosecute the appeal to effect.

§ 398. **Trial Court can not control a Supersedeas**—A supersedeas is an order of an appellate tribunal made by it in the exercise of its appellate jurisdiction, and as such it is above the control of an inferior tribunal.¹ It is a settled principle of appellate procedure that when a case is brought within the jurisdiction of an appellate tribunal it is taken entirely out of the control of the inferior court.² The rule just stated is not violated by the cases which hold that the trial court may, upon due application, amend its record so as to make it speak the truth, for those cases rest upon the ground that the acts have been performed but are not properly evidenced by the record entries. Where a judgment has been affirmed and the judgment of the appellate tribunal certified to the clerk below it is not, as a general rule, in the power of the lower court to stay the proceedings contrary to the mandate of the higher court.³ This general rule is not without exceptions. If facts presenting a cause for staying proceedings on the judgment have come into existence since the rendition of the judgment and were not discovered until after its affirmance, we suppose the trial court might interfere for the protection of the unsuccessful party, provided, of course, he showed merit and diligence and proceeded in the appropriate mode. The judgment of affirmance may well be regarded as conclusive as to all the facts and all the questions involved in the controversy on appeal, but it can hardly be so regarded as to facts not in existence when the judgment on appeal was pronounced.⁴ Like all general rules, the rule stated must be subject to exceptions, and one exists in a case where a party shows right to be relieved from fraud.

¹ *Draper v. Davis*, 102 U. S. 370; *Kolsem (Ind. Sup. Ct.)*, Dec. 17, *Hovey v. McDonald*, 109 U. S. 150; 1891.

Helden v. Helden, 9 Wis. 557. See ² *Mayor of Marysville v. Buchanan*, 3 Cal. 212; *Dibrell v. Eastland*, 3 Yerg. 507.
Jerome v. McCarter, 21 Wall. 17; *Railroad Co. v. Schute*, 100 U. S. 644.

³ See *post*, Chapter XXVII, "Effect of an appeal." See, also, *State v.* ⁴ *Post*, Chapter XXIX, "Judgment on Appeal."

§ 399. **Setting aside a Supersedeas—Practice**—Although the cases in which a supersedeas will be set aside are very rare, still, there are cases in which it may be done. A supersedeas will not be set aside upon the ground that there is no merit in the appeal, and the uniform practice of the court has been to decline to entertain a motion founded upon any such ground. The reason for this rule is obvious. Nor will the court entertain a motion to set aside a supersedeas upon the ground that the supersedeas brief filed is not sufficient. Such questions are foreclosed by the decision involved in the order granting the supersedeas. But where the supersedeas is obtained by fraud it may be set aside.¹ So it may be where the bond filed in the appellate tribunal is insufficient. Where sureties on the bond filed below have since its approval become insufficient, the appellate tribunal may, in the proper case, set aside the stay of proceedings.² The practice is to file a written motion to set aside the supersedeas specifying the grounds of the application, and to give written notice of the motion to the adverse party. If questions of fact are presented by the motion affidavits should be filed with it. Upon questions of law a brief is required. No oral arguments are heard upon such motions except in special cases and upon leave asked in writing and obtained. The motion with affidavits and briefs should be filed with the clerk and he should be requested to place them before the court.³ A party opposing the motion has a right to file counter-affidavits and briefs, and the motion is disposed of upon the papers filed.

§ 400. **Motions to Dismiss an Appeal, and Motions to vacate a Supersedeas**—There is an important difference between dismiss-

¹ *Draper v. Davis*, 102 U. S. 370; *Railroad Co. v. Schute*, 100 U. S. 644; *Jerome v. McCarter*, 21 Wall. 17.

² See *ante*, § 366; *Midland R. Co. v. Wilcox*, 111 Ind. 561.

³ Rules XI, XII, XIII, XIV. Although it is implied in what is said in the text, it may not be inappropriate to expressly say that the only ground upon which a motion to vacate a supersedeas can be supported, except in very

extraordinary cases, is the insufficiency of the bond. It may be shown that the bond is radically defective, or that the sureties are insolvent, and, for that purpose, evidence in the form of affidavits or depositions is competent. It may be added, that the supersedeas will not be vacated unless the assailant makes a strong and clear case. After the order is made the burden is upon the party who seeks to have it vacated.

ing an appeal and setting aside a stay of proceedings or vacating an order of supersedeas. The difference is obvious although it is often lost sight of in practice. As a bond is not, ordinarily, essential to an appeal the appeal may often be effective, although the bond is not sufficient to support a stay of proceedings or an order of supersedeas. Where a bond is essential to an appeal, as, for instance in the case of an appeal in term, or, in the case of an appeal from an interlocutory order, then the failure to file one may support a motion to dismiss the appeal; where, however, the bond is only required to secure a stay of proceedings the failure to file a bond may support a motion to set aside the order staying the proceedings, but it will not be sufficient cause for dismissing the appeal.¹ In cases where the bond is not sufficient to support an order of supersedeas the proper motion is to vacate or set aside the order, but where it is essential to the effectiveness of the appeal the motion to dismiss is the appropriate one. It may be true, and, indeed, it is generally true, that in cases where a bond is filed because required to perfect the appeal it serves a double purpose, namely, that of a necessary step in the appeal itself, and, also, that of securing ancillary relief by staying or suspending proceedings on the judgment from which the appeal is prosecuted, and, when this is true, one motion,—that to dismiss the appeal,—is all that is required.

¹ *Winter v. Hughes*, 3 Utah, 438, 24 Pac. Rep. 907.

CHAPTER XIX.

PLEADINGS OF THE APPELLEE.

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| § 401. Demurrer to the assignment of errors. | § 416. Assignment of cross-errors—When necessary. |
| 402. Ill-assigned errors disregarded. | 417. Nature of the assignment of cross-errors. |
| 403. Classification of pleas or answers. | 418. Object of the assignment of cross-errors. |
| 404. Joinder in error. | 419. Effect of the assignment of cross-errors. |
| 405. The common joinder admits the record. | 420. Groundwork of the assignment of cross-errors. |
| 406. Waiver by common joinder. | 421. Transcript. |
| 407. Special pleas or answers. | 422. Notice of the assignment of cross-errors not required when filed within the time limited. |
| 408. What must be specially pleaded. | 423. Time within which cross-errors may be assigned. |
| 409. Election of remedies. | 424. Answer to the assignment of cross-errors not required. |
| 410. Presenting matter in bar by motion. | |
| 411. Verification of the motion. | |
| 412. Notice of the plea or motion. | |
| 413. Demurrer to the special plea. | |
| 414. Reply to the special plea. | |
| 415. Cross-errors. | |

§ 401. **Demurrer to the Assignment of Errors**—At common law an assignment of errors was regarded as a declaration, and our decisions declare that it is the appellant's complaint on appeal. It was the practice at common law to demur to the assignment of errors where it was insufficient,¹ and, some of the writers on procedure affirm that a demurrer is proper under our code system. We are, however, very much inclined to doubt whether our code intended that demurrers should be filed to the assignment of errors. There is, at all events, no longer any practical benefit to be secured by demurring. Defects in the assignments of errors when called to the attention of the court in the brief or

¹ *Freeborn v. Denman*, 2 Halst. 190; *law*, as under our system, each specification was required to be complete in *Fitch v. Lothrop*, 2 Root, 524; *Clarke v. Bell*, 2 Litt. (Ky.), 162; *Moody v. itself. Landsdale v. Findley, Hardin, Vreeland*, 7 Wend. 55. At common 151; *Kelley v. Bennett*, 132 Pa. St. 218.

argument will receive consideration, and parties by this course can secure all the substantial benefit that a demurrer could procure.¹ A reference to some of the decided cases will make good the statement, that it is sufficient to direct attention to the defective assignment and that when so challenged, it will be held to be unavailing. A joint assignment of errors not good as to all will be held not good as to any who join in it.² Omission of names will be held fatal.³ Where instructions are not sufficiently indicated specifications founded on rulings upon them will be adjudged to be ill.⁴ Assigning as error what should be specified in the motion for a new trial will be declared to be nugatory.⁵ So, as held in cases almost past numbering, a specification that is too general will accomplish nothing.⁶ The doctrine of our cases is held by many other courts.⁷

§ 402. **Ill-assigned Errors Disregarded**—It is the rule as declared by the adjudged cases that ill-assigned errors will not be considered, for this is the only effect that can be logically ascribed to those cases. As errors not well assigned are disregarded there can be no possible reason for demurring. There are, on the other hand, substantial reasons why the practice of demurring should be disapproved. It tends to multiply pleadings and uselessly cumber the record. It breeds useless tech-

¹ See "The Assignment of Errors," Chapter XVI.

² *Hawkins v. Heinzman*, 126 Ind. 551; *Wall v. Bagby*, 126 Ind. 372, *Arbuckle v. Swim*, 123 Ind. 208.

³ *Snyder v. Fleming*, 124 Ind. 335.

⁴ *Ohio, etc., Co. v. McCartney*, 121 Ind. 385, limiting *Bartholomew v. Langsdale*, 35 Ind. 278, in fact practically overruling it. See, *Pratt v. Burhans*, 47 N.W. Rep. 1064; *Taylor v. Steam Navigation Co.*, 105 N. C. 484.

⁵ *Staser v. Hogan*, 120 Ind. 207; *Bedford, etc., v. Rainbolt*, 99 Ind. 551; *West v. Cavins*, 74 Ind. 265; *Ogle v. Dill*, 61 Ind. 438; *Patterson v. Lord*, 47 Ind. 203; *Garrigan v. Dickey* (Ind.App. Ct.), 27 N. E. Rep. 713; *Ringenger v. Hartman*, 102 Ind. 537, 26 N. E. Rep. 91.

⁶ *Knusly v. Hire* (Ind. App. Ct.), 28 N. E. Rep. 195; *Lawless v. Harrington*, 75 Ind. 379; *Clayton v. Blough*, 93 Ind. 85. The court will, indeed, of its own motion disregard insufficient specifications.

⁷ *Arndt v. Hosford* (Iowa), 48 N. W. Rep. 981; *Blecker v. Schoff* (Iowa), 48 N. W. Rep. 1079; *American Legion v. Rowell* (Texas), 15 S. W. Rep. 217; *Farrar v. Churchill*, 135 U. S. 609; *Kimbrell v. Rogers* (Ala.), 7 So. Rep. 241; *Johnston v. Flint*, 75 Texas, 379, 12 S. W. Rep. 1120; *Garlington v. Copeland*, 25 So. Car. 41; *Franz, etc., Co. v. Mielenz*, 5 Dak. 136, 37 N. W. Rep. 728; *Territory v. Reberg*, 6 Mont. 467; *Filley v. Walker*, 44 N. W. Rep. 737.

nicalities. It creates collateral issues. The mischief it does is not counterbalanced by any corresponding good, for it really produces nothing of value. Bald technical errors, or mere errors of form, the courts will not regard, so that, as it is useless to urge such errors or defects against the assignment of errors, there is no function for a demurrer to perform.

§ 403. **Classification of Pleas or Answers**—The subject of appeals is regulated to a very great extent by statute, but there are, nevertheless, many of the common law principles which are still of controlling influence. Many questions of practice are solved by resorting to the rules which prevailed in the common law procedure ordinarily denominated a writ of error. While it is true that our statute has abolished writs of error, it is still true that many of the principles established by the courts of common law enter into and form part of our system of procedure. Old rules of the common law cling to the new modes of procedure with something of the same tenacity that the "Old man of the Sea" clung to "Sinbad the sailor." Reference is constantly made to the common law decisions, and this is done upon the long accepted doctrine that the common law aids statutes. Following this doctrine we shall adopt the old classification of pleas that may be pleaded on appeal to the assignment of errors. "Pleas in error are common or special."¹ This shall be our classification, though it may not be as accurate or definite as it is possible to frame. There is but one common plea, but there are numerous special pleas.

§ 404. **Joinder in Error**—The common plea, or as we call it, and as it is generally called elsewhere, the common joinder is; "There is no error in the record or proceedings."² This plea, or answer, is in the nature of a demurrer.³ It admits all that is properly part of the record, and presents an issue of law. Under the old rules it did not admit errors that "were ill-assigned."⁴ Some of our decisions seem to indicate that the

¹ 2 Tidd's Pr. (4 Am. ed.) 863.

³ Booth v. Commonwealth, 7 Metc. (Mass.) 285, 287.

² The formula in the old books, and, indeed, in many modern ones is, "*in nullo est erratum*."

⁴ 2 Tidd's Pr. (4 Am. ed.) 1173; Bodenth v. Goodrich, 3 Gray, 508, 512; Riley v. Waugh, 8 Cush. 220.

rule is that errors not accurately assigned are admitted, but, certainly, what can not be assigned as error is not confessed by the common joinder. We suppose all that can be said is that under our system the common joinder waives matters of form but not matters of substance. That it does not confess specifications not well made is settled beyond controversy. This is the doctrine of the long line of cases which hold that specifications of error must be definite, as well as of the great number of cases which hold that reasons for a new trial can not be made specifications in the assignment of errors. There can be little doubt that under our system of procedure matters of substance which render bad the specifications in the assignment of errors are not made unavailing by a common joinder in error. Matters of form can not be made available upon such a plea or answer, but matters of substance may be. It has never been the practice to specifically object to such specifications as we have named, but it has always been held that the appellee may make objections after joining in error, that is, he may show that the specification is not sufficient to bring in review the rulings of the trial court.

§ 405. **The Common Joinder admits the Record**—The general rule is often stated thus, "the common answer or plea admits the record."¹ This statement requires qualification. The answer does admit that the record is perfect unless the record itself shows that it is imperfect. Under our decisions the plea does not admit that all recitals or instruments contained in the record are properly there if upon the face of the record itself it appears that they are not legitimately a part of it. Thus, it does not confess that mere statements of a ministerial officer are part of the record, nor that a bill of exceptions not signed or not filed in time is in the record, although copied in the transcript. It is entirely safe to affirm that where the record upon its face shows that matters are copied into it which do not le-

¹ Tidd says: "By pleading *in nullo est erratum*, the defendant in error admits the record to be perfect; the effect of his plea being that the record in its present state is without error." He fol-

lows these general statements, however, with others which modify or qualify their effect and scope. 2 Tidd's Pr. 1174.

gitimately belong there the plea does not preclude the party pleading it from denying that they are part of the record.¹ In such a case, as we have elsewhere fully shown, the appellee may point out the parts of the transcript embodying improper orders, instruments, or recitals, and if the transcript, upon inspection, shows that the appellee is right, the ill parts of the transcript will be disregarded by the court in deciding the case.² But where the record does not on its face disclose the infirmity then there must be an amendment, otherwise the plea will conclude the party who pleads it. Omissions in the transcript must, as a general rule, be supplied, for it is seldom, indeed, that the face of the transcript discloses the fact that material matters are omitted. A party who stands solely upon the plea can not contradict the record on appeal. But in saying this we do not mean to convey the impression that a party may not, after joinder, obtain a correction of the record; we mean only this, that if nothing more is done than to file the plea he can not contradict the record. As we have shown in another place, a party may have the record corrected even after the case has been submitted.

§ 406. **Waiver by Common Joinder**—All objections to process are waived by a joinder in error.³ It operates as a waiver of many other rights, as, for instance, a motion to dismiss an appeal.⁴ It will waive an objection that there is a defect of parties, and all objections of like character.⁵ But it is not necessary to collect particular cases, for it may be said that a joinder in error waives all strictly preliminary motions, except such as go to the jurisdiction of the subject. It is necessary, therefore,

¹ Even in jurisdictions where the effect given the common joinder is more strict than that given it under our system, matters not properly in the record, although copied in the transcript, will not be regarded as admitted to be part of the record. *Baker v. Swift* (Ala.), 6 So. Rep. 153; *Winters v. Null* (W. Va.), 7 S. E. Rep. 443; *Chicago, etc., v. Yando*, 127 Ill. 214, 20 N. E. Rep. 70; *Noble v. Bourke*, 44 Mich.

193; *Roanoke v. Karn*, 80 Va. 589; *Shilto v. Thatcher*, 43 Ohio St. 63.

² Motions to strike out are unnecessary where the record shows that the instrument, order or recital is not properly part of the record. *Creamer v. Sirp*, 91 Ind. 366.

³ *Beck v. State*, 72 Ind. 251, 255.

⁴ *State v. Walters*, 64 Ind. 226, 228.

⁵ *Field v. Burton*, 71 Ind. 380.

for a party who desires to present a preliminary question to do so before filing a joinder in error. If the joinder was obtained by fraud or was made through mistake, the court may, upon a proper application and for sufficient cause, permit it to be withdrawn, or relieve the party from its effect.

§ 407. **Special Pleas or Answers**—A special answer to the assignment of errors is affirmative, and is in the nature of an answer in the trial court, pleading matter in confession and avoidance. It does not controvert the assignment of errors, but avers facts showing that it has ceased to be effective. A special plea is always required where matters have occurred since the appeal was taken which render the attack upon the judgment of the trial court unavailing. In general it pleads matters which occurred after the judgment below was entered.

§ 408. **What must be Specially Pleaded**—A release of errors must be specially pleaded, for the release is not available under the common joinder.¹ The joinder admits the representative character of the party assigning error, and facts showing the contrary must be set forth in a special plea.² A special plea is, it has been held, a proper mode of presenting the objection that the appeal was not taken within the time limited by law,³ but a verified motion is simpler and equally as efficacious.⁴ The motion is now usually employed in such cases.⁵ Where the rec-

¹ *Adams v. Beem*, 4 Blackf. 128; *Veach v. Pearce*, 6 Ind. 48; *Vick v. Maulding*, 1 How. (Miss.), 217; *Trustees v. Hihler*, 85 Ill. 409. It is held by the Supreme Court of Illinois that where a party unsuccessfully pleads a release of errors the judgment will be reversed and leave will not be granted to join in error. *Mahoney v. Keane*, 28 N. E. Rep. 915; *Austin v. Bainter*, 40 Ill. 82; *Clapp v. Reid*, 40 Ill. 121; *Ruckman v. Allwood*, 44 Ill. 184.

² *Rundles v. Jones*, 3 Ind. 35. See *Voiles v. Voiles*, 51 Ind. 385. There may possibly be cases where this rule will not fully apply, but they are rare ones.

³ *Jacobs v. Graham*, 1 Blackf. 392. The plea does not confess errors as to appellants not barred. *Hawkins v. Hawkins*, 28 Ind. 66; *McEndree v. McEndree*, 12 Ind. 97.

⁴ *Buntin v. Hooper*, 59 Ind. 589; *Day v. School City of Huntington*, 78 Ind. 280.

⁵ *Louisville, etc., Co. v. Boland*, 70 Ind. 595; *Louisville, etc., Co. v. Jackson*, 64 Ind. 398; *Miller v. Carmichael*, 98 Ind. 236. A failure to appeal in time is regarded as an infirmity affecting jurisdiction. *Miller v. Carmichael*, *supra*. A jurisdictional question may, as we have seen, and as decided in the last named and other cases, be made at

ord discloses the fact that the appeal was not taken in time it is the better practice to use the motion rather than the special plea. Under the old system the statute of limitation was available only upon a special plea, but under the liberal rule our decisions declare it may be made available on a proper motion.¹ It is, indeed, evident from the trend of our decisions that the motion to dismiss has in a great measure supplanted the special plea, but it has not entirely excluded that remedy. Where the judgment creditor and appellant buys land upon an execution issued on the judgment and receipts the judgment, it bars the appeal, and the facts should be specially pleaded to the assignment of errors. Acceptance of payment by the appellant bars the appeal, and such payment is well pleaded by special plea or answer.³ But a verified motion will present the question.⁴ The position of a defendant who pays a judgment⁵ or enters replevin bail⁶ is essentially different from that of a plaintiff who voluntarily accepts payment, and the appeal of such a defendant is not barred. Facts constituting an estoppel should be specially pleaded. Thus, if the appellant accepts a substantial benefit from the judgment, the facts are properly set forth specially, for they would not be available under the common joinder.⁷ Possibly they would be available under a motion to dismiss, but it is certainly more appropriate to present matter of estoppel by plea. We suppose that notwithstanding the fact that the present practice permits matters in bar to be alleged by motion as well as by plea, there are some matters that may be more appropriately presented by plea, as, for instance, a release.

any stage of the proceedings. *Louisville, etc., Co. v. Horton*, 67 Ind. 546; *Horton v. Sawyer*, 59 Ind. 587.

¹ *Brooks v. Norris*, 11 How. (U. S.), 204.

² *Clark v. Wright*, 67 Ind. 224; *Test v. Larsh*, 76 Ind. 452.

³ *Newman v. Kiser* (Ind.), 26 N. E. Rep. 1006, and cases cited; *Smith v. Coleman* (Wis.), 46 N. W. Rep. 664; *Moore v. Floyd*, 4 Oregon, 260; *Lyons*

v. Bain, 1 Wash. Ty. 482; *Alexander v. Alexander*, 104 N. Y. 643.

⁴ *McCracken v. Cabel*, 120 Ind. 266.

⁵ *Hayes v. Nourse*, 107 N. Y. 577; *Chapman v. Sutton*, 68 Wis. 657; *Edwards v. Perkins*, 7 Oregon, 149; *Aimes v. Chappel*, 28 Ind. 469; *Dickensheets v. Kaufman*, 29 Ind. 154; *Johnson v. Unversaw*, 30 Ind. 435.

⁶ *Hyer v. Norton*, 26 Ind. 269.

⁷ *Pittsburgh, etc., Ry. Co. v. Swinny*, 91 Ind. 399.

§ 409. **Election of Remedies**—It seems from our decisions that the appellee may allege matter in bar of the appeal either by motion or by plea. The remedies are, according to the rule deducible from the decisions, cumulative, and the appellee may generally elect which he will pursue. The court declared in one of the earlier cases that it was inclined to favor the practice of presenting the question by motion.¹ The doctrine that matter in bar may be presented by motion is now well established and it is illustrated by many cases. The practice is less cumbersome and more direct than the old procedure by plea.

§ 410. **Presenting Matter in Bar by Motion**—It needs neither argument nor authority to prove that a motion alleging matter in bar of an appeal must be good on its face. If the motion does not, upon inspection, show facts which bar the appeal it is insufficient. The practice has been to inspect the motion and, if it is not sufficient on its face, to deny it. Not many cases can be found in our reports upon this subject for the reason that opinions are not usually written upon such motions, but it has long been the practice to examine the motion and if insufficient to so adjudge without a formal opinion. It is necessary, therefore, to plead the facts with directness, clearness and certainty.

§ 411. **Verification of the Motion**—It is usual to verify all motions pleading matter in bar. It can, however, hardly be said that there is any established rule of practice requiring verification, but there are strong reasons why such a rule should be declared and enforced. Verification is essential in order that it may appear that the motion is made in good faith and that it is, at least believed by counsel, that there are good grounds for interposing it.

¹ *Buntin v. Hooper*, 59 Ind. 589. In the case cited it was said: "With a view to the simplicity and facility of practice and the early disposition of causes improperly appealed after the time limited therefor, we have concluded to dispose of such questions on motion upon due notice to the opposite party. This is not intended, however, to prevent the appellee, if he shall see proper to do so, from pleading lapse of time in bar of the appeal." See *Louisville, etc., v. Boland*, 70 Ind. 595; *Day v. School City of Huntington*, 78 Ind. 280.

§ 412. **Notice of the Plea or Motion**—Notice of the plea or motion should be given.¹ It is not a motion or proceeding of course, as the filing of a brief, or the like, of which parties are bound to take notice without special information. To permit the hearing of such motions or pleas in an appellate tribunal to which are brought cases from all parts of the State, as of course and without special notice, would, it is manifest, be productive of hardship and injustice.

§ 413. **Demurrer to the Special Plea**—Under the old practice, as we have said, all matters in bar were required to be presented by special plea. If the plea was insufficient a demurrer would lie. This rule has been acted upon by our court and is undoubtedly still in force.² But, as the remedies by plea and motion are cumulative, and as motions are not usually tested by demurrer, we suppose that a demurrer is only necessary, or, probably, only proper, where a plea is employed. It is enough, under the prevailing practice, to point out, in the brief on the motion, the defects apparent in the motion itself. If the motion is insufficient and its insufficiency is pointed out, the court will deny it. No formal attack upon a motion is necessary, but it seems that a formal attack must be made where a plea is filed, although we can see no good reason why this should be so. It seems to us that the spirit of our system of procedure is that all such applications, whether by plea or by motion, should be disposed of in a summary way, giving little heed to form and going at once to the merits of the application.

§ 414. **Reply to the Special Plea**—The practice at common law was to file a formal replication to a special plea alleging matter in bar of the appeal. This is still proper where a formal plea is filed. Where, however, a motion is filed presenting an issue of fact it may be met by counter-affidavits without any formal pleading tendering an issue. This practice has been pursued in many cases and it was adopted in the case which first specifically and decisively declared that matter in bar of the appeal

¹ *Buntin v. Hooper*, 59 Ind. 589; *Newman v. Kizer* (Ind.), 26 N. E. Rep. 1006.

² *Millar v. Farrar*, 2 Blackf. 219; *Pittsburgh, etc., Co. v. Swinney*, 91 Ind. 399.

might be alleged by motion. The plea may be supported by written evidence, and by written evidence it may be met without filing a formal reply.¹

§ 415. **Cross-Errors**—It has long been the practice to permit the assignment of cross-errors although there is no statute expressly authorizing or providing for such a pleading. The practice, however, is defensible upon principle and is sustained by the rules declared in analogous cases. The assignment of cross-error in many respects, but not in all, resembles the cross-complaint or counter-claim filed in the trial court. As to what may be assigned as cross-error and as to the form and substance of the assignment, it is sufficient to say that, as a general rule, the principles applicable to the appellant's assignment of errors are equally applicable to the assignment of cross-errors.² It is, however, held that the assignment of cross-errors need not contain the names of the parties to the appeal.³

§ 416. **Assignment of Cross-Errors—When necessary**—If the appellee desires to avail himself of an error committed against him, either for the purpose of preventing a reversal of the judgment appealed from, or for the purpose of obtaining some affirmative relief, or of vindicating some right, he must, as a general rule, file an assignment of cross-errors.⁴ It may be said with safety that the general rule is that an appellee can reap no advantage from adverse rulings unless he properly presents them on appeal by assigning them as the law and the rules of the court direct. Where no cross-errors are assigned a bill of exceptions taken

¹ Under the rules of practice all such issues as those formed upon a plea or motion of the character named in the text, are submitted to the court for decision upon written evidence in the form of affidavits or depositions and written briefs.

² *Dutton v. Dutton*, 30 Ind. 452.

³ *State v. First National Bank*, 89 Ind. 302; *Nichol v. Henry*, 89 Ind. 54.

⁴ Rule IV. *Hayes v. O'Brien* (Ill.), 26 N. E. Rep. 601; *Hollingsworth v.*

Koon, 117 Ill. 511; *Pollard v. King*, 63 Ill. 36; *Dickson v. Chicago, etc., Co.*, 81 Ill. 215; *Johnson v. Maples*, 49 Ill. 101, 105. In the case first cited it was said: "As no cross-errors have been assigned on the record, counsel are in no position to find any fault with the ruling of the court. Had they desired to call in question the ruling of the court they should have excepted to the decision of the court and assigned cross-errors."

by the appellee, as it is held, will not be noticed,¹ but we suppose that this general rule does not always hold good, for it seems to us that where a bill, although taken by the appellee, contains recitals directly connected with the main questions and essential to a full understanding of them, it should be considered in determining questions presented by the appellant's assignment of errors. It can not, however, be considered in the absence of an assignment of cross-errors for the purpose of making directly available an error committed against the appellee, but it may, as we believe, be considered in determining whether the errors alleged by the appellant were in fact committed or were prejudicial. Ordinarily, as we have substantially said, errors committed against the appellee will not be noticed for any purpose unless properly brought before the appellate tribunal by an assignment of cross-errors.² Where a record is amended by a *nunc pro tunc* order and the proceedings which secured the order are carried up, the appellee can not avail himself of any error in the proceedings unless he has filed an assignment of cross-errors appropriately assailing the rulings made in such proceedings.³ In one of our cases it is held that if a complaint is not challenged by an assignment of cross-errors its sufficiency can not be considered.⁴ Where the complaint of an appellant is appropriately questioned by an assignment of cross-errors and it is incurably bad, the judgment will be affirmed without remanding the case.⁵ Where, however, the complaint can be amended so as to cure defects the court may reverse the judgment at the costs of the appellant, and is not bound to affirm the judgment because of the defective complaint.⁶ So, upon the same principle, no question upon the admission of incompetent evidence can be successfully made by an appellee who has not filed an assignment of cross-errors.⁷

¹ White v. Allen, 9 Ind. 561.

⁴ Anderson, etc., Co. v. Thompson.

² Nutter v. Junction R. Co., 13 Ind. 479. In the case cited the ruling the appellee sought to make available was in overruling a demurrer of the appellee to the appellant's complaint. See, also, Jenkins v. Peckinpaugh, 40 Ind. 133.

88 Ind. 405.

⁵ State v. Harris, 89 Ind. 363, 367.

⁶ McCole v. Loehr, 79 Ind. 430; Goodman v. Niblack, 102 U. S. 550; Robertson v. Cease, 97 U. S. 646.

⁷ Evansville, etc., Co. v. Mosier, 114 Ind. 447.

³ Adler v. Sewell, 29 Ind. 598.

In some peculiar cases a ruling adverse to the appellee can be used to destroy a specification of error made by the appellant, as, for instance, where the appellant secures the exclusion of evidence offered by the appellee the latter may show such a ruling to prevent a reversal because evidence of the same kind offered by the appellant is excluded,¹ but such cases are marked exceptions to the general rule.

§ 417. **Nature of the Assignment of Cross-Errors**—An assignment of cross-errors is not a plea in confession and avoidance, for it does not confess the errors assigned by the appellant in cases where there is a common joinder. It is in the nature of a counter-claim or cross-complaint in the trial court. It pleads independent affirmative matter, for, when properly framed, it presents questions upon rulings adverse to the appellee, and does not stand upon the same rulings as those relied upon for the reversal of the judgment assailed by the appellant's appeal. It is independent in the sense that it does not connect itself with other pleas nor blend with the appellant's assignment of errors, but it is, nevertheless, connected with and grows out of the main controversy. The decisions are that the appellant can not dismiss the appeal so effectively as to carry with it the assignment of cross-errors.² The practice has been to decline to dismiss where the appellee insists upon retaining the appeal upon the assignment made by him.

§ 418. **The Object of the Assignment of Cross-Errors**—Primarily the object of the rule permitting the assignment of cross-errors is to enable the appellate tribunal to adjudicate upon all material questions in one appeal and thus prevent a multiplicity of appeals.³ At common law cross-petitions in error were allowed.

¹ See "Invited Error," *post*.

² *Feder v. Field*, 117 Ind. 386. The appellee may elect to insist upon the retention of the appeal on his assignment of cross-errors. *The Beeswing*, 10 Law. Rep. P. D. 18.

³ In the case of *Shinkle v. First National Bank*, 22 Ohio St. Rep. 516, 522, it was said: "There is no good rea-

son why cross-petitions in error should not be allowed equally as in original actions. They were allowed at common law and there is nothing in the code which forbids their use. On the contrary they are calculated to subserve a leading object of the code, namely to prevent multiplicity of suits, and to render litigation simple, cheap and speedy."

Under our code, blending, as it does, the principles of equity and law procedure, but greatly favoring the former, there is strong reason for extending the doctrine that it is the duty of the courts to settle the entire controversy where the questions involved are presented to them. If it be true, as it surely is, that a leading purpose of cross-petitions in error, or of assignments of cross-error, is to secure a complete adjudication, then, it is a manifestly logical conclusion that if the cross-errors entitle the appellee to affirmative relief beyond the mere affirmance of his judgment full relief should be awarded him when he appropriately insists upon it. This rule has been enforced in many cases appealed upon special findings, but in those cases it was not directly affirmed that such relief was proper although that is the tacit assumption. In one case a judgment was reversed upon cross-errors assigned by the appellee and a direction given as to the course to be pursued by the trial court.¹ The authorities show that the practice of assigning cross-errors is favored for the reason that it enables the court in one case and upon one record to award full affirmative relief to the party entitled to it.² It seems to us very clear upon principle that the assignment of cross-errors may, in the proper case and upon

See, also, *Bundy v. Ophir Iron Co.*, 35 Ohio St. 80. Much to the same effect is the language of our court in *Feder v. Field*, 117 Ind. 386, where it was said: "The rule has much to commend it. Under its operation one appeal brings to the appellate court the entire controversy. By the one appeal as much can be accomplished as by two distinct appeals. If distinct appeals were taken, then the only method of avoiding confusion would be to consolidate the cases, and this, while it would accomplish no more would greatly increase the record and augment the costs. The rule is in harmony with the spirit of our code, since it tends to bring the merits of a controversy before the court in a short and simple method." All equitable rules run in one direction and that is against the dissection of a

case into parts. *Ex parte Sweeney*, 126 Ind. 583; *Chapell v. Shuee*, 117 Ind. 481; *Wood v. Ostram*, 29 Ind. 177. In jurisdictions where the practice is to allow cross-appeals the appellate tribunal directs the main appeal and the cross-appeal to be consolidated. *Hid-dingh v. Dempsea*, 12 App. Cases (H. L.), 107.

¹ *Johnson v. Culver*, 116 Ind. 278, 289. The subject is fully considered in *Feder v. Field*, 117 Ind. 386. See, also, *Cleveland, etc., Co. v. Closser*, 126 Ind. 348, 369.

² *Shinkle v. First National Bank*, 22 Ohio St. 516; *Collins v. Davis*, 32 Ohio St. 76; *Smith v. Wright*, 71 Ill. 167. See, generally, *Chicago, etc., Co. v. Peck*, 112 Ill. 408; *Wabash, etc., Co. v. Goodwine*, 18 Bradw. (Ill. App.) 65.

due request, secure the appellee just relief and that such relief can not always be awarded by a mere affirmance of the judgment. There is very little force, or, indeed, plausibility, in the argument sometimes made that the appellee should appeal if not content with the rulings of the trial court. It may well be that he is satisfied to suffer some wrong rather than prolong the litigation, and for that reason does not himself prosecute an appeal. If the appellant elects to prolong the litigation he has no cause to complain because the appellee asks all that he is entitled to receive from the courts of his country.

§ 419. **Effect of the Assignment of Cross-Errors**—If the appellee is content with the simple affirmance of the judgment from which the appeal is prosecuted and asks no more, the court will pronounce a decision without noticing the assignment of cross-errors.¹ According to the decision in one of our cases an appellee can not complain of a failure to pass upon cross-errors duly assigned in case the judgment is affirmed.² This may possibly be the correct general rule, but it is not without exceptions, for there are certainly cases where justice demands that the appellee should be awarded affirmative relief. If a complaint is incurably bad the appellee has, as we believe, a right to have it so decided, although the judgment may be sustainable on other grounds, in a case where such a decision may prevent a second action. Public policy requires that such a question should be decided so that litigation may not be uselessly prolonged.³

§ 420. **Groundwork of the Assignment of Cross-Errors**—The foundation for the assignment of cross-errors must be laid in the trial court. There the proper exceptions must be taken and reserved, and there must be filed the motions requisite to present for review the rulings deemed erroneous and prejudicial to the ap-

¹ *Kammerling v. Armington*, 58 Ind. 384. See *Huston v. Vail*, 84 Ind. 262, 268. In *Thomas v. Simmons*, 103 Ind. 538, 546, it is held that if the appellee does not insist upon his assignment of cross-errors the errors so assigned will

not be considered. It seems that some of the statements of the opinion in that case are too broad. *Rochester v. Levering*, 104 Ind. 562.

² *Case v. Johnson*, 70 Ind. 31, 33.

³ *State v. Harris*, 89 Ind. 363.

pellee.¹ It is not within the power of the appellee to present questions for the first time on appeal, except possibly where the complaint wholly fails to state a cause of action, or where there is no jurisdiction of the subject.

§ 421. **Transcript**—Where the transcript brought up by the appellant necessarily presents the case upon the cross-errors as well as upon the errors assigned by appellant, that one transcript is sufficient.² But the appellee can not in all cases compel the appellant to bring up the parts of the record exhibiting the rulings on which cross-errors are assigned.³ If, however, those parts of the record are necessary to exhibit the rulings on which rest the appellant's assignments of errors, they must be embodied in the transcript, and if they are in the transcript the appellee may take advantage of them. The appellant is under no obligation to present a transcript for the benefit of the appellee, since the statute gives him the right to direct what part of the record shall be certified up by the clerk,⁴ and he is not required to do any act such as that of presenting a transcript of the complete record for the benefit of his adversary.⁵

§ 422. **Notice of the Assignment of Cross-Errors not required when filed within the time limited**—An assignment of cross-errors is a pleading in due course, and of such pleadings the appellant must take notice without special information. In filing such a pleading the appellee does no more than what the appellant is bound to know may be done as of course, without special leave or notice. This is the effect of the decisions upon the question.⁶ But to dispense with notice the assignment must be made within the time fixed; if not filed within that time notice is essential.

¹ *Merritt v. Richey*, 127 Ind. 400.

² *Feder v. Field*, 117 Ind. 386; *Merritt v. Richey*, 127 Ind. 400. Judge Perkins says: "The appellant can only assign errors occurring against himself. He can not complain of errors in his favor. But the appellee may on the appellant's record, complain of them, by way of a cross-assignment of errors, and thus bring them under review on the single appeal, and on the

submission of the cause by the appellant." Perkins' Practice, 323. Judge Buskirk adopts this statement of the law. Buskirk's Practice, 119.

³ *Feder v. Field*, 117 Ind. 386, 389.

⁴ R. S. 1881, § 649.

⁵ *Hall v. King*, 29 Ind. 205.

⁶ *Smith v. Wright*, 71 Ill. 167; *Bundy v. Ophir Iron Co.*, 35 Ohio St. 80; *Feder v. Field*, 117 Ind. 386.

§ 423. Time within which Cross-Errors may be Assigned—An assignment of cross-errors may be filed, as of course, at any time within sixty days after the submission of the cause. If not filed within that time special leave must be asked in writing and written notice served upon the appellant. A satisfactory excuse must be shown for not making the assignment within the time designated or leave to assign will be denied. The general rule is that the assignment must be filed within one year from the time the judgment appealed from was rendered.¹ It is evident, however, that this general rule can not always govern. There may, it is clear, be circumstances which will prevent its operation. Thus, it may well be that the appeal is taken so near the end of the year that compliance with the rule is impossible. So, too, there may be some element of fraud or accident which will take the particular case out of the general rule.

§ 424. Answer to the Assignment of Cross-Errors not required—The practice has been to consider assignments of cross-error without plea or answer.² This seems the correct practice, since the fact that the appellant appeals justifies, indeed requires, the presumption, that he denies that there are errors in his favor precluding a reversal, or the award of relief to his adversary. It is not necessary to answer what is presumed as matter of law, nor would any good purpose be subserved by an answer. It is possible that there may be cases where a special answer would be proper, but they would be extraordinary ones.

¹ Rule IV.

² Judge Perkins says: "The appellant may answer errors assigned by the appellant as in other cases." Perkins' Practice, 123. Possibly he may, if he elects, answer, but he is not bound to

do so. *White v. Allen*, 9 Ind. 561, cited by the author quoted, does not touch the question. The practice has been so long continued and so uniform that it has the full force of a statutory rule.

CHAPTER XX.

SUBMISSION.

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| § 425. Submission by agreement. | § 432. Nature of the notice required in cases where the appeal is in term. |
| 426. Effect of a submission by agreement. | 433. Submission in cases appealed upon notice under act of 1885. |
| 427. Rights not waived by an agreement submitting the cause. | 434. Submission upon the application of the appellee. |
| 428. Forced submission. | 435. Notice under the act of 1885. |
| 429. Submission on call. | 436. Objecting to submission. |
| 430. Importance of the submission. | 437. Setting aside the submission. |
| 431. Submission of appeals in term. | |

§ 425. **Submission by Agreement**—Parties may submit a cause by an agreement entered upon the transcript or filed with the clerk. No particular form is required; any form of writing embodying an agreement to submit the cause will be sufficient. The agreement must, however, be in writing unless made in open court.¹

§ 426. **Effect of a Submission by Agreement**—An agreement to submit dispenses with notice and waives objections to process.² It does not, however, waive substantial objections to the transcript, for after submission by agreement a *certiorari* may be obtained. A submission by agreement, as it has been held, waives some objections that would not be waived by a submission under the law. Submission by agreement waives a pending motion to dismiss the appeal.³ It will waive defects in the

¹ Rule XV.

² *Rabb v. Graham*, 43 Ind. 1, distinguishing *Aylesworth v. Milford*, 38 Ind. 226; *State v. Board*, 92 Ind. 133; *Cooper v. Cooper*, 86 Ind. 75; *State v. Walters*, 64 Ind. 226; *Higbee v. Rodeman* (Ind.), 28 N. E. Rep. 442.

³ *Bender v. Wampler*, 84 Ind. 172; *Summers v. State*, 51 Ind. 201. As

submission by agreement is a convenient, speedy and inexpensive mode of submitting causes and has but little, if any, stronger effect than a joinder in error, the rule forbidding subsequent pleas or motions should not, it seems to us, be too rigidly enforced.

clerk's certificate to the transcript.¹ In many cases it is held that it will waive the objection that notice has not been given co-parties.² In one case it is held that an irregularity in the assignment of errors is waived by such a submission,³ but this doctrine is one to be limited and not extended. Error in naming parties in the assignment of errors is not available after submission by agreement.⁴ Other decisions illustrate and enforce the rule that a submission by agreement waives errors in the procedure connected with and involved in the appeal unless they are of a very substantial character.⁵ We are not to be understood as affirming that it is only in cases where there is a submission by agreement that irregularities or technical errors are waived by the failure to object before submission; on the contrary, we desire to be understood as saying that the general rule is that as to such matters there is a waiver where there is no opportune objection. But it is safe to say that, according to the decisions⁶ and the practice,⁷ the rule is more strictly ap-

¹ *Walker v. Hill*, 111 Ind. 223; *Cooper v. Cooper*, 86 Ind. 75.

² *People's Savings Bank v. Finney*, 63 Ind. 460; *Brooks v. Doxey*, 72 Ind. 327; *Field v. Burton*, 71 Ind. 380; *Easter v. Severin*, 78 Ind. 540; *Hendricks v. Frank*, 86 Ind. 278; *Martin v. Orr*, 96 Ind. 491; *Burk v. Simonson*, 104 Ind. 173; *Hunter v. Chrisman*, 70 Ind. 439; *Talbut v. Berkshire, etc., Co.*, 80 Ind. 434; *Dobbins v. Baker*, 80 Ind. 52; *DeHaven v. DeHaven*, 77 Ind. 236.

³ *Ridenour v. Beekman*, 68 Ind. 236.

⁴ *Truman v. Scott*, 72 Ind. 258; *Hinkle v. Margerum*, 50 Ind. 240.

⁵ *State v. Board of Commissioners*, 92 Ind. 133; *Wilson v. Hefflin*, 81 Ind. 35; *Hadley v. Hill*, 73 Ind. 442.

⁶ *Heller v. Clark*, 103 Ind. 591. In the case cited a distinction was made between a forced submission under the law and a submission by agreement, the court saying: "The third clause of Rule XXXIX is not open to and should not receive the construction which counsel place upon it. The sub-

mission provided for in such rule is a statutory or forced submission, brought about by mere operation of law, and it ought not to be held, as it seems to us, that by his mere failure to file objections to such submission, either party agrees thereto or waives any right which he would otherwise possess." The language used is rather broad and is to be understood, as is always true of judicial opinions, with reference to the case before the court, for the authorities decisively show that some rights must be asserted before submission or they will be regarded as waived. The rule referred to in the opinion from which we have quoted is now known as Rule XVII.

⁷ The practice is well settled although not evidenced by the reported decisions. The reason that the practice in the cases referred to, and in similar ones, is not shown by the reported cases is that the questions generally arise on motions and are disposed of without written opinions.

plied where there is a submission by agreement than it is where the submission is an enforced one under the law.

§ 427. **Rights not waived by an Agreement Submitting the Cause—**Substantial rights or rights of a general jurisdictional nature are not waived by an agreement to submit, although rights affecting jurisdiction of the person are waived. Rights of the nature last mentioned, that is, rights affecting only the jurisdiction of the person, may, as we have often said, in substance, be waived by a much less decisive act than an agreement submitting the cause for decision. It is implied in every agreement to submit that there is no waiver of the right to show that specifications of error are so destitute of force as not to present any question for review. This is so because the party in agreeing to submit the cause does not consent that questions may be considered which are not presented; he simply consents that the court shall decide such questions as the assignment of errors presents, waiving only irregularities and informalities in the mode of alleging errors but waiving no material matter of substance. Thus, an agreement submitting a cause does not waive a failure to file the transcript within the time allowed by law.¹ An agreement to submit does not waive the right to object that the appeal was not perfected within the time prescribed.² Such an agreement does not waive the right to point out matters improperly in the transcript, nor does it, as said in the preceding paragraph, waive a right to a *certiorari* in the proper case.³

§ 428. **Forced Submission—**A submission brought about otherwise than by agreement of the parties is generally called a

¹ Hubertz v. State, 50 Ind. 374. Same case on petition for rehearing, 50 Ind. 517.

² Day v. School City of Huntington, 78 Ind. 280. This decision is clearly right for the reason that the time for perfecting an appeal is essentially jurisdictional, and it can not be prolonged by agreement contrary to the provisions of the law upon the subject. *Ante*, §§ 112, 128.

³ Rule XII. It may be said here, as well as elsewhere, that the rules of the Appellate Court are substantially the same as those of the Supreme Court, and that in referring to rules we mean the Supreme Court rules unless otherwise indicated. As we are explaining references, we may also add that the reference "R. S." is to the revision of the Indiana statutes made in 1881, unless otherwise noted.

“ forced submission,” although a more appropriate term would be “ submission by operation of law.” A submission by operation of law is essential in all cases where there is no express or implied agreement to submit,¹ and such a submission can only be effective where the substantial requirements of the law respecting the acts to be done in order to perfect an appeal have been obeyed. It is in general true that a submission by operation of law is not regular or effective unless a perfected appeal, taken within the time limited, is pending; if any essential step in the procedure has been omitted the submission may be set aside upon the seasonable and appropriate application of a party who has not waived his rights or is not in default.²

§ 429. **Submission on Call**—Where there is a perfected appeal there may be, as a rule of court provides, a submission on the call of the docket.³ It is, however, optional with an appellee, where the case comes under the rule of court, to either submit the case or obtain an order dismissing the appeal. The change in the practice wrought by the act of 1885⁴ and the rule based upon it have rendered the rule of court of very little practical importance, but it is still in force and there may be cases, although rare ones, in which it may be invoked.

§ 430. **Importance of the Submission**—It is important that a case should be properly submitted for the reason that it is not ripe for decision until after submission,⁵ and for the further reason that the time for filing briefs runs from the date of the submission. Thus, in the case of appeals in term the submission takes place by operation of law when the case has been in the appellate tribunal for thirty days. So, where the appeal is upon

¹ In *Archey v. Knight*, 61 Ind. 311, 314, it is held that if a party has actual notice of an appeal and does such acts as a party would do who proceeded upon the theory that there had been an effective submission, he can not, after long delay, successfully apply to set aside the submission, although had he proceeded promptly his application might have been granted.

² *Johnson v. Miller*, 43 Ind. 29; *Burkam v. McElfresh*, 88 Ind. 223. See *Riley v. Murray*, 8 Ind. 354; *Board v. Brown*, 14 Ind. 191.

³ Rule XV.

⁴ *Elliott's Supp.*, § 28.

⁵ Judge Buskirk says: “ A cause can not be considered or decided by the Supreme Court until it is submitted.” *Buskirk's Pr.* 291.

notice the submission takes place by operation of law at the expiration of the time fixed by the statute and the rule framed to give it practical effect.¹

§ 431. **Submission of Appeals in Term**—An appeal in term, “when perfected within the time limited” is deemed submitted within thirty days after the transcript is filed in the office of the clerk of the Supreme Court.² The act of November, 1885, contains the provision of which we have given the substance, and also adds, and within thirty days “after the notice is given as above required.” The act, as it has been held in a number of unreported cases, does not require notice to be given in cases of appeals in term. Its framers evidently had in mind the provisions of the statute regarding the notice required in other cases than term appeals. No statute can be construed as an independent and isolated fragment, but must be taken in connection with the great principles of the law and with other statutes.³ So that it is proper and necessary to look to other statutes and to the general rules of law. Regard must be had to the statute providing for notice as well as to the statute providing for appeals in term, and, taking these statutes into consideration, it is clear that the legislature did not mean to change the law respecting appeals in term. The act does require either a perfected appeal in term, that is, one where the law has been fully complied with, by praying an appeal, filing the bond and the like, or an appeal upon notice, but it does not require a notice to bring the parties into court where there is an effective appeal in term. The construction here placed upon the act of 1885 respecting appeals in term is that given it by the rules of the court⁴ and that acted upon by the bar. The con-

¹ Elliott's Supp., § 28; Rule XVII.

² Elliott's Supp., § 28; Rule XVII.

³ *Humphries v. Davis*, 100 Ind. 274, 284; *Bradley v. Thixton*, 117 Ind. 255; *Morrison v. Jacoby*, 114 Ind. 84; *Chicago, etc., Co. v. Summers*, 113 Ind. 10; *Robinson v. Rippey*, 111 Ind. 112. To so construe the act of 1885 as to require notice where the appeal is taken in term would completely nullify the pro-

visions of the statute respecting appeals in term as well as violate the principle referred to in the text. In the case of *Holloran v. Midland R'y Co.* (Ind.), 28 N. E. Rep. 549, it is asserted that notice is not required where the appeal is taken in term time.

⁴ See the last paragraph of Rule XVII. It has been so construed in many instances where the question

clusion, upon principle, must be that no notice is required to bring the appellee into court where an appeal is fully perfected in term and that the cause is to be regarded as submitted thirty days after filing the transcript in the office of the clerk of the Supreme Court. And this is the effect of the practical exposition given the statute.

§ 432. **Nature of the Notice required in cases where the Appeal is in Term**—The notice provided for in appeals in term is not a notice of the appeal but a notice that submission has been made.¹ There is a radical difference between a notice to parties of an appeal and notice of an entry made after the appeal. The notice of the appeal is essential to jurisdiction of the person, the other is notice of a step taken after the acquisition of jurisdiction. The notice of the submission is given by the clerk, not by the parties, and its object is to convey information of a step taken in the cause, but it is not essential to jurisdiction, nor, indeed, to the validity of the submission. The duty of giving notice of the submission is enjoined upon the clerk, and his neglect or refusal to perform it might, possibly, entitle a party to an extension of time for the filing of a brief, or to some relief of a similar nature, provided a satisfactory showing is made, but it would certainly not entitle him to assail the jurisdiction or to challenge the effectiveness of the submission. The notice comes after jurisdiction attaches and after the cause has been submitted under the law. It conveys information of what has been done. It is clear, therefore, that the parties in court are not absolved from the duty which rests upon all parties duly given "their day in court," and that duty is to take notice of the proceedings taken in the cause.

§ 433. **Submission in cases Appealed upon Notice under the Act of 1885**—By force of the act of 1885 appeals after term are "regarded as submitted after the expiration of thirty days from the date of the service of the notice upon the appellee of the taking of the appeal."² The law submits the cause without any formal

came up on motions respecting the filing of briefs, the reinstatement of dismissed appeals and the like.

¹ Rule XVII.

² Elliott's Sup., § 28.

or direct request or motion upon the part of the parties, where notice of the appeal has been effectively given. The clerk enters the formal submission but the submission is really made by the statute.

§ 434. Submission upon the Application of the Appellee—The rule secures to the appellee a right to enforce submission. The delay incident to notice by publication may be obviated if the appellee so desires, by filing the request and giving the notice provided for by the rule. The acts required of the appellee are so fully specified by the rule of the court that there is no necessity to speak of the procedure at length.

§ 435. Notice Under the Act of 1885—The act of 1885 is confused and obscure, and unaided by the rule of court would be almost, if not quite, incapable of practical enforcement. But aided by the rule and the practice which has grown up under it, there is no longer very serious difficulty in giving effect to the act. It may now be regarded as firmly settled that only one notice is required by the act, that is the notice of the appeal.¹ If notice of the appeal is properly given no other notice is required, except that given by the clerk after the order of submission has been entered. Where personal notice is given to the party or his attorney, ten days' notice is sufficient. Where the notice is by publication thirty days' notice is required. But a submission can not be enforced against the appellee until thirty days after notice by publication is complete where notice is given in that mode; where there is personal notice a submission can not be forced until thirty days after the notice has been given. Of course, no notice is effective until the time fixed has expired. It is hardly necessary to suggest that we are here speaking of forced submissions and are not referring to submission by express agreement, or by an agreement implied from acts or conduct.

§ 436. Objecting to Submission—An appellee may, for good cause, properly shown, resist a submission. Where a resistance

¹ In other words the one notice accomplishes a twofold purpose: it informs the appellee that an appeal has been filed and that it will be submitted at the time designated therein.

is made the appellee is required to file written objections and to accompany the objections by a verified statement that they are made in good faith. When such objections and such verified statements are filed the clerk shall not enter a submission but shall report the papers to the court.¹

§ 437. **Setting Aside a Submission**—A submission may be set aside for cause shown, but it will not be set aside as of course. Where the record does not fully disclose the grounds upon which the motion to set aside proceeds, the motion must be verified or supported by affidavit. Where a submission is entered the presumption in the absence of countervailing facts is that it was duly made, so that it is incumbent upon a party who assails a submission to remove this presumption. Notice must be given of the application to set aside a submission, for such an application falls within the general rule requiring notice of motions.² Where a submission is once effectively made and entered it remains in force until the final decision of the case although a rehearing may be granted.³

¹ Rule XVI.

³ Rule XXXVII.

² Rules VII, XIV.

CHAPTER XXI.

BRIEFS AND ARGUMENTS.

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| <p>§ 438. Briefs—Definition.</p> <p>439. General frame of the brief.</p> <p>440. Showing the manner in which the questions arise.</p> <p>441. Stating the facts.</p> <p>442. Method of stating the facts.</p> <p>443. Correcting erroneous statements of facts.</p> <p>444. Making the points.</p> <p>445. Showing rulings to be wrong.</p> <p>446. Stating propositions of law.</p> <p>447. Citing authorities.</p> <p>448. Waiver of preliminary motions by filing brief.</p> | <p>§ 449. Time within which the appellant's brief must be filed.</p> <p>450. Brief on cross-errors—Time of filing.</p> <p>451. Appellee's brief on the appellant's assignment of errors.</p> <p>452. Extension of the time for filing briefs.</p> <p>453. Oral arguments.</p> <p>454. Application for oral arguments.</p> <p>455. Limitation of oral arguments.</p> <p>456. Statement of propositions for argument.</p> <p>457. Interchange of points for argument.</p> |
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§ 438. **Briefs—Definition**—In American appellate procedure a brief is very different from the paper called by that name prepared by an English attorney for an English counselor or barrister.¹ Under our system a brief is a written presentation of the questions involved in a forensic controversy and of the matters of fact and of law which demand investigation. The primary object is to convey information to the court, and this can not be done without clearly stating the manner in which the controverted points arise, the facts which constitute

¹ *Parker v. Hastings*, 12 Ind. 654; *105 Ind. 212*; *Bray v. Franklin Life Gardener v. Stover*, 43 Ind. 356; *Ins. Co.*, 68 Ind. 6; *Wilson v. Hollo-*
ford v. Urbain, 42 Ind. 476; *Roy v. way*, 70 Ind. 407; *Newcomer v. Hutch-*
State, 58 Ind. 378; *Harrison v. Hedges*, 96 Ind. 119; *Irwin v. Lowe*, 89
60 Ind. 266; *Millikan v. State*, 70 Ind. Ind. 540; *Powers v. State*, 87 Ind. 144;
283; *Martin v. Smith*, 57 Ind. 62; *Ar-* *Louisville, etc., Co. v. Donnegan*, 111
buckle v. Biederman, 94 Ind. 168; *Land-* *Ind. 179*; *Bybee v. State*, 94 Ind. 443;
werlen v. Wheeler, 106 Ind. 523; *Now-* *City of Anderson v. Neal*, 88 Ind. 317;
lin v. Whipple, 89 Ind. 490; *Northwest-* *320*; *Wright v. McLarinan*, 92 Ind. 103.
ern Mutual Life Ins. Co. v. Haezlett,

the groundwork of the legal dispute, and the governing propositions of law. A subsidiary object is to convince the court where the law and justice of the case lie. In every well prepared brief will be found a concise and clear statement of the manner in which the questions arise, a succinct and methodical statement of the facts, and a perspicuous array of arguments and authorities.

§ 439. **General Frame of the Brief**—The frame of a brief determines its method, and method is of great importance in conveying information or producing conviction.¹ If the method adopted leads to illogical cross divisions, to the omission of material points, or to the violation of logical order, the result will be a brief of which no lawyer should be proud. The framework, if laid out in symmetrical proportions and in due order, will add greatly to the power of the brief and do much to dispel confusion and clear away obscurities. It is, of course, not possible to lay down a general rule which will fit all cases, for in some cases it is better to begin with a statement of the questions presented and the manner in which they arise;² in others it is better to begin with a statement of the facts.

¹ Emerson, as is well known, ranked method in the chief place, and asserted that method constituted the great virtue of an argument or address. It may be that the great thinker somewhat over-valued method, but, however this may be, it is undoubtedly true that it is one among the highest virtues of argumentative discourse. Choosing the wrong method is much like selecting the wrong road; it is possible to reach the destination intended but the way will be long and crooked.

² The following extracts from Rule XXI of the Supreme Court of the United States suggest a good plan for framing a brief: "A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised. In cases brought up by appeal the spec-

ification shall state as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or rejection of evidence the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to in *totidem verbis*, whether it be instructions given or instructions refused. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed with a reference to the pages of the record, and the authorities relied upon in support of each point." This rule has been strictly enforced. *Ryan v. Koch*, 17 Wall. 19; *Portland Co. v. United States*, 15 Wall. 1; *Lucas v. Brooks*, 18 Wall. 436; *School District v. Ins. Co.*, 101 U. S. 472. We do

§ 440. **Showing the Manner in which the Questions Arise**—It is necessary that the appellate tribunal should be fully informed as to the manner in which the questions arise and where and how they are presented by the record. It is not enough to assert that there is a designated question in the record; general assertions are valueless. The manner in which the question assumed to be presented arose is required to be specifically and particularly stated. It is to be constantly kept in mind that the brief should supply the court with information and that the court must be referred to the record to verify the statements of the brief. Not only so, but more, for the court is unacquainted with the record, and hence it is incumbent upon counsel to specifically refer to the particular part of the record which exhibits the ruling sought to be brought under investigation. In other words, it is the duty of counsel to acquaint the court with the parts of the record of which an examination is desired. The court will not hunt through the record to discover the parts of it which counsel assume exhibit the rulings which they desire considered.¹ In all cases where a knowledge of the pleadings is necessary to enable the court to fully and clearly understand the questions discussed there should be a clear and accurate synopsis of the pleadings. It is seldom necessary to copy any pleading at full length—indeed, in most cases confusion is produced by doing so—but there may be cases where the decision depends upon the exact language employed by the pleader, and in such cases so much of the pleading as is necessary to adequately present the question should be literally copied.

not, of course, refer to this rule as controlling, but, on the contrary, refer to it as merely suggestive of the general frame of a brief. It is unnecessary under our practice to be as specific as under the Federal rule, for the rule really makes what is there denominated a brief, both a brief and an assignment of errors.

¹ This is an inexorable rule and it has been enforced in very many cases. *Brunner v. Brennan*, 49 Ind. 98; *Lowder v. Lowder*, 58 Ind. 538; *Rout v.*

Woods, 67 Ind. 319; *Bray v. Franklin Life Ins. Co.*, 68 Ind. 6; *Sanders v. Scott*, 68 Ind. 130; *Martin v. Martin*, 74 Ind. 207; *City of Anderson v. Neal*, 88 Ind. 317; *Louisville, etc., Co. v. Donnegan*, 111 Ind. 179. The rules of the court are explicit upon this subject. Even a supersedeas brief must refer to the record "by pages and lines." Rule XXII. The requisites of a brief are pointed out in Rule XXVI. The courts everywhere require a strict compliance with such rules.

While the general rule is that condensation, and not expansion, increases the power of a brief, there are, nevertheless, cases where a full and complete statement is indispensably necessary.¹ Where a synopsis of the pleadings is all that is required, their substance only should be given. It weakens a brief to overload it with useless matter, and it is a serious mistake to suppose that a brief is a mere reproduction of the record.

§ 441. **Stating the Facts**—It is well enough to say, at the outset, that there is an essential difference between the evidence and the facts.² It is one thing to state facts and another to state evidence. "Facts are the ultimate conclusions established by the evidence,"³ hence the evidence is the mode or means of proof, not the result of proof. In affirming that facts must be stated it is not implied that the evidence must be rehearsed; on the contrary, the affirmation of the proposition that the facts must be stated,⁴ excludes the implication that the evidence must be set forth. It may sometimes be necessary to state the evidence, but not often. Where the objection relates to a particular part of the evidence, then, that part may be stated and the substance of such other evidence as is connected with it given in short form, but this is, as a general rule, a matter which comes after the general facts of the case have been stated.⁵

¹ It is a mistake to suppose that the duty of counsel is invariably performed by a general reference to a pleading, to a series of instructions, or the like, for it is sometimes—although rarely—necessary to set forth the pleading or the particular instruction. Rule XXVI. While it is true always that the parts of the record requisite to a full understanding of the question must be referred to with particularity, it is not always true that such a reference is of itself sufficient.

² There is an essential and important difference between the facts and the evidence. It is one thing to rehearse the evidence and quite another to state the facts. *Work of The Advocate*, 24, 25. The difference is illustrated in the cases enforcing the familiar rules that

pleadings, special verdicts, and special findings must state the facts and not evidence.

³ *Kirkpatrick v. Reeves*, 121 Ind. 280. See, generally, *Louisville, etc., Co. v. Cauley*, 119 Ind. 142; *Phelps v. Smith*, 116 Ind. 387; *Bartholomew v. Pierson*, 112 Ind. 430; *Stix v. Sadler*, 109 Ind. 254.

⁴ There may be instances where, for the purpose of showing the effect of a particular item of evidence, it is proper to quote literally from the record, but this is a different matter from that discussed in the text, for what is there referred to is the general statement of the facts of the case.

⁵ The general statement of facts should be such as to put the court in possession of the general nature of the

§ 442. **Method of Stating the Facts**—A clear and concise statement of facts, neither too prolix nor yet too meager, is an admirable thing. It has been said again and again that he who can "well state the facts is a man of rare ability."¹ Facts extracted from the evidence and grouped together in an orderly method are always more quickly perceived and more clearly comprehended than facts loosely stated. Method is one of the chief virtues of the statement of facts for an appellate tribunal. The statement there required is very different from that required in the address to the jury, for there the evidence is not weighed nor the probabilities measured. Mere supporting facts or assisting probabilities are of no value in the brief on appeal. The leading and controlling facts are the only ones to which the appellate tribunal can, as a general rule, give a consideration. It is in general true that the facts should be stated in correct chronological order,² but this rule does not always hold good; indeed, no general rule can be framed which will be free from exceptions. But whatever the order adopted, to that order there should be unvarying adherence. Information so conveyed as to secure an abiding lodgement in the minds of the court is the leading object of a statement of facts, and whatever method is most likely to accomplish that object is the best. At the outset, as suggested by the author quoted in the note, clearness and strength are gained, and, indeed, can only

case, and specific questions should be taken up afterwards in logical order.

¹ See Judge Dillon's article on "Stating the Case" in *Rhetoric as an Art of Persuasion*, 28; Washburn's "Study and Practice of the Law," 181; 23 *Central Law Journal*, 223. "But, if you determine to appeal, when you have got the appeal book into shape make a very careful statement of the facts. This is far more important than it appears to many lawyers, especially where a case is long and complicated, and where the facts to be intelligible must be extracted from a large mass of evidence and grouped together. To suppose the court will do for you what you will not do for yourself, and pro-

duce order out of chaos, is a great mistake. You must start with some clear and logical theory as to what the facts really are, for if your facts do not commend you to the appellate court, it may look with some suspicion on your logical conclusions, however convincing they may be."—On making a Brief on Appeal, *New York Law Journal*. In an article on the preparation of briefs, Judge Dillon says of stating the facts: "Not only the first step, but the most important. Not only the most important, but it may surprise the legal reader to add, *the most difficult*." 14 *Am. Law. Rec.* 53, 54. The italics are Judge Dillon's.

² Buskirk's *Pr.*, 325.

be certainly secured by forming a definite theory. In the absence of such a theory the grouping will be irregular, the order disconnected, and the entire brief obscure and feeble.

§ 443. **Correcting Erroneous Statements of Fact**—The presumption is that facts stated in the brief of counsel are correctly stated and that the record is truthfully represented. As it has been said, "counsel's statement of the facts is a certificate of fairness and accuracy," and the courts will assume, in the absence of a countervailing showing, that the facts are fairly stated and that there is neither intentional wrong nor innocent mistake. It is, therefore, incumbent upon counsel who believe that the facts are incorrectly stated, or the record not accurately represented, to contradict or explain the statements of their opponents. If they do not make the necessary corrections or explanations the court will accept that made by their adversaries as true and accurate.¹

§ 444. **Making the Points**—Points rule cases on appeal as well as in the trial court.² A "point" has been defined as: "Any material question, particularly of law, arising in connection with the determination of a cause." It is essential that all points be made in the brief, and properly made; if not so made they are waived. Many cases affirm this doctrine, although the phrase employed usually, not always, however, is, all questions not made in the briefs are regarded as waived.³

¹ Rule XXVI provides that, "If a statement of fact is made by counsel and not questioned or explained by opposing counsel, it will be deemed by the court to be accurate." This provision does no more than give expression to a general doctrine that has long prevailed.

² Memoir of Lord Abinger, 61-62. In *Gray v. Schenck*, 3 How. Pr. 231, it was held that: "The heads of an argument together with the authorities cited, but not the argument at length, are embraced under the term points." *Work of the Advocate*, 29, 49, 443.

³ *Western Union Tel. Co. v. Kil-*

patrick, 97 Ind. 42; *Wright v. Abbott*, 85 Ind. 154; *Stockton v. Lockwood*, 82 Ind. 158; *Fairbanks v. Meyers*, 98 Ind. 92; *Ohio, etc., Co. v. Nickless*, 73 Ind. 382; *Daniels v. McGinnis*, 97 Ind. 549; *Kennell v. Smith*, 100 Ind. 494; *Pittsburgh, etc., Co. v. Williams*, 74 Ind. 462. Many other cases may be found in our reports. As illustrating the application of the rule, *McClure v. State*, 116 Ind. 169; *Staser v. Hogan*, 120 Ind. 207; *State v. McGinnis*, 17 Ore. 332, 20 Pac. Rep. 632; *Tucker v. Constable*, 16 Ore. 239; *Faris v. Lampson*, 73 Cal. 190; *Brown v. State*, 82 Ga. 224, 7 S. E. Rep. 915.

Points, or propositions, distinctly stated and conspicuously displayed are quickly discerned, their force is apprehended without effort and their impression is deeper and more lasting than that of points huddled together in disorderly array.¹

§ 445. Showing Rulings to be Wrong—It is not enough to assert in general terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong or the point will not be considered as having been made. Counsel can not make a point in an appellate tribunal by a naked general assertion, for such an assertion will not be heeded. Even if counsel do not succeed in convincing the higher court that the trial court erred they will, nevertheless, gain something which would otherwise be lost, by an effort to do so, inasmuch as they will secure notice of the point stated unless, indeed, it is wholly without merit. But, in order to secure so much as notice of the point stated they must support it by a fair effort, adducing arguments and, if they can, citing authorities.² A bare designation of a

¹ "Judges," says a lawyer of experience and ability, "who desire to refer quickly to a certain part of an argument must be seriously hindered sometimes by this slovenly lack of proper arrangement by which the pages are closely-huddled up and every observation is on a typographical level with the rest. The points themselves should be printed in a bold, heavy-faced letter, and subordinate matter may be put in capitals, italics or common type, according to its importance. Every authority should be in a separate line. Generous spacing should be made, and indentation can be put to good use. One brief—and one only—that we have come across had a line at the top of each page, stating the contents of the page; this is especially useful in referring to summaries of testimony. This matter is just as important as emphasis in oral argument." 43 Albany Law Journal, 345. But some brief-makers err in going to extremes, and they

are thus criticised in a law periodical: "Some lawyers in having a brief printed, use every variety of type that is in the printing office, from small italics to gigantic capitals. We have even seen a large hand pointing to particularly impressive passages. All this is an absurdity, but it is only an exaggeration of what is the true theory of a brief, that is to call the attention of the court in some way to the points which are deemed especially important. One of the best ways of doing this is to print such passages in full-faced letters." On making a Brief on Appeal, New York Law Journal.

² *Liggett v. Firestone*, 102 Ind. 514; *Northwestern, etc., Co. v. Hazelett*, 105 Ind. 212; *City of Anderson v. Neal*, 88 Ind. 317; *Irwin v. Lowe*, 89 Ind. 540; *Kaster v. Kaster*, 93 Ind. 581; *Collins v. McDuffie*, 89 Ind. 562; *Millikan v. State*, 70 Ind. 283; *Richardson v. State*, 55 Ind. 381; *Cutler v. State*, 62 Ind. 398; *Martin v. Smith*, 57 Ind. 62; *Bennett*

ruling as erroneous, without discussion, is not sufficient to entitle counsel to successfully insist that he has made a point, but a discussion, even though it be not sufficient to secure assent, will save the counsel from the reproach of having waived a point by a failure to do his duty.¹ Where a ruling is asserted to be erroneous the party making the assertion must overcome the presumption that it was correct, and this he can not do otherwise than by specifying the particular error which invalidates the ruling.² This rule is required for the assistance and enlightenment of the court. Common fairness to opposing counsel likewise demands it, for they have a right to know just what particular point they are to meet. It is also required by the analogous cases which declare that objections wherever presented must be specific.

§ 446. Stating Propositions of Law—A proposition of law clearly and strongly stated is often better than a prolix argument. Exhibited in a condensed form and separated from a mass a proposition is quickly seized, and it penetrates deeply, but concealed in a confused mass it is likely to be overlooked or its force dimly perceived.³ “The propositions of law and fact on which

v. State, 22 Ind. 147; *Lackey v. Hernby*, 9 Ind. 536; *Crisman v. Masters*, 23 Ind. 319; *Heady v. Wood*, 6 Ind. 82. The decision in *Coon v. Welborn*, 83 Ind. 230, is certainly out of line with our own cases and with the cases in other courts. They are too numerous for citation. It is unsound on principle.

¹ This is important as affecting petitions for rehearing, as will be hereafter indicated.

² In *Williams v. Nesbit*, 65 Ind. 171, counsel stated an objection in general terms and referred to a case, but this was held not sufficient to present the question, the court saying, among other things, that “This is the only reference he makes to the judgment or execution in his brief. In this reference to the judgment no objection to its validity is pointed out, and hence no question upon its validity is raised here.” See, also,

Harrison v. Hedges, 60 Ind. 266; *Powers v. State*, 87 Ind. 144; *Wright v. McLarinan*, 92 Ind. 103; *Cooper v. Robertson*, 87 Ind. 222; *Collins v. McDuffie*, 89 Ind. 562; *Mills v. Winter*, 94 Ind. 329. “It is the duty of counsel to do more than make an assertion; they should state reasons for their propositions and, if necessary, cite authorities in their support.” *Liggett v. Firestone*, 102 Ind. 514.

³ “The aim should be to concentrate and rise above the crude points that were mooted in the first stages of the controversy and bring all the arts of brevity, conciseness and severe logic, with pith and point, to bear on the few real questions which are worth the attention of a court which exists only to settle real doubts.” Austin Abbott in the *New York Daily Register*.

counsel rely," said Justice Miller, of the Supreme Court of the United States, "must be stated so as to show clearly their relation to each other, and be so plainly expressed as to present a chart of the road to be traveled." But it is not always sufficient to do no more than state bare propositions of law, indeed, it is seldom sufficient to simply state naked legal propositions, for propositions are by no means always self-evident. It is often necessary to support propositions by arguments, and sometimes to fortify them by illustrations and by reference to authorities. Clear, concise propositions serve as heads for arguments, but they are not always in themselves arguments.

§ 447. **Citing Authorities**—Decisions add weight to a written argument,¹ not always simply because they constitute precedents, but often because the court which makes the decision is so highly regarded as to carry force in its utterances and often because the reasoning of the opinion carries conviction. It is not the number of cases so much as the character of cases, that is important. The practice of collecting cases from digests without close examination has more than once been censured.² Care in selecting and accuracy in citing authorities are cardinal virtues. The correct practice is to give the names of the parties and the volume and page of the reports where the case will be found.³ It is not good practice, as writers and judges have

¹ "To cite cases," wrote Sir Edward Coke, "standeth well with the gravitie of our lawyers." *Work of the Advocate*, 533.

² "The most common defect I have observed in the argument of causes," says Judge Dillon, "next to faulty statements is the misuse of reported cases. No lawyer is justified in citing a case in his brief which he has not carefully read and studied." 1 *Columbia Jurist*, 125, 14 *Am. Law. Rec.* 53, 56. "In citing cases," says an author already quoted, "you will not, of course, inflict on the court undigested and indigestible paragraphs from the various digests, half of which may turn out on close inspection to have been founded on *obiter dicta*. It does not take long for an at-

torney to find out that a court does not want a digest piecemeal; but a mistake that is only too common is the citing of a long list of authorities taken from all jurisdictions, and some of which have not, apparently, as far as human ingenuity can ascertain, the slightest relevancy to the particular case." On making a Brief on Appeal, *New York Law Journal*. Justice Miller, in his address before the Pennsylvania Law School, in Philadelphia, makes some excellent suggestions as to the weight and value of judicial decisions. See *The Advocate*, January 31, 1889.

³ Rule XXVI provides that counsel "shall give the titles of cases cited, together with the volume and pages of the reports where they are found."

often said, to refer to the page and volume of the reports without giving the names of the parties.¹ There are manifest reasons for this rule; one is that the court often recalls without examination what is decided in a case, and all that is required is the naming of the case; another reason is that accuracy is increased and mistakes avoided by giving names, and still another reason is that if names are given the court may, by examining the table of cases, find the case cited, although the figures indicating the volume and page may be wrong. When text books are cited the edition, if there be more than one edition, should always be given. The primary principle of selection is to secure cases decided by the court to which the argument is addressed, since only such cases can, with strict accuracy, be said to be authority.² But cases decided by other courts

¹ Judge Buskirk's suggestions upon this point are valuable. He says: "As a general rule, counsel should not cite an authority without examination; but where the attorney has not an opportunity of examining an authority which is cited in a text-book or digest and seems to be in point, he may cite it, with a statement that he has not examined it. In citing an adjudged case, the names of the parties, the volume and page should be given, for, where the names of the parties are given, the case can be found, although there is a mistake in the volume and page." Judge Dillon says: "A citation of a case under a given proposition ought, unless distinctly otherwise stated, to be equivalent to an implied professional certificate that, in the writer's judgment, the case cited is an express authority in support of such proposition." 1 *Columbia Jurist*, 125, 14 *Am. Law Rec.* 53, 56. The reports contain many cases in which counsel have supplied their adversaries with authorities. It has often happened that counsel have cited cases which so far from being of service to them, have given support to their opponents.

² *Ram on Legal Judgments*, Chapter

XII to XIX; *Bishop's First Book of the Law*, Book IV, Chapter XXIII; *Heard's Criminal Pl.*, Chapter I; *The Work of the Advocate*, 52. "Devote yourself above all to find authorities in your own State," says Mr. Abbott, "for these are the ones which are controlling, and it must be a very new and strange question upon which you can not find some light. * * * And even in your own State always, before citing an authority of importance, trace it down to date, for it may have been so 'distinguished' as to have lost all vitality of meaning." Justice Miller says: "But a far more important element in determining the weight to be given a case is the fact that it has been judicially decided after full argument on both sides of the case; and if the report shows that counsel directed attention of the court to the main point to be decided, and gave the aid which they should always give, arising from their own careful examination of the matter, to enable the court to decide correctly, it is then a case decided after full argument on both sides and necessarily carries the weight which attaches to the care with which the case has been examined."

are important and are always to be cited unless the question is set at rest by the decisions of the court of the State in which the case arises. It seldom happens that two cases are precisely alike. In many cases a conclusion is reached by a process of analogical reasoning, and in order to arrive at a conclusion resembling cases are studied and the principles extracted from them and applied to the particular case.

§ 448. Waiver of Preliminary Motions by Filing Brief—An appellee who voluntarily files a brief upon the merits of the appeal, that is, contests the points made by the appellant either by asserting that they are not properly presented by the record or by insisting that the rulings challenged are right, in effect enters an appearance and thus waives some of the objections that might be made available upon a preliminary motion.¹ A party who files a brief waives all questions as to notice which affect him, and he waives questions as to the formality or regularity of the assignment of errors. But, as elsewhere shown,² he does not, by filing a brief, waive the right to challenge the specifications of error, as, for instance, the right to insist that a cause for a new trial not assigned in the motion below is not available on appeal.

§ 449. Time within which the Appellant's Brief must be Filed—The appellant must file a full brief within sixty days after the cause is submitted.³ If the brief is not filed within that time it is the duty of the clerk to enter an order dismissing the appeal, unless the appellee requests that a decision be given in the case. The rule requiring the appellant to file a brief within

¹ *Schmidt v. Wright*, 88 Ind. 56. In the case cited it was said: "By unconditionally filing their brief on the 27th day of January, 1882, they entered a general appearance and waived all objections on account of notice." See *Bass v. Doerman*, 112 Ind. 390. That a general appearance waives preliminary motions is well settled. *Mahon v. Mahon*, 19 Ind. 324; *Miller v. Hays*, 20 Ind. 451; *Feaster v. Woodfill*, 23 Ind. 493; *Brown v. Buzan*, 24 Ind. 194;

Watts v. State, 33 Ind. 237; *Bosley v. Farquar*, 2 Blackf. 61; *Glenn v. State*, 46 Ind. 368; *Cox v. Pruitt*, 25 Ind. 90; *Rose v. Allison*, 41 Ind. 276; *Kambleskey v. State*, 26 Ind. 225; *Free v. Haworth*, 19 Ind. 404; *Templeton v. Hunter*, 10 Ind. 380; *Rich v. Starbuck*, 45 Ind. 310; *New Albany, etc., Co. v. Combs*, 13 Ind. 490.

² Pleadings of the Appellee, Chapter XIX.

³ Rule XX.

sixty days has been enforced in many cases¹—very many more than appears from the reports. Filing a brief after the expiration of the time designated will not prevent a dismissal.² If the last day falls on Sunday a filing on the succeeding Monday will be in time.³

§ 450. **Brief on Cross-Errors—Time of filing**—The appellee is allowed sixty days after submission in which to assign cross-errors⁴ and the rule requires him to file a brief on his assignment within sixty days after the submission of the cause.⁵ But the appellee may upon due application, proper notice and sufficient cause,⁶ obtain leave to assign cross-errors after the expiration of sixty days, so that the rule limiting the time to file a brief on cross-errors to sixty days can not apply to all cases. It would be in accordance with the doctrine which prevails in analogous cases to require an appellee to accompany an application made after the expiration of the time designated with a brief, and this has been required in some instances, but it can hardly be said that there is any established rule upon the subject. Generally, however, a party who asks leave to do an act after the time limited has expired in which he can do the act as a matter of right must do all that he reasonably can to prevent further delay, and we can see no reason why this doctrine should not apply to an appellee who asks leave to assign cross-errors after the expiration of sixty days from the date of the submission.

§ 451. **Appellee's Brief on the Appellant's Assignment of Errors**—The rule provides that the appellee shall have ninety days af-

¹ *Schwarm v. State*, 81 Ind. 247; *Murray v. Williamson*, 79 Ind. 287; *Schulties v. Keiser*, 95 Ind. 159; *Roy v. State*, 58 Ind. 378; *Indianapolis, etc., Co. v. Ferguson*, 58 Ind. 445; *Indianapolis, etc., Co. v. Kostanzer*, 58 Ind. 446; *State v. Lieben*, 57 Ind. 106.

² *Stephens v. Stephens*, 51 Ind. 542; *Sagasser v. Wynn*, 88 Ind. 226. In *Murray v. Williamson*, 79 Ind. 287, the court said: "The fact that a brief has since been filed is no answer to the ap-

pellee's motion. He has a right to have the appeal dismissed."

³ *Hogue v. McClintock*, 76 Ind. 205.

⁴ Rule IV.

⁵ Rule XX. This rule after fixing the time within which the appellant shall file a brief provides that, "If cross-errors are assigned, the party assigning them shall have the same length of time to file a brief thereon, and if a brief is not filed within that time the cross-errors shall be struck out."

⁶ Rule IV.

ter the submission in which to file a brief upon the questions presented by the appellant.¹ If the brief is not filed within that time the court may, if it chooses, regard a brief as waived. But the rule is seldom strictly enforced against the appellee. Briefs filed within a reasonable time before the case is taken under consideration by the court are generally accepted and acted upon by the court. The appellant is, however, entitled to a reasonable time to examine and answer the appellee's brief.²

§ 452. **Extension of the Time for filing Briefs**—It is, of course, within the power of the court to extend the time for filing briefs. An extension of time is, however, not granted as a matter of course, or as a matter of right. Counsel who desire an extension of time should make written application to the court, or to one of the judges, prior to the expiration of the time limited. While the matter is one of a discretionary character the usual practice has been to require a sufficient excuse to be shown for not filing the brief in due time, and if such an excuse is not shown to deny the application.

§ 453. **Oral Arguments**—Our great lawyers and judges have sadly erred if it be not true that oral arguments are much more effective than written ones, for they have declared, whenever they have spoken upon the subject, that an oral address is much more powerful than a written one. There is, indeed, no diversity of opinion upon this subject, and we venture to say that a court that discourages oral arguments departs from the true course.³ But in commending oral arguments judges and writers have not been sparing in their censure of long and prolix addresses to the court.⁴ It requires ability and labor to make

¹ Rule XXII.

² Rule XXV. This rule requires counsel to interchange briefs. It also requires copies of additional or supplemental briefs to be furnished opposite counsel.

³ Judge Dillon says: "As a means of enabling the court to understand the exact case brought thither for its judgment, as a means of eliciting the very

truth there is no substitute for oral argument." 19 Am. Law Review, 19. See, also, authorities collected in *The Work of the Advocate*, 506, 514.

⁴ *Profession D'Avocat*, Vol. I, p. 510; 24 Albany Law Journal, 40; 22 Albany Law Journal, 439; Judge Samuel F. Miller's Address to the Iowa Bar Association; Henry's *Reminiscences of Daniel Webster*.

a short, sharp and incisive forensic argument, but the value of brevity far outweighs the expense of the time, talent and labor expended in condensing and crystallizing an argument. It is a mistake, often made, for too many counsel to argue one side of a cause;¹ division in such cases, as was long since suggested by the Supreme Court of the United States (and against which one of its rules is directed), is very likely to impair and weaken the effect of oral arguments addressed to the court. It is not to be supposed that a written argument is not needed where the case is orally argued;² on the contrary, a brief is always of importance; so plainly is this true, that the assertion carries its own support.

§ 454. Application for Oral Argument—Counsel who desire an oral argument are entitled to it upon filing a written application requesting that the cause be set down for argument, and by complying with the rules upon the subject.³ Notice of the time fixed for the argument must be given and a statement of the propositions which counsel propose to argue mailed or delivered to counsel representing adverse parties.

§ 455. Limitation of Oral Arguments—The limitation is two hours, the time to be equally divided between opposing counsel. If longer time is required it must be asked and obtained in advance of the argument.⁴ It is necessary that reasonable cause be shown in order to secure an extension of time beyond that fixed by the rule of court, for an extension is not granted

¹ "The system by which the one who argues the cause and the one who prepares the brief are different persons, tends very much to multiply unnecessary points, and swell the bulk of the reading matter which is put between the judge and the decision of the case."

32 Albany Law Journal, 41.

² As we have seen, points not properly made in the brief are waived, but if there duly made, the failure to insist upon them in the oral argument is not a waiver. Rule XXVI explicitly requires briefs. Rule XXIX provides

that: "The failure to notice or discuss in oral argument points properly made in the briefs shall not be deemed a waiver of such points, but they will be fully considered in determining the cause."

³ Rule XXVII.

⁴ Rule XXVIII. The rules do not provide that the time shall be two hours in every case, but they fix that as the maximum limit, leaving it to the court, whenever it deems proper, to restrict the time. Rule XVII.

as a matter of course, nor can counsel agree upon the time so as to break the force of the rule. The rule prevails in all cases where the court is not put in possession of facts clearly showing that the time fixed by the rule is not adequate. Experience has demonstrated the fact that the time fixed by the rule is amply sufficient in the great majority of cases. It is not to be forgotten that the oral argument is, in all cases where counsel have fully discharged their duty, supplemented and aided by a written brief. This brief is before the court and to it reference is made in consultation and in submitting the opinion before it is accepted as that of the court. As the brief is at hand there is little necessity for prolix discussion and none for the repetition and reiteration of propositions, nor is there any reason for reading at length from text-books or decisions, since the brief should supply needed quotations and make proper citations.¹

§ 456. **Statement of Propositions for Argument**—The propositions which counsel propose to argue are required to be stated in writing; each proposition is to be appropriately numbered, and under each proposition the authorities relied upon as supporting it must be arrayed.² It is only the points or propositions that can properly be stated; an extended discussion is forbidden.³ The points clearly stated, logically arranged and exhibited in an orderly form greatly aid the court. Counsel who

¹ "In citing cases which you think are controlling of the question at issue, or which, at least, fairly sustain your view, give the principle fully and clearly, quoting *in extenso*, when necessary, the parts of the opinion which are exactly in point, and adding to those citations such other cases as sustain the same propositions. If the reasoning of your authority is somewhat mixed, or is complicated with other questions, carefully point out exactly how it is applicable to sustain your position, and if there are any parts of the cases cited apparently in conflict with your own case, carefully distinguish it or make clear to the court, if you can, that the conflict

is only apparent." The Advocate, January 3, 1889. But while there is much of truth in what is said by the writer quoted, still, it is to be taken with some qualification. It is not always necessary to quote from decisions or text-books, since the simple reference to authority on a familiar question is often sufficient. Where, however, the question is intricate, or difficult, or novel, quotations may, with profit and propriety, be freely made.

² Rule XXIX. "Counsel shall not read from written or printed briefs in discussing the propositions stated."

³ *Ibid.*

can not prepare such a statement, it is fair to infer, are not sufficiently acquainted with the case to assume to instruct the court or to impart information. Either this must be the inference or else something even less creditable to counsel must be inferred. All the points that counsel desire to orally argue should be embodied in the written statement, since the argument will be strictly confined to the points stated. The written statement "must," as the rule provides, "be mailed or delivered to opposing counsel at least ten days before the time appointed for the argument, and a copy shall be filed with the clerk before the argument for the use of the court."¹ The statement of the points is an important instrument, and, if well prepared, is of great assistance to the court, in the examination of the case. It does not supply the place of a brief, but it is a valuable auxiliary. The brief is always essential and an oral argument does not dispense with the necessity of filing it. Points made in the brief are not waived by a failure to discuss them in the oral argument. Many of the courts deal very severely with counsel who fail to present briefs and points as the rules require. Some of the courts dismiss the appeals where the appellant is in default, and where the appellee is the delinquent reverse the judgment.² There is good reason for strictness. It is due to the court that the case should be presented as the rules of the court require, and it is due to clients in causes important enough to demand the time and study of the courts that there should be a full and careful argument.

§ 457. Interchange of Points for Argument—The rule expressly requires that counsel shall interchange the written propositions required for oral argument. If counsel, duly notified by those who apply for oral argument, desire to be heard, they must make a written statement of the propositions which they desire to discuss and mail or deliver it to opposing counsel.³ Under

¹ Rule XXIX.

² *Purdy v. Rahl* (Cal.), 21 Pac. Rep. 971; *Parson v. Haskell*, 30 Ill. App. 444; *Green v. Smith*, 21 Ill. App. 198. See, generally, *Steffen v. Jefferis* (Mont.), 22 Pac. Rep. 152; *Hanson v. Voll* (Cal.),

21 Pac. Rep. 971; *Owen v. Going*, 13 Col. 290, 22 Pac. Rep. 768; *People v. Bachman* (Cal.), 23 Pac. Rep. 1090; *Lancaster v. Waukegan, etc., Co.*, 132 Ill. 492, 24 N. E. Rep. 629.

³ Rule XXIX.

the propositions must be cited the authorities upon which counsel rely. The practice has been in cases where counsel on one side have failed to make and file the written propositions required by the rules, to hear the counsel not in default and to refuse to hear the delinquent counsel. This is, certainly, as liberal a practice as can be pursued, and as compared with the practice of many of the courts is unusally liberal.

CHAPTER XXII.

THE ORDER OF DOCKETING AND HEARING APPEALS.

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| 458. Docketing appeals. | § 464. Cases can not be advanced by agreement. |
| 459. Exceptions to the general rule. | |
| 60. Filing of the transcript is generally essential to jurisdiction. | 465. The application for advancement. |
| 61. Order of hearing. | 466. What must precede application. |
| 2. Authority of the court to change the order of hearing. | 467. Notice of the application. |
| 6. Advancement of cases. | 468. Hearing the motion to advance. |
| | 469. Questions for decision on a motion to advance. |

458. Docketing Appeals—Causes are docketed in the order in which they are filed in the office of the clerk of the Supreme Court.¹ As the assignment of errors is the appellant's complaint and is essential to complete jurisdiction it should accompany the transcript. Another reason why the assignment of errors should accompany the transcript is this: Process issues leading to the assignment of errors.² The general rule is which we have stated, and to this general rule the practice has conformed.

Exceptions to the General Rule—There are exceptions to the general rule that the assignment of errors must accompany the transcript, although they are rare. It may happen, to give a representative instance, that it is necessary to file the transcript before an order to perfect the record before an assignment can be intelligently or properly prepared. In such a case the transcript should be filed, the proper motion or petition filed, and due notice issued. When this is done the tribunal has such jurisdiction, although the jurisdiction is not complete, as authorizes it to proceed in the case. As a general rule, the transcript must be filed, to-

¹ 653. Errors," *ante* Chapter XVI. See, also, See "The Assignment of "Process," *ante* Chapter XIII.

gether with the proper motion or petition. This is so, because, as a general rule, the appellate tribunal can not exercise original jurisdiction, and until the transcript is filed there is nothing to call into exercise appellate authority. Until then there is no case to review. There are, doubtless, other cases than that adduced as an illustration where action in the appellate tribunal may be taken without first filing the assignment of errors, but the illustration we have given is sufficient for our present purpose. There are cases where the appellate tribunal exercises original jurisdiction, as, for instance, in determining its own duties and protecting its own records, but ordinarily it exercises only appellate authority. Connected with this jurisdiction are incidental powers, but they are seldom anything more than auxiliary ones exercised in aid of its principal jurisdiction.

§ 460. Filing of the Transcript is generally essential to Jurisdiction—It is quite clear that ordinarily a cause can not be docketed on appeal until the transcript is filed. The transcript is, in the very great majority of cases, the foundation of the authority to take cognizance of the appeal. If, by wrong, it is withheld, there is a remedy—but we need do no more at present than speak of the general rule. As the transcript is, in general, the foundation of the proceedings, it must be filed, even though it be imperfect. Filing the transcript is nearly always the initial step. If imperfect it can be corrected after filing and docketing, but until it is before the court there is ordinarily no appeal, and there is no ground justifying or requiring the exercise of either the principal or auxiliary appellate jurisdiction. The party who first files his transcript and then asks for auxiliary aid will seldom go wrong. It may be safely assumed that until the transcript is filed there is no appeal to docket, and if no appeal to docket, none to try.

§ 461. Order of Hearing—Causes are heard in the order in which they are docketed (if correctly entered), unless the court otherwise directs.¹ As the law was prior to 1885, appeals stood for trial, in the order in which they were docketed, at the first

¹ R. S. 1881, § 653.

term after filing the transcript in cases where the appeal was duly perfected as a term appeal, and in cases of appeals upon notice, at the first term after personal notice had been served ten days, or notice by publication had been given for thirty days.¹ As there were but two terms in each year, May and November,² delay was unavoidable. The act of 1885 wrought an important change, and under that act appeals are submitted thirty days after due notice irrespective of the beginning of the terms of court.³ It is probably true that circumstances may change the order of hearing without special direction of the court, but the general rule is that prescribed by statute. Either this must be true or it must be true that the statute is nugatory. This can not be justly affirmed. It may be justly affirmed, however, that a general rule, whether prescribed by statute or not, has its exceptions, and that general rules often yield to particular circumstances. It is, at least, safe to affirm that the statute must be followed as far as practically possible.⁴ The statute does little more than declare what in fairness and common justice is the true rule, for, all other things being equal, the first in time are first entitled to an adjudication. It is to be remembered that there is a marked difference between hearing and deciding. A case may be taken up for consideration and a decision delayed (as in fact often occurs), because of a difference of opinion developed on consultation.

§ 462. Authority of the Court to Change the order of Hearing—

There can be no doubt that the court has authority, by virtue of the statutory provision, to change the order of hearing appeals. Probably it would have this authority without the statutory grant contained in the words, "unless the court for good cause shown shall otherwise direct."⁵ It has, at all events, the authority, whether it be statutory or inherent. The authority is plenary. The entire subject is committed to the court, for it

¹ R. S. 1881, § 652.

² R. S. 1881, § 1301.

³ Elliott's Supp., § 28. See *ante*, "Submission," Chapter XX.

⁴ Judge Buskirk condemns the statu-

tory provision in strong terms. Buskirk's Practice, 331. But we are unable to agree with some of his statements.

⁵ R. S. 1881, § 653.

is for the court to determine whether or not "good cause is shown."

§ 463. **Advancement of Cases**—It is quite clear that the court may rightfully advance the hearing of a case when "good cause is shown," but it is not so clear what constitutes good cause. Every case advanced displaces others. The advancement of an appeal is a preference of one case above others. Naturally and justly litigants have a right to a disposal of their cases in the order of their filing. It can seldom be justly said that one case involving strictly private interests should be advanced over others involving like interests. There are, however, a few cases of this character that may justly be advanced, but they are exceedingly rare. Where a speedy decision will settle many cases and prevent a multiplicity of actions a prompt decision is often desirable and benefits both the public and individuals. Possibly there may be cases involving elements of hardship and possessing peculiar characteristics that should be advanced; such, for instance, as a case where the year for the redemption of land sold on execution is nearly at an end, or, a case which prevents the final settlement of a trust involving large amounts or important interests, or, a case which stands in the way of closing a decedent's estate. Generally, however, it is only cases involving important public interests that are entitled to advancement. The Supreme Court of the United States enforces this doctrine with strictness.¹

§ 464. **Cases can not be advanced by Agreement**—Counsel representing adverse parties can not by agreement procure an advancement. It is not enough that parties or counsel agree to advance; it must appear, even where there is an agreement, that there is sufficient cause for an advancement. An agree-

¹ *Barry v. Mercein*, 4 How. (U. S.), 574; *United States v. Bassett*, 21 How. (U. S.), 412; *Sage v. Iowa, etc., Co.*, 93 U. S. 412; *Hoge v. Richmond, etc., Co.*, 93 U. S. 1; *Central R. R. Co. v. Bourbon County*, 116 U. S. 538; *Ward v. Maryland*, 12 Wall. 163. That court holds that the fact that the validity of an ordinance of a municipal corporation is involved will not warrant an advancement. *Davenport City v. Dows*, 15 Wall. 390. See, generally, *Miller v. State*, 12 Wall. 159.

ment has some weight, but it is by no means sufficient in itself to secure an order advancing a case for hearing.

§ 465. **The Application for Advancement**—A written motion, or petition, is required. It must be verified or supported by affidavit. The grounds upon which an advancement is asked should be specifically and fully stated.¹ The court will not examine the transcript to determine whether the case is one entitled to be advanced for hearing. The petition or motion must show, and clearly show, cause for the advancement; failing in this, it will not accomplish its object. A party who asks that his case be advanced asks an extraordinary order and hence it is incumbent upon him to present a strong petition. The nature of the case should be stated in general terms and the reasons for an advancement should be stated with certainty and particularity.

§ 466. **What must Precede the Application**—The case must be submitted before an advancement is asked. The party making the application should precede it with his brief. In short, the party moving should, so far as it is in his power, do all that is required to put the case in form and situation for a hearing. The underlying theory is that the appeal is ripe for judgment.

§ 467. **Notice of the Application** — Written notice must be served upon the adverse party or his counsel informing him of the general nature of the motion, or petition, and of the time fixed for its hearing. Notice may, however, be waived by express agreement, by joining in the motion, or by conduct from which a waiver may be implied. While parties can not by an agreement secure an order advancing a cause, they may by agreement waive notice.

§ 468. **Hearing the Motion to Advance**—A motion or petition to advance is heard and decided upon the pleadings and affidavits filed by the respective parties. Oral evidence is not heard. Counter-affidavits may be filed. Briefs may be properly filed, but oral arguments are not heard.

¹ Call *v. Palmer*, 106 U. S. 39; *Taylor v. Wing*, 83 N. Y. 527.

§ 469. **Questions for Decision on the Motion to Advance**—The questions presented by a motion to advance are such, and such only, as relate to the right of the applicant to a preference. No other questions are involved. It is, therefore, correctly held that the statement that there is no merit in the case is not sufficient to authorize an order advancing it for hearing.¹ Whether or not there is merit in a case is a question to be decided upon the regular hearing. If courts should undertake to examine the record upon motions to advance, or should inquire into the merits of the case upon such applications, they would not only go counter to settled principles, but they would find little time for considering cases regularly submitted for decision on their merits.

¹ *Amory v. Amory*, 91 U. S. 356.

CHAPTER XXIII.

QUESTIONS THAT MAY BE FIRST MADE ON APPEAL.

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| <p>470. Objections not presented to the trial court not considered on appeal—General rule.</p> <p>471. Objections to the complaint.</p> <p>472. Assailing a complaint in the assignment of errors.</p> <p>473. What defects are fatal upon an original attack on appeal.</p> <p>474. One good paragraph will save the complaint.</p> <p>475. Judgment by default—Requisites of the complaint.</p> <p>476. Answer can not be attacked for the first time on appeal.</p> <p>477. Cross-complaint or counter-claim.</p> | <p>478. Requisites of a counter-claim.</p> <p>479. Reply.</p> <p>480. The doctrine applicable to answers and replies.</p> <p>481. The reason of the rule.</p> <p>482. Rendering judgment on the pleadings.</p> <p>483. Set-off.</p> <p>484. The rule where a bad answer is proved.</p> <p>485. Effect of the rule respecting the proving of a bad answer.</p> <p>486. Effect of proving a bad answer.</p> <p>487. Anomalous cases.</p> <p>488. Criminal cases.</p> |
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470. Objections not presented to the Trial Court not considered on appeal—General Rule—The general rule is that objections not presented to the trial court will receive no attention on appeal.¹

Missouri, etc., Co. v. Vandeventer, 222; *State v. Nelson*, 101 Mo. 222; *Bowler v. Bowery Savings Bank*, 115 N. Y. 450; *O'Neil v. New York*, 115 N. Y. 579; *Winters v. City, etc., Co.*, 99 Mo. 509; *McNamee*, 102 U. S. 572; *Belker*, 104 U. S. 379; *Wright v. ...*, 78 Wis. 89, S. C. 9 Law. R. 7; *Adams County v. Hunter*, 128; *Clark v. Fredericks*, 105 Louisville, etc., Co. *v. Fox*, 116; *Falley v. Gribbling*, 128 *Keiser v. Lines*, 79 Ind. 445; *Steigelmayer*, 76 Ind. 479; *Wilmington v. Breen*, 77 Ind. 29; *Mobley v. State*, 83 Ind. 92; *New Albany, etc., Co. v. Day*, 117 Ind. 337; *Queen Ins. Co. v. The Studebaker, etc., Co.*, 117 Ind. 416; *McNutt v. McNutt*, 116 Ind. 545; *Louisville, etc., Co. v. Hart*, 119 Ind. 273; *Alexander v. Humber*, 86 Ky. 565; *Brown v. Brown*, 29 W. Va. 777, S. C. 2 S. E. Rep. 808; *Hauxhurst v. Ritch*, 119 N. Y. 621, 23 N. E. Rep. 176; *Hardin v. Clark*, 32 So. Car. 480, 11 S. E. Rep. 304; *Goodnow v. Plumb*, 67 Iowa, 661; *Patterson v. Stiles*, 6 Iowa, 54. The record must affirmatively show that the question was appropriately presented to the trial court. *Coleman v. Dobbins*, 8 Ind. 156.

To this rule there is one very important exception, which is as far reaching as the rule itself, and that is this: Objections to the jurisdiction of the trial court over the subject may be successfully urged at any time.¹ If the trial court did not have jurisdiction of the subject the appellate court acquires none.²

§ 471. **Objections to the Complaint**—The general rule that objections not presented to the trial court are unavailing on appeal applies, with one important exception, to pleadings. It would seem, on principle and independent of statute, that where a complaint or declaration wholly fails to state a cause of action the judgment should not be allowed to stand, for it is difficult, if not impossible, to conceive how a judgment can stand where there is no actionable wrong, and, surely, there can be none where there is no cause of action. An unsupported judgment is as a foundationless structure.³ The reason of the rule does not, however, exist where there is simply a formal or unsubstantial defect in the complaint or declaration, or a defect that can be supplied by amendment, since such defects may well be deemed to be cured by the verdict.

¹ *Doctor v. Hartman*, 74 Ind. 221; *Smith v. Myers*, 109 Ind. 1, 9; *Robertson v. Smith*, 109 Ind. 79; *Damp v. Dane*, 29 Wis. 419, 431; *Chapman v. Barney*, 129 U. S. 800; *Morris v. Gilmer*, 129 U. S. 315; *Fowler v. Eddy*, 110 Pa. St. 117, S. C. 1 Atl. Rep. 789; *Ware v. Henderson*, 25 So. Car. 385; *People v. Walter*, 68 N. Y. 403, 411; *Weeden v. Richmond*, 9 R. I. 128; *Willins v. Wheeler*, 17 How. Pr. 93; *Tiffany v. Gilbert*, 4 Barb. 320; *Fitch v. Develen*, 15 Barb. 47; *Hardin v. Trimmer*, 30 So. Car. 391, 9 S. E. Rep. 342; *Randleman, etc., Co. v. Simmons*, 97 N. C. 89, S. C. 1 S. E. Rep. 923; *Murry v. Burris*, 6 Dak. 170, 42 N. W. Rep. 25; *Hall v. Wadsworth*, 30 W. Va. 55, S. C. 3 S. E. Rep. 29; *Keokuk, etc., R. Co. v. Donnell*, 77 Iowa, 221, 42 N. W. Rep. 176.

² *Withers v. Patterson*, 27 Texas, 491, 495; *Robertson v. Smith*, 109 Ind. 79, 81.

³ *Slacum v. Pomeroy*, 6 Cranch, 221; *Bank of United States v. Smith*, 11 Wheat. 171. In the case of *Beaird v. The United States*, 5 Ind. 220, it was held that in a case which originated before a justice of the peace the judgment will be reversed unless the transcript discloses a cause of action. To the same effect are the cases of *Bell v. Trotter*, 4 Blackf. 12; *Denby v. Hart*, 4 Blackf. 13. But if there is a complaint sufficient to bar another action the judgment will stand where no attack is made upon the complaint in the trial court. *Clark v. Benefiel*, 18 Ind. 405. In actions commenced before a justice of the peace this would, indeed, be the rule even where there was a direct attack

§ 472. **Assailing a Complaint in the Assignment of Errors**—In this State the question as to the right to challenge a complaint on appeal for the first time is settled by statute,¹ and settled, as we believe, in accordance with principle. Doubtless the statute is open to abuse and that result can only be prevented by construing it so as to prevent advantage being taken of defects that do not go to the substance. The statute has been before the court in many cases and has been enforced wherever there is no cause of action.² It has, indeed, been held, that a complaint may be assailed by the assignment of errors although a demurrer to it may have been overruled but no exception taken at the trial court,³ and this holding seems defensible upon the ground that where there is no cause of action there can be no valid judgment.

473. **What defects are fatal upon an original attack on Appeal**—A complaint may be bad as against a demurrer and yet good

S. 1881, § 343.
Walter v. Catterlin, 10 Ind. 117;
Edge v. Benedick, 12 Ind. 389;
Wre v. McClure, 19 Ind. 185; *Kip-*
Brennemen, 25 Ind. 152; *Tot-*
tc., Co. v. Tilton, 27 Ind. 71;
Son v. Hamilton, 27 Ind. 139;
W. v. State, 38 Ind. 32; *Livesey*
sey, 30 Ind. 398; *Newhouse v.*
35 Ind. 463; Heitman v.
40 Ind. 93; Davis v. Perry, 41
Mercer v. Patterson, 41 Ind.
Seaway v. Deariner, 42 Ind. 157;
v. Mendenhall, 42 Ind. 598;
ick v. Slevin, 43 Ind. 522;
Heritage, 45 Ind. 66; *Ford v.*
Ind. 395; Town of Brazil v.
Ind. 14. Where a complaint
 filed on appeal for the first
 assignment must be directed
 to the pleading. An assignment
 only of the paragraphs are
 unavailing. *Louisville, etc.,*
s. 124 Ind. 427, 8 Lawyers'
636; Board v. Tichenor
N. E. Rep. 32; Ludlow v.

Ludlow, 109 Ind. 199; *Louisville, etc.,*
Co. v. Peck, 99 Ind. 68.

¹ *Nugent v. Laduke*, 87 Ind. 482. If, however, an exception has been taken the appropriate mode is to assign the ruling upon the demurrer, since a much more liberal rule prevails as to the objecting party where the pleading is duly challenged by demurrer in the trial court. *Burkett v. Holman*, 104 Ind. 6. In *Lassiter v. Jackman*, 88 Ind. 118, the court said: "If the appellants had demurred to the complaint of facts we may well suppose that it would have been held insufficient; but many objections may be cured by a verdict, and parties may waive their objections or lose all benefit therefrom by not making them in the proper mode or at the proper time." The court cited, among others, the cases of *Purdue v. Stevenson*, 54 Ind. 161; *Wilson v. Kelly*, 58 Ind. 586; *Galvin v. Woollen*, 66 Ind. 464; *Lewis v. Bortsfeld*, 75 Ind. 390; *Parker v. Clayton*, 72 Ind. 307; *Beal v. State*, 77 Ind. 231; *Roberts v. Porter*, 78 Ind. 130.

against an assault made upon it for the first time in the Supreme Court.¹ It is, therefore, not sufficient to entitle a party to a reversal to prove that a complaint would have fallen before a demurrer had it been attacked in the court below. As has been suggested, defects which a verdict will cure are not available where no demurrer is filed,² and hence it is important to demur wherever it is sought to take advantage of a defect that does not affect in a very material degree the cause of action. The rule that many defects are cured by a verdict prevails as against a motion in arrest of judgment made in the trial court,³ and there is reason for liberally extending that rule to cases where the first assault is made on the complaint in the assignment of

¹ *Hostetler v. State*, 62 Ind. 183. In the case of *McGregor v. Hubbs*, 125 Ind. 487, 488, it was said: "It is settled law in this State that an assignment of error that the complaint does not state facts sufficient to constitute a cause of action, is not available for the reversal of the judgment, unless some fact essential to the existence of a cause of action has been wholly omitted from the complaint." The same doctrine is stated in somewhat stronger terms in other cases. *Lavery v. State*, 109 Ind. 217; *Smith v. Smith*, 106 Ind. 43; *Taylor v. Johnson*, 113 Ind. 164; *Burkhart v. Gladish*, 123 Ind. 337; *Hornaday v. Shields*, 119 Ind. 201; *Orton v. Tilden*, 110 Ind. 131; *Kinney v. Dodge*, 101 Ind. 573; *Baltimore, etc., Co. v. Kreiger*, 90 Ind. 380; *Smith v. Freeman*, 71 Ind. 85; *Cox v. Albert*, 78 Ind. 241.

² *Old v. Mohler*, 122 Ind. 594; *Lassiter v. Jackman*, 88 Ind. 118; *Owen School Tp. v. Hay*, 107 Ind. 351; *Eberhart v. Reister*, 96 Ind. 478; *Colchen v. Ninde*, 120 Ind. 188; *Westfall v. Stark*, 27 Ind. 377; *Indianapolis, etc., Co. v. Petty*, 30 Ind. 261; *Tomlinson v. Hamilton*, 27 Ind. 139; *Howorth v. Scarce*, 29 Ind. 278; *Gander v. State*, 50 Ind. 539; *Galvin v. Woollen*, 66 Ind. 464; *Smith v. Freeman*, 71 Ind. 85.

³ *Eshelman v. Snyder*, 82 Ind. 498; *Louisville, etc., Co. v. Hixon*, 101 Ind. 337; *Haywood v. Hedrick*, 94 Ind. 340; *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143; *Puett v. Beard*, 86 Ind. 104; *Clegg v. Waterbury*, 88 Ind. 21; *Burkett v. Holman*, 104 Ind. 6; *Trammel v. Chipman*, 74 Ind. 474; *Pittsburgh, etc., Co. v. Thornburgh*, 98 Ind. 201; *Felger v. Etzell*, 75 Ind. 417; *Beal v. State*, 77 Ind. 231; *Smock v. Harrison*, 74 Ind. 348; *Kious v. Day*, 94 Ind. 500. While the rule that defects are cured by a verdict is very liberally applied, still, it can not be invoked to sustain a complaint which omits to state a fact indispensably essential to the cause of action. *Cox v. Hunter*, 79 Ind. 590; *Mansur v. Streight*, 103 Ind. 358; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Peters v. Banta*, 120 Ind. 416. Whatever fair intendment will supply will be deemed to exist. *Sharpe v. Clifford*, 44 Ind. 346; *Howorth v. Scarce*, 29 Ind. 278; *Barnes v. Bell*, 39 Ind. 328; *Galvin v. Woollen*, 66 Ind. 464; *Scott v. Zartman*, 61 Ind. 328; *Louisville, etc., Co. v. Spain*, 61 Ind. 460; *Bales v. Scott*, 26 Ind. 202; *Gander v. State*, 50 Ind. 539; *Griesel v. Schmal*, 55 Ind. 475; *Parker v. Clayton*, 72 Ind. 307.

errors. It is a necessary sequence of the propositions stated that a complaint will prevail against an original attack on appeal, however defectively it may allege facts, if its allegations are such as to authorize the court to remedy defects, or supply omissions, by liberal and reasonable intendment.¹ There is in such cases reason for liberality, none for strictness. A strict, or technical, exactness would render the statutory provision a trap for the unwary and often lead to the defeat of justice.²

§ 474. One good paragraph will save the Complaint—An original attack on appeal will not prevail against a complaint containing one good paragraph, although there may be many bad ones. An original attack can not prevail unless the whole complaint is bad.³ This conclusion, it is evident, is the only

¹ *Burkett v. Holman*, 104 Ind. 6; *Charlestown School Tp. v. Hay*, 74 Ind. 127; *Baltimore, etc., R. Co. v. Kreiger*, 90 Ind. 380; *Du Souchet v. Dutcher*, 113 Ind. 249; *Taylor v. Johnson*, 113 Ind. 164; *Donnellan v. Hardy*, 57 Ind. 393; *Lassiter v. Jackman*, 88 Ind. 118; *Kinney v. Dodge*, 101 Ind. 573; *Smith v. Smith*, 106 Ind. 43; *Becknell v. Becknell*, 110 Ind. 42.

² It is no more than a just application of a sound principle to hold, as it has been held, that if there is enough in the complaint to bar another action an original attack upon appeal will be unavailing. *Harris v. Wright*, 123 Ind. 272; *Du Souchet v. Dutcher*, 113 Ind. 249; *Burkhart v. Gladish*, 123 Ind. 337; *Laverty v. State*, 109 Ind. 217; *Harper v. Pound*, 10 Ind. 32. There is, indeed, little reason for favoring a party who lies by without challenging the complaint in the trial court where there is full opportunity for him to do so, and where a challenge from him would arouse the attention of the trial court and fairly warn his adversary of the imperfections in the pleading. It is upon solid ground, therefore, that the court proceeds in dealing liberally with

a complaint which passed the trial court unchallenged.

³ *Buchanan v. Lee*, 69 Ind. 117; *Smith v. Freeman*, 71 Ind. 85; *Murdock v. Cox*, 118 Ind. 266; *United States, etc., Co. v. Rawson*, 106 Ind. 215; *Louisville, etc., Co. v. Corps*, 124 Ind. 427; *Louisville, etc., Co. v. Ader*, 110 Ind. 376; *Charlestown School Tp. v. Hay*, 74 Ind. 127; *McCormick, etc., Co. v. Gray*, 114 Ind. 340; *McCallister v. Mount*, 73 Ind. 559; *Ludlow v. Ludlow*, 109 Ind. 199; *Louisville, etc., Co. v. Peck*, 99 Ind. 68; *Haymond v. Saucer*, 84 Ind. 3; *Schuff v. Ranson*, 79 Ind. 458; *Carr v. State*, 81 Ind. 342; *Iles v. Watson*, 76 Ind. 359; *Elmore v. McCrary*, 80 Ind. 544; *Wabash, etc., R. Co. v. Nice*, 99 Ind. 152; *Stout v. Turner*, 102 Ind. 418. In *Louisville, etc., Co. v. Peck*, 99 Ind. 68, 69, the court said: "The assignment that neither paragraph of the complaint states facts sufficient to constitute a cause of action really presents no question. Such an assignment can only be made in regard to the complaint as a whole, and where properly made, as also a motion in arrest of judgment as here made, calls in question the sufficiency of the complaint as a whole."

just one that can be deduced from principle and it is sustained by all the analogies of the law of procedure. While different paragraphs of a complaint may be distributively assailed by demurrer, no such assault can be successfully made on appeal, for one good paragraph will sustain a judgment.

§ 475. **Judgment by Default—Requisites of the Complaint**—The rule that such pleadings as a complaint, or cross-complaint, can not be attacked on appeal unless there is an entire failure to state a cause of action seems to be somewhat relaxed in cases where the judgment is rendered on default. In such cases the rule appears to be that if the complaint is not such as would withstand a demurrer it may be first assailed by the assignment of errors.¹ This doctrine proceeds upon the theory that as there was no trial and no evidence adduced, the rule that absent allegations may be supplied by intendment can not apply and the right to a recovery must depend wholly upon the complaint. There is reason for this ruling, but, nevertheless, it is a ruling to be carefully limited, for it comes very near trenching upon settled and salutary principles.

Hence if either paragraph is sufficient, neither of the assignments here can be maintained." The court cited the cases of *Leedy v. Nash*, 67 Ind. 311; *Smith v. Freeman*, 71 Ind. 85; *Wagner v. Wagner*, 73 Ind. 135; *Elmore v. McCrary*, 80 Ind. 544; *Iles v. Watson*, 76 Ind. 359; *Jones v. Pothast*, 72 Ind. 158; *Toledo, etc., Co. v. Milligan*, 52 Ind. 505; *Spahr v. Nicklaus*, 51 Ind. 221. To the same effect as *Louisville, etc., Co. v. Peck*, *supra*, are *Higgins v. Kendall*, 73 Ind. 522; *Stout v. Turner*, 102 Ind. 418. See, also, *Branch v. Faust*, 115 Ind. 464; *Ashton v. Shepherd*, 120 Ind. 69; *Burkhardt v. Gladish*, 123 Ind. 337; *Taylor v. Johnson*, 113 Ind. 164. It is quite clear from the authorities cited, as well as from other cases, that *Bolin v. Simmons*, 81 Ind. 92, is in part erroneous. It is so undoubtedly in so far as it is in conflict with the doctrine

declared in the extract we have made from the opinion in *Louisville, etc., Co. v. Peck*, *supra*.

¹ *Old v. Mohler*, 122 Ind. 594; *Collins v. Gibbs*, 2 Burr. 899; *Abbe v. Marr*, 14 Cal. 210; *Strock v. Commonwealth*, 90 Pa. St. 272; *Gould's Pl.* 471; *Bliss Code Pl.*, § 438. In *Old v. Mohler*, *supra*, the doctrine of such cases as *Parker v. Clayton*, 72 Ind. 307; *Lassiter v. Jackman*, 88 Ind. 118, *Owen School Tp. v. Hay*, 107 Ind. 351, *Eberhart v. Reister*, 96 Ind. 478, *Westfall v. Stark*, 24 Ind. 377, *Scott v. Zartman*, 61 Ind. 328, is approved, but it is held that the doctrine asserted in those cases does not apply where there is a judgment upon default inasmuch as there is no evidence from which a cure for an error can be extracted as there is in cases where there is a trial and a verdict.

§ 476. **Answers can not be Attacked for the First Time on Appeal**
 -The rule which authorizes an original attack upon a complaint in the assignment of errors on appeal does not apply to answers.¹ The change wrought by the act of 1881,² which omits the clause contained in the code of 1852 concerning answer by a failure to demur,³ does not go so far as to entitle a plaintiff to attack an answer for the first time in the Supreme Court. This must result from the rule declared in many cases that even though no answer at all is filed the judgment is not to be reversed where parties go to trial without objection.⁴ The rule is as declared in the long line of cases referred to, and must necessarily follow that where there is an insufficient answer not demurred to there is a waiver of the right to object to it. Having voluntarily submitted the cause for trial, since it is reasonable to hold that where there is an answer, although insufficient, the defendant is at a greater disadvantage than if there were no answer at all. It would be very difficult, if not impossible, to frame a plausible theory in support of the position that no answer at all puts the plaintiff in a better situation than he would be if the defendant had filed a defective answer.⁵ The semblance of an answer is at least as good as no apology at all. The rule that where incompetent evidence sustains a verdict there can be no reversal in cases where the evidence is not objected to at the trial, and the jury without objection⁶ requires that it be held that

go, etc., Co. v. Modesitt, 124 Ind. 546; *Kirkpatrick v. Alexander*, 60 Ind. 95; *Bledsoe v. Rader*, 30 Ind. 354; *Benoit v. Schneider*, 47 Ind. 13; *Reed*, 80 Ind. 1; *City of Indianapolis v. Medsker Draining Co.*, 48 Ind. 107; *Casad v. Holdridge*, 40 Ind. 529; *Moffit v. Medsker Draining Co.*, 48 Ind. 107; *Casad v. Holdridge*, 40 Ind. 529; *Purdue v. Stevenson*, 54 Ind. 161; *Holten v. Board of Commissioners, etc.*, 55 Ind. 194.
 1876, p. 65, § 64.
 1. *Loan and Trust Company v. City of Warsaw*, 127 Ind. 250; *Bender v. City of Warsaw*, 107 Ind. 285; *June v. Payne*, 107 Ind. 285; *Hartlep v. Cole*, 101 Ind. 367; *Briscoe v. Briscoe*, 92 Ind. 367; *Chambers v. Chambers*, 96 Ind. 426; *Chambers v. Chambers*, 82 Ind. 508; *Lewis v. Lewis*, 5 Ind. 390; *Felger v. Ettinger*, 117 Ind. 117; *McCormick v. Hyatt*, 117 Ind. 117.

⁵ It is to be borne in mind that we are here speaking of the effect of the change in the statute with respect to attacking answers for the first time in the Supreme Court, and not as to the effect of the change upon the doctrine of carrying back a demurrer.

⁶ *Stockwell v. State*, 101 Ind. 1; *Riehl v. Evansville Foundry*, 104 Ind. 70; *Kincaid v. Indianapolis Natural Gas Co.*, 104 Ind. 70.

an answer can not be successfully assailed on appeal for the first time. It is in harmony with the spirit of the code which is that objections shall be seasonably and openly presented, and that no devices intended to ensnare or entrap litigants shall be tolerated.¹

§ 477. Cross-Complaint or Counter-Claim—A cross-complaint or counter-claim² stands upon a different footing from that on which an answer rests. A counter-claim under the reformed system of procedure established by the code is substantially the same thing as a complaint, inasmuch as its office is to state a cause of action which will entitle the party who files it to affirmative relief.³ It is to be observed, however, that a counter-claim must plead matters that are not entirely foreign to the matter to which the complaint relates,⁴ but it may, nevertheless, allege

124 Ind. 577; *Judd v. Small*, 107 Ind. 398; *McFadden v. Fritz*, 110 Ind. 1; *Compton v. Ivey*, 59 Ind. 352; *Indiana, etc., Co. v. Finnell*, 116 Ind. 414, 422; *Graves v. State*, 121 Ind. 357; *Yeager v. Wright*, 112 Ind. 230; *Roberts v. Graham*, 6 Wall. 578; *Cross v. People*, 47 Ill. 152, S. C. 95 Am. Dec. 474; *Stoddard v. Chambers*, 2 How. 284; *Houghton v. Jones*, 1 Wall. 702; *Fowler v. Bowery, etc., Bank*, 113 N. Y. 450.

¹ *City of Evansville v. Martin*, 103 Ind. 206; *Riehl v. Evansville Foundry*, 104 Ind. 70, 74. In *Indianapolis, etc., Co. v. Petty*, 30 Ind. 261, it was said: "The code has very little toleration for the practice of concealing questions from the lower courts with a view to make them available on appeal."

² Under the code a counter-claim is a pleading by a party to a suit, or action, setting up an affirmative cause of action, and is really the correct name of the pleading often called a cross-complaint. In this State the pleading is usually designated as a cross-complaint, although in strictness it should be designated as a counter-claim. The terms "cross-complaint" and "coun-

ter-claim" as ordinarily used denote the same thing, although a counter-claim is something more than a cross-complaint, inasmuch as it includes the element of recoupment. *Standley v. Northwestern Insurance Co.*, 95 Ind. 254, and cases cited.

³ *Jones v. Hathway*, 77 Ind. 14; *Standley v. Northwestern, etc., Ins. Co.*, 95 Ind. 254; *Dietrich v. Koch*, 35 Wis. 618, 626; *Tyler v. Willis*, 33 Barb. 327, 333; *Belleau v. Thompson*, 33 Cal. 495; *Great West Ins. Co. v. Pierce*, 1 Wyo. 49; *Clarkson v. Manson*, 60 How. Pr. Rep. 45, 48; *Gilliman v. Eddy*, 8 How. Pr. Rep. 133; *Winterfield v. Bradnum*, 3 Q. B. D. 324, 326; *Hay v. Short*, 49 Mo. 139, 143; *Grignon v. Black*, 45 N. W. Rep. 122; *Thomson v. Sanders*, 118 N. Y. 252, S. C. 23 N. E. Rep. 374; *Woodruff v. Garner*, 27 Ind. 4.

⁴ *Sterne v. First National Bank*, 79 Ind. 560; *Williams v. Boyd*, 75 Ind. 286; *Hunter v. McLaughlin*, 43 Ind. 38; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Grimes v. Duzan*, 32 Ind. 361; *Campbell v. Routt*, 42 Ind. 410; *White v. Miller*, 47 Ind. 385; *Thompson v. Toohey*, 71 Ind. 296; *Washburn v.*

such facts as constitute a substantive cause of action. There is such a clear and well defined distinction between a counter-claim and an answer that it has been held again and again that an answer can not perform the office of a counter-claim.¹

§ 478. **Requisites of a Counter-Claim**—A counter-claim or cross-complaint is to be tested substantially as a complaint, and must, as a general rule, be sufficient in itself.² As it is to be thus tested and must stand substantially as a complaint, it is but reasonable to hold that it may, when radically defective, be challenged on appeal.³ It is not to be forgotten, however, that it is only counter-claims that are substantially cross-complaints that can be first assailed in the court of last resort. Not every pleading that opposes a cause of action by an affirmative defense can be regarded as strictly a counter-claim, and it is only pleadings that are properly counter-claims that the rules stated are relevant. The fact that a defense by way of mere supposition is not always a counter-claim in the sense implied in a pleading setting up a cause of action is referred to does

not, 72 Ind. 213; *Williams v. Gabe*, 62 Ind. 259; *Gabe v. McGinnis*, 55 Ind. 75 Ind. 286; *Standley v. North-rop, etc., Ins. Co.*, 95 Ind. 234; *Harrison v. McCormick*, 69 Cal. 616, S. C. 115 Rep. 456; *Humbert v. Brisbane*, 100 Cal. 506; *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, S. C. 100 W. Va. 809. The name does not determine the character of the pleading; it must be determined from the facts. *Searle v. Whipperman*, 79 Ind. 115; *Anderson v. Hosford*, 110 Ind. 572; *Reed v. Reed*, 80 Ind. 1; *Harrison v. McCormick*, 69 Cal. 616, S. C. 115 Cal. 56. *Person, etc., Association v. Person*, 88 Ind. 405; *Gaff v. Greer*, 102 Ind. 2; *Hadley v. Prather*, 64 Ind. 236; *Thitt v. Smith*, 69 Ind. 463; *Reed v. Reed*, 80 Ind. 1; *Conger v. Conger*, 104 Ind. 592; *Schee v. McQuillan*, 100 Ind. 269; *Toledo, etc., Works v. Toledo*, 100 Ind. 253; *Stockton v. Stockton*, 100 Ind. 510; *Branham v. Johnson*, 100 Ind. 259; *Hinkle v. Margerum*, 50 Ind. 240. ² *Gossard v. Woods*, 98 Ind. 195; *Jones v. Hathaway*, 77 Ind. 14. ³ *Conger v. Miller*, 104 Ind. 592; *Wadkins v. Hill*, 106 Ind. 543; *Shoemaker v. Smith*, 74 Ind. 71; *Masters v. Beckett*, 83 Ind. 595; *Anderson v. Wilson*, 100 Ind. 402; *Ewing v. Patterson*, 100 Ind. 326. There is an exception to this general rule which it may be well to note, although it does not affect the phase of the subject under immediate consideration, and that is that an exhibit filed with the complaint may be referred to by the counter-claim or cross-complaint. *Pattison v. Vaughan*, 40 Ind. 253; *Sidener v. Davis*, 69 Ind. 336; *Gardner v. Fisher*, 87 Ind. 369; *Anderson v. Wilson*, 100 Ind. 402. The exception tests the rule but does not overthrow it; it is, indeed, all the clearer and stronger for the test.

not, however, oppose the conclusions stated, since there may be a mere defense in the nature of a counter-claim. A defense which does no more than meet a cause of action alleged in a complaint can not, with propriety, be denominated a cross-complaint or a counter-claim.¹ In a qualified sense such a defense may be a counter-claim, that is, it may arise out of a counter-claim—it may be an affirmative claim opposed to that of the plaintiff—but it is, nevertheless, not a counter-claim in the sense in which that term is employed when a pleading which is akin to a cross-complaint and which sets forth facts constituting a cause of action entitling the party to affirmative relief is intended to be named or designated.

§ 479. *Reply*—The principle which requires the conclusion that the sufficiency of an answer can not be challenged on appeal for the first time applies to a reply, and it has been held that a reply can not be successfully attacked for the first time on appeal.² This principle is, indeed, the one which gives to an appellate tribunal its chief characteristic, for such a tribunal is primarily and essentially one for the review of decisions of a court of inferior jurisdiction and not one for the decision of questions not adjudicated by some other judicial tribunal. Manifestly a leading purpose of the creation of appellate tribunals is to give litigants an opportunity for securing the judgment of two courts upon the same questions; if it were otherwise it would in many instances be quite as well to simply require the decision of a single tribunal. It is, therefore, a departure from

¹ It is upon this ground that the decision in *Hall v. Hedrick*, 125 Ind. 326, S. C. 25 N. E. Rep. 350, may be, perhaps, sustained, but the doctrine of that case can not be extended to cases where the counter-claim states a cause of action which entitles the cross-complainant to affirmative relief. This is evident when it is brought to mind that a counter-claim will stand although the complaint is dismissed, and that a cross-complaint or counter-claim may, and usually does, state a cause of action

upon which relief may be adjudged as fully as to an original plaintiff. The case of *Luntz v. Greve*, 102 Ind. 173, is of a different type, for in that case the counter-claim secured all the relief an answer could possibly do under the statute, but an answer can, it is obvious, very rarely, if ever, procure the full relief that a counter-claim may secure.

² *Hon v. State*, 89 Ind. 249; *Walker v. Scott*, 106 N. C. 56, S. C. 11 S. E. Rep. 364; *Wood v. Lake*, 13 Wis. 84.

principle to permit original questions to be made in an appellate tribunal, except in cases where there is clearly no cause of action,¹ or no jurisdiction.

§ 480. **The Doctrine applicable to Answers and Replies**—It is true that in some of the cases expressions may be found which seem to authorize the conclusion that the question of the sufficiency of an answer or reply may be made in the first instance on appeal, but the strong current of authority is against that doctrine. It is, indeed, impossible to enforce that doctrine without doing violence to one great object which the framers of our code sought to attain, and that is, as has been already suggested, to compel parties to bring forward all objections which they desire to make available on appeal so that the adverse parties may be informed of them and the trial court be so fully apprized of their character as to enable it to intelligently grasp the legal principles involved. In almost every phase and posture—in civil cases, in criminal cases and in special proceedings—the general question has been presented and in every well considered case the judgment of the court has been that questions on the pleadings (subject to the exceptions heretofore noticed) must be so presented to the trial court as to challenge and require its decision.²

¹ Some able courts do, indeed, hold that even where there is no cause of action stated an attack on appeal for the first time will be unavailing. *Knapp v. Simon*, 96 N. Y. 284; *McKnight v. Evlin*, 52 N. Y. 399.

² *Zehnor v. Beard*, 8 Ind. 96; *Hornrger v. State*, 5 Ind. 300; *Scheible v. Agle*, 89 Ind. 323; *Cupp v. Campbell*, 3 Ind. 213; *Buchanan v. Berkshire Ice Co.*, 96 Ind. 510; *Shirts v. Jones*, 28 Ind. 458; *Hauser v. Roth*, 37 Ind. 89; *Johnson v. Stebbins*, 5 Ind. 1; *Newhouse v. Miller*, 35 Ind. 463; *Annun v. State*, 38 Ind. 32; *Campbell v. Coon*, 61 Ind. 516; *English v. State*, 81 Ind. 455; *Louisville, etc., v. Fox*, 101 Ind. 416; *Kurtz v.*

Frank, 76 Ind. 594; *Smith v. Foster*, 59 Ind. 595; *Sloan v. Wittbank*, 12 Ind. 444; *Allis v. Gumberts*, 1 Ind. 104; *Key v. Robinson*, 8 Ind. 368; *Shaw v. Binkard*, 10 Ind. 227; *Tinder v. Association*, 47 Ind. 351; *Bowman v. Philips*, 47 Ind. 341; *Rhodes v. Mummery*, 48 Ind. 216; *Higham v. Warner*, 69 Ind. 549; *Potts v. Felton*, 70 Ind. 166. Other courts affirm the same general doctrine. *Copley v. Rose*, 2 N. Y. 115; *Neff v. Clute*, 12 Barb. 466; *Lane v. Pere Marquette, etc., Co.*, 62 Mich. 63; *S. C. 28 N. W. Rep. 786*; *Patton v. Gash*, 99 N. C. 28; *S. C. 6 S. E. Rep. 193*; *Richardson v. Woodring*, 74 Iowa, 149; *S. C. 37 N. W. Rep. 122*; *Jefferson v. Chapman*, 127 Ill. 438.

§ 481. **The Reason of the Rule**—There is solid reason for the general rule that a party who litigates questions without presenting objections to the pleadings, or without calling upon the trial court to require pleadings, shall not be heard on appeal to urge that there were no pleadings or that they were not sufficient, and a departure from this rule would cause almost endless and hopeless confusion. The rule is required to give consistency to appellate practice; indeed without it there could be no system, since, in the absence of such a rule, cases would be but particular instances unregulated by any principle, forming fragmentary and disjointed parts of legal procedure without connecting elements, and destitute of uniformity and stability. The rule is required by the principle often declared by our own and other courts that parties on appeal must abide by the theory adopted by them in the trial court.¹ It is required by the general doctrine that the court of last resort should not be required to decide a question that has not been passed upon by the trial court,² since any other holding would in effect make the appellate court one of original jurisdiction. The true theory is that there must be a decision by a court of original jurisdiction to be reviewed by the appellate tribunal, for unless this be so the appellate court becomes a trial court.

§ 482. **Rendering Judgment on the Pleadings**—Resembling but yet essentially different from the questions arising upon the rule which permits complaints and counter-claims, or cross-com-

¹ *Brink v. Reid*, 122 Ind. 257; *Louisville, etc., Co. v. Wood*, 113 Ind. 544; *Carver v. Carver*, 97 Ind. 497; *Adams v. Davis*, 109 Ind. 10; *Lake Erie, etc., Co. v. Acres*, 108 Ind. 548; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480; *Vann v. Rouse*, 94 N.Y. 401, 407; *Gernon v. Hoyt*, 90 N. Y. 631; *Campbell v. Birch*, 60 N.Y. 214; *Wilson v. Locke*, 58 N.Y. 642; *Hill v. Heermans*, 17 Hun. 470; *Paige v. Fazackerly*, 36 Barb. 392.

² *Osborne & Co. v. Williams*, 37 Minn. 507; *Sylvia v. Sylvia*, 11 Col. 319, 17 Pa. Rep. 912; *Porter v. Western, etc., Co.*, 97 N. C. 66, S. C. 2 Am. St. R. 272; *Cur-*

tiss v. Hazen, 56 Conn. 146; *Home, etc., Co. v. Caldwell*, 85 Ala. 607; *Hanson v. Fricker*, 79 Cal. 283, 21 Pac. Rep. 751; *Nelson v. Wilson*, 75 Iowa, 710, S. C. 38 N. W. Rep. 134; *Coffman v. Acton*, 74 Iowa, 147, S. C. 37 N.W. Rep. 121; *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. Rep. 76; *Engleman v. Arnold*, 118 Ind. 81, S. C. 20 N. E. Rep. 505; *Taylor v. Nichols*, 86 Tenn. 32, S. C. 5 S. W. Rep. 436; *Beatty v. Brown*, 85 Ala. 209; *Jones v. Degge*, 84 Va. 685; *Bewley v. Graves*, 17 Ore. 274, 20 Pac. Rep. 322; *Budd v. Power*, 8 Mont. 380.

plaints, to be assailed in the first instance on appeal are the questions which grow out of the practical application of the rule that a party may, in the proper case, have judgment in his favor on the pleadings.¹ It has been held that where there is no complaint or no answer the party in fault may be compelled to suffer judgment, unless there has been a waiver or something has intervened which precludes the party from demanding such a judgment.² But the question which connects itself with the subject here under immediate consideration is not solved by the rule stated, since it is here necessary to ascertain whether a party can in the first instance successfully demand judgment on the pleadings after the case reaches the appellate court. It is clear from the reasoning in analogous cases that the sound rule is that the question of the right of a party to judgment on the pleadings can not be first made on appeal, since no opportunity was afforded the trial court to consider or decide that question, and beyond controversy the general rule is that no question can be made on appeal which was not appropriately presented to the trial court. The exceptions to this general rule have been considered, and it is evident that the case of a party asking judgment on the pleadings does not fall within those exceptions; hence it is correctly held that a party must first move in the trial court for judgment on the pleadings.³

§ 483. **Set-Off**—After much wavering it has been held that a set-off is substantially the same thing as a counter-claim or

¹ R. S. 1881, § 566.

² *Fitch v. Polke*, 5 Blackf. 86; *Board of Trustees of the Wabash, etc., Co. v. Mayer*, 10 Ind. 400; *Martindale v. Price*, 14 Ind. 115; *Needham v. Webb*, 20 Ind. 213. See, upon the subject generally, *Musselman v. Wise*, 84 Ind. 248; *Brown v. Searle*, 104 Ind. 218; *Donaldson v. Dunn*, 87 Ind. 343; *Cox v. Vickers*, 35 Ind. 27; *Train v. Gridley*, 36 Ind. 241; *Locke v. Merchants National Bank*, 66 Ind. 353, 360.

³ *Shordan v. Kyler*, 87 Ind. 38; *Cupp v. Campbell*, 103 Ind. 213; *Penn-*

sylvania Co. v. Roney, 89 Ind. 453; *Bledsoe v. Rader*, 30 Ind. 354; *Meredith v. Lackey*, 16 Ind. 1, 6; *Wells v. Dickey*, 15 Ind. 361; *Martindale v. Price*, 14 Ind. 115; *Dunham v. Courtenay*, 24 Neb. 627; *Budd v. Power*, 8 Mont. 380. See, generally, *Willey v. Strickland*, 8 Ind. 453; *Meredith v. Lackey*, 14 Ind. 529; *Roush v. Emerick*, 80 Ind. 551; *Hauser v. Roth*, 37 Ind. 89; *Fisher v. Purdue*, 48 Ind. 323; *Trentman v. Eldridge*, 98 Ind. 525, 527; *Fowler v. Bowery Savings Bank*, 113 N. Y. 450.

cross-complaint, so that, possibly, it may be assailable on appeal.¹ Assuming that a set-off is in substance a counter-claim, there is no difficulty in holding it subject to attack on appeal, but it is not quite clear on principle that it can be regarded as the same thing as a counter-claim. That question, however, is settled by the later decisions. A set-off is hard to classify; it is in truth a nondescript,² and while there are strong reasons against classifying it as a counter-claim it can hardly be said that the classification is indefensible. At all events, it is better to treat the question as settled and steadily hold that it stands on substantially the same footing as a cross-complaint or counter-claim, than to produce confusion and uncertainty by a wavering line of decisions.

§ 484. The Rule where a bad Answer is proved—There is a class of cases which seems to trench upon the general rule that questions upon the pleadings, or questions concerning the failure to plead, must be first presented to the trial court and its decision invoked, but, upon examination, it will be found that the cases of the class first mentioned may be discriminated from those which assert and enforce the general rule, although some ex-

¹ *Blount v. Rick*, 107 Ind. 238, 245; *Kennedy v. Richardson*, 70 Ind. 524; *Daily v. National, etc., Co.*, 64 Ind. 1; *Gregory v. Gregory*, 89 Ind. 345; *Curran v. Curran*, 40 Ind. 473; *Mullendore v. Scott*, 45 Ind. 113; *Ewing v. Patterson*, 35 Ind. 326; *Shoemaker v. Smith*, 74 Ind. 71; *Boil v. Simms*, 60 Ind. 162; *Wills v. Browning*, 96 Ind. 149; *Rush v. Thompson*, 112 Ind. 158, 165. The earlier cases asserted a somewhat different doctrine. *Hamilton v. Noble*, 1 Blackf. 188; *Jones v. McGrew*, 1 Blackf. 192; *Coe v. Givan*, 1 Blackf. 367; *Hanna v. Ewing*, 3 Blackf. 34; *Young v. Harry*, 4 Blackf. 167; *Hurd v. Earl*, 4 Blackf. 184; *Conklin v. Waltz*, 3 Ind. 396. The earlier decisions were not without some strength, inasmuch as it is settled that a set-off can not be pleaded to an action for a tort, and an answer that could not

be good might well be held bad for want of facts. *Richey v. Bly*, 115 Ind. 232; *Zeigelmüller v. Seamer*, 63 Ind. 488; *Harris v. Rivers*, 53 Ind. 216; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Indianapolis, etc., Co. v. Ballard*, 22 Ind. 448. This consideration proves that the reasoning in *Boils v. Simms*, *supra*, is not sound, whatever may be said of the conclusion reached. The case of *Roback v. Powell*, 36 Ind. 515, can not be harmonized with that case, nor, indeed, with the cases first named above.

² That a set-off is a nondescript is evidenced in part at least by the fact that it may be pleaded notwithstanding the bar of the statute of limitations. *Fankboner v. Fankboner*, 20 Ind. 62; *Armstrong v. Caesar*, 72 Ind. 280; *Livigood v. Livigood*, 6 Blackf. 268.

pressions in the opinions may not harmonize with the rule. The cases to which reference is made as creating apparent exceptions to the general doctrine are those in which it is held that evidence proving a bad answer will not support a judgment in favor of the defendant.¹ Properly limited and applied the doctrine of these cases is not at variance with principle, but it is one to be carefully confined within reasonable limits. The doctrine may be upheld where the evidence wholly fails to make out a defense; that is, where, conceding all that it fairly tends to prove, the defense fails as to so material point.² It can not be so extended as to be allowed to control cases where the evidence is simply incompetent,³ as for instance, when parol evidence is given where it should have been written, or where there is a curable variance,⁴ since, to permit this would be to permit an indefensible violation of the general rule that such questions must be presented by an appropriate objection and exception in the court of original jurisdiction.

§ 485. **Effect of the Rule respecting the proving of a bad Answer**

—The cases which hold that, where the evidence entirely fails to establish a defense, a judgment in favor of the defendant will be reversed, although the answer was not attacked in the trial court, do not authorize the inference that a question may be made on appeal for the first time upon the evidence; on the contrary, the inference is that the question must be appropriately presented to the trial court and this must be done, in general, by a motion for a new trial. It is evident, therefore, that the question is considered on appeal upon the evidence, not upon the pleading, and that the question considered is the same as that presented to the trial court and upon which that court made a decision. All the conditions of the general rule requiring questions to be first presented to the trial court are thus

¹ *McCloskey v. Indianapolis, etc., Co.*, 67 Ind. 86; *Dorman v. State*, 56 Ind. 454; *Freitag v. Burke*, 45 Ind. 38; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1. *well v. State*, 101 Ind. 1; *Riehl v. Evansville Foundry Association*, 104 Ind. 70.

² It may well be doubted whether the decision in *Roback v. Powell*, 36 Ind. 515, does not go too far. ⁴ *Coates v. First National Bank*, 91 N. Y. 20, 31; *Roberts v. Graham*, 6 Wall. 578; *Pike v. Evans*, 15 John. 210, 213.

³ *Graves v. State*, 121 Ind. 357; *Stock-*

complied with, and there is neither a shifting of position nor an attempt to secure a decision from the appellate court upon an original question. It is clear, that, with rare exceptions, which it is not important to here note, an appellant would not be heard to complain that the evidence was insufficient to establish a defense unless he had properly presented that question to the trial court. It is, in truth, not because the answer is insufficient that a judgment is vulnerable in a case of the class under consideration, but the judgment is subject to attack because the finding or verdict is contrary to law inasmuch as there is no evidence upon which the law will permit a recovery by the defendant. He fails because he has no evidence to establish a fact, or facts, essential to a recovery, not because he has an insufficient answer.

§ 486. Effect of proving a bad Answer—The fact that the trial court declines to find upon insufficient evidence although the answer is fully proved, does not require the conclusion that the case is an exception to the general rule. The appeal by the plaintiff brings up the case on the evidence and he may, with entire propriety, insist upon a reversal if no defense is established, although he may not have assailed the answer in the court below, provided, of course, that he there made the proper motion and reserved the proper exceptions. He can not, to be sure, assail the answer for the first time on appeal, but he may attack the proof, for it is one thing to attack the proof and another to attack a pleading. Where the defendant appeals and has no evidence sufficient to authorize a finding or verdict in his favor, he can not, with propriety or justice, assert that, although he has no evidence, yet, as he has an answer which has not been challenged, he is entitled to judgment.¹

¹ The early New York cases of *Fox v. Hunt*, 8 How. Pr. R. 12, and *Mallory v. Lamphear*, 8 How. Pr. 491, have been practically overruled. *Smith v. Countryman*, 30 N. Y. 655. It is held in the case last named that objections to the pleadings should be presented to the trial court and the case of *Reynolds v. Lounsbury*, 6 Hill, 534, is referred to

as asserting that doctrine. In strictness objections should be presented to pleadings before trial, but it does not follow because objections are not presented before trial that a party can recover where the facts proved are not such as will support a finding or verdict. The question is not disposed of by declaring that objections to plead-

§ 487. **Anomalous Cases**—Anomalous cases occasionally arise which can hardly be placed under any general rule where error may be assigned by one who has not joined issue in such a mode as would ordinarily entitle him to relief.¹ As an illustration of the character of the cases of which we are speaking may be taken one wherein the trial court proceeds upon an erroneous theory which is carried to a judgment affecting the interests of all of the parties to the suit or action. In such a case the whole judgment or decree must be reversed in order that complete justice may be done. But such cases are very rare, and there should be very strong reason for creating exceptions to the general rule. It is very seldom, indeed, that a case can arise in which a judgment will be disturbed where the question was not definitely and appropriately made in the trial court, and hence it is never safe in practice to depart from settled principles.

§ 488. **Criminal Cases**—Very much the same rule governs the subject of making objections for the first time on appeal in criminal cases as that which prevails in ordinary civil actions. As criminal cases and civil actions are controlled by the same general principle it is not illogical or unnatural to speak in this place of the rule which obtains in criminal cases. The general rule in such cases is that an indictment or information which wholly fails to charge a public offense may be originally assailed on appeal.² This rule is obviously just, since it would be de-

ings must be presented in due season, for the question is not whether a pleading is sufficient or insufficient but whether there is evidence which will warrant a finding or verdict. There are New York cases holding that although there is a bad pleading, unobjected to, still judgment may be given upon the evidence. Some of the cases carry the doctrine farther than it can justly be carried under our system of procedure. *Wright v. Hooker*, 10 N. Y. 51, 59; *Meyer v. Fiegel*, 34 How. Pr. R. 434; *Lounsbury v. Purdy*, 18 N. Y. 515, 521; *Emery v. Pease*, 20 N. Y. 62, 64; *Winterson v. Eighth Ave. R. Co.*,

2 Hilt. 389; *Pope v. Dinsmore*, 8 Abb. Pr. R. 429.

¹ *Whipperman v. Dunn*, 124 Ind. 349. See, also, *State v. Templin*, 122 Ind. 235. This ruling in the case cited may be sustained upon the ground that the opening of the controversy renders it necessary to open it as to all, but the doctrine is, at best, one to be limited rather than extended, since its extension would result in confusion detrimental to the proper administration of justice.

² *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242; *Arbintrode v. State*, 67 Ind. 267. It is very

structive of principle to hold that a conviction of a criminal offense can be sustained without an indictment or information. It is, however, to be borne in mind that it is true in criminal cases as it is in civil actions, that an assault first made by the assignment of errors does not always serve the purpose of a motion to quash, for defects may be reached by a motion of that kind that will not avail on an original attack in the appellate tribunal. Thus, an objection that an information or indictment is uncertain may avail on a motion to quash and yet be without avail where the first attack is made by a specification in the assignment of errors.¹ It is, indeed, true that defects available on a motion to quash are not always available on a motion in arrest of judgment.² Analogous to the rule which prevails respecting complaints is the general rule respecting original attacks upon indictments in the assignment of errors, for that rule is that the attack will fail if there is one valid count sustaining the judgment, although there may be many bad ones. The rule upon this subject is similar to that which runs

doubtful whether these cases do not carry the doctrine too far, for they hold that the accused may present the question on appeal although he pleaded guilty in the trial court. In civil cases a confession would preclude an attack on appeal, and it is not easy to perceive why it should not do so in criminal cases, except, perhaps, where there is no statute upon the subject, or no attempt to define an offense of the kind sought to be charged. The case of *Hays v. State*, 77 Ind. 450, goes even further, and its soundness may well be doubted. In suggesting these doubts, we do not mean to question the soundness of the rule that where no offense is charged and there is no plea of guilty, the indictment may be challenged on appeal. It seems to us that the decision in *Mayer v. State*, 48 Ind. 122, is a correct expression of the law. The cases first named certainly go much beyond the earlier cases. In *Daily v.*

State, 10 Ind. 535, the question was not fully considered, and only a vague statement of the general rule was made. In *Reams v. State*, 23 Ind. 111, it was correctly held that the question of jurisdiction of the subject may be made on appeal. *Greer v. State*, 50 Ind. 267, does not touch the question.

¹ *Stewart v. State*, 113 Ind. 505. See, generally, *Lawrence v. Monroe*, 43 Kan. 125, S. C. 10 Law. Rep. Anno. 520.

² *Nichols v. State*, 127 Ind. 406; *Græter v. State*, 105 Ind. 271; *Greenley v. State*, 60 Ind. 141; *Lowe v. State*, 46 Ind. 305; *Shepherd v. State*, 64 Ind. 43; *Bright v. State*, 90 Ind. 343, 578; *Trout v. State*, 107 Ind. 580; *Rubush v. State*, 112 Ind. 107, 113; *Hoover v. State*, 110 Ind. 349; *State v. Nowland*, 29 Ind. 212, 216. The reason for the rule is admirably stated by *Frazier, J.*, in the case last cited. What is there so well said applies with even greater force to an attack made for the first time on appeal.

throughout the whole system of procedure ; the objection must be made to separate pleadings, whether represented by counts or by paragraphs, distributively, for a general attack will fail if one or more¹ counts, or paragraphs, be sufficient to support the judgment. It is, to repeat, in substance, what has been elsewhere said, always safer to attack in detail, for joint attacks are often perilous.

¹ It is well settled that where there is one good count in an indictment a motion to quash addressed to the pleading as an entirety will fail. *Dantz v. State*, 87 Ind. 398; *Bryant v. State*, 106 Ind. 549; *Casily v. State*, 32 Ind. 62; *State v. Staker*, 3 Ind. 570; *Dukes v. State*, 11 Ind. 557.

CHAPTER XXIV.

HOLDING PARTIES TO TRIAL COURT THEORIES.

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| § 489. The cardinal principle. | § 497. Limitations of the rule. |
| 490. Adherence to theory. | 498. Exceptions to the rule. |
| 491. Illustrative cases. | 499. The rule as affecting jurisdictional questions. |
| 492. Instances of the application of the general doctrine. | 500. Special cases. |
| 493. The rule as applied to cases involving constitutional questions. | 501. Nature of jurisdictional questions. |
| 494. The theory as outlined by the pleadings. | 502. Original objections to jurisdiction. |
| 495. Requiring adherence to the opening statement. | 503. Jurisdiction of the subject not the same thing as jurisdiction of the particular case. |
| 496. The doctrine of election. | |

§ 489. **The Cardinal Principle**—The cardinal principle of appellate procedure which requires that questions of which a review is sought shall first be appropriately brought before the trial court for decision, makes it indispensably necessary that positions should not be shifted on appeal, for, if parties were allowed to change positions, the appellate tribunal would often be compelled to decide questions as purely original ones, and this, certainly, is not the purpose for which they were created. It is, therefore, with reason held that parties must stand by the positions assumed in the trial court and upon which they asked and obtained rulings. The same rulings are to be reviewed and not different ones.¹ It may be true that in some instances parties are not bound to abide by their positions in minute detail, but they are, at all events, required to abide by the general positions upon which they planted themselves in the trial court.

¹ As illustrative of this principle may be adduced those cases which hold that questions can not be decided in advance for the reason that an appellate tribunal only reviews decisions made by an inferior tribunal. *Fisk v. Henarie*, 14 Ore.

29; *Railroad v. Gibbes*, 24 So. Car. 60, 75. It has been held by our own court that questions will not be considered on appeal, although parties agree that they shall be considered. *Whitman v. Weller*, 39 Ind. 515.

§ 490. **Adherence to Theory**—The strong current of authority carries the general principle stated to its logical conclusion, for the courts are well agreed upon the doctrine that the theory acted upon in the lower court must be adhered to in the higher.¹ The rule that the theory acted upon in the trial court must be adhered to upon appeal finds expression in various forms, but the meaning conveyed, whatever the form of words employed may be, is essentially the same. Some of the courts express the rule by saying that new issues can not be made on appeal,² others give it expression by saying that there can be no change of base on appeal,³ and others by some such expression as that the matter was not contested below and it can not be contested above.⁴

§ 491. **Illustrative Cases**—The principle of appellate practice requiring adherence to the theory assumed in the lower court is illustrated in many cases, but in all the principle is adhered to with undeviating steadiness. It seems hardly necessary or profitable to refer to particular instances for the sole purpose of establishing the existence of a rule so evidently just and so essential to the fair and orderly administration of justice, but it is necessary and profitable to refer to some of those instances for the purpose of exhibiting the practical effect and operation

¹ *Lake Erie, etc., R. Co. v. Acres*, 108 Ind. 548; *Graham v. Nowlin*, 54 Ind. 389; *Carver v. Carver*, 97 Ind. 497; *Brink v. Reid*, 122 Ind. 257; *Feder v. Field*, 117 Ind. 386, S. C. 20 N. E. Rep. 120; *Manifold v. Jones*, 117 Ind. 212, S. C. 20 N. E. Rep. 124; *Bull v. Coe*, 77 Cal. 54; *Trigg v. Taylor*, 27 Mo. 245; *Capital Bank v. Armstrong*, 62 Mo. 59; *Walker v. Owen*, 79 Mo. 563; *Wheeler v. American Central Ins. Co.*, 6 Mo. App. 235.

² *O'Leary v. Iskey*, 12 Neb. 136; *Ophir, etc., Co. v. Carpenter*, 6 Nev. 393; *St. Louis Brokerage Co. v. Bagnell*, 76 Mo. 554; *Blackwell v. Smith*, 8 Mo. App. 43; *King v. Rea*, 13 Col. 69; *Jennings v. Bank*, 13 Col. 417.

³ As Judge Dillon says, "He can not change his base after an appeal." *Garland v. Wholebau*, 20 Iowa, 271; *Laverty v. Woodward*, 16 Iowa, 1. *Vide*, also, *Barlow v. Brock*, 25 Iowa, 308; *Bishop v. Carter*, 29 Iowa, 165; *Robinson v. Keith*, 25 Iowa, 321; *Coonrod v. Benson*, 2 *Greene (Iowa)*, 179.

⁴ *Bouknight v. Brown*, 16 So. Car. 155, 165. See, generally, *Lawrence v. Grambling*, 13 So. Car. 120; *Chamble v. Tribble*, 16 So. Car. 165; *Hickenbottom v. Delaware, etc., Co.*, 122 N. Y. 91; *Crippen v. Morss*, 49 N. Y. 63; *Platner v. Platner*, 78 N. Y. 90; *Egan v. Menard*, 32 Minn. 273; *Brown v. Minneapolis, etc., Co.*, 25 Minn. 461; *Spencer v. Levering*, 8 Minn. 461.

of the rule, since an abstract statement of a rule falls far short of conveying a just conception of its practical effect and importance. Such a conception only concrete examples can forcibly and clearly convey. The practical working of the rule in one of its phases is well illustrated by the cases wherein it is held that if parties voluntarily try a case upon the theory that it is a suit in equity, and not an action at law, they must abide by their theory in the higher court.¹ The obverse of this doctrine is exhibited in the cases which declare that a party who submits without objection to a trial of his case by the court can not successfully claim on appeal that he was entitled to a jury trial.² To the general class of which the cases referred to are types belongs the case wherein it was held that an objection that an account should have been referred to a master comes too late on appeal.³ Exhibiting another phase of the general principle is the case which decides that an objection to the validity of a rule of court can not be first urged in the appellate court.⁴ Still another phase of the principle appears in the case which adjudges that a party who has treated a contract as valid in the trial court can not impeach it on appeal for illegality.⁵ So, it may be said of cases wherein a party is held to the construction of a contract insisted upon by him in the trial court, that they present peculiar phases of the subject and illustrate the rule.⁶ In another case the rule was so applied as to preclude a party, who acted upon the theory in the trial court that a deed

¹ *Farmer's Bank v. Butterfield*, 100 Ind. 229; *Ikerd v. Beavers*, 106 Ind. 483; *Jarboe v. Severin*, 112 Ind. 572; *Crabs v. Mickle*, 5 Ind. 145; *Wallace v. Harris*, 32 Mich. 380; *Dunbar v. Locke*, 62 N. H. 442. See, also, *Davidson v. Morrison*, 86 Ky. 397, 5 S. W. Rep. 871; *Reynes v. Dumont*, 130 U. S. 354. In the case of *Harrison v. Brooklyn, etc., Co.*, 100 N. Y. 621, the defendant asked judgment in the trial court upon the ground that the complaint stated facts showing an actionable trespass, and it was held on appeal that he was concluded from insisting that the com-

plaint did not state facts showing such a trespass.

² *Brown v. Home Savings Bank*, 5 Mo. App. 1; *Adams County v. Hunter*, 78 Ia. 328, 43 N. W. Rep. 208.

³ *Whittemore v. Fisher (Ill.)*, 24 N. E. Rep. 636.

⁴ *Bomar v. Asheville, etc., Co.*, 30 So. Car. 450, S. C. 9 S. E. Rep. 512.

⁵ *Russell v. Rosenbaum*, 24 Neb. 769, S. C. 40 N. W. Rep. 287.

⁶ *Metzler v. James*, 12 Col. 322, 19 Pac. Rep. 885; *Barrett v. Fisch*, 76 Ia. 553, 41 N. W. Rep. 310.

entitled him to the land described in it, from recovering money paid out by him.¹

§ 492. **Instances of the Application of the General Doctrine**—It would be a departure from the principle we are considering to permit parties to treat a case in the trial court as an agreed case, upon that theory secure a decision, and, on appeal, allow them to wage a contest upon a different theory, so that the cases which hold them to the original theory are based upon sound principle.² To the same general class are referable the numerous cases which hold that questions exclusively concerning the making or the failure to make parties can not be first raised on appeal.³ In harmony with the cases to which reference has been made are the cases which hold that where a party sues in contract when he should have sued in tort, he must stand to his original theory in the higher court.⁴ Upon the same principle it is held that a party who affirms the validity of a contract in

¹ *Downard v. Hadley*, 116 Ind. 131, 18 N. E. Rep. 457. See, generally, *Spickerman v. McChesney*, 111 N. Y. 686, 19 N. E. Rep. 266; *Fry v. State*, 81 Ga. 645, 8 S. E. Rep. 308; *Withers v. Jack*, 79 Cal. 21 Pac. Rep. 824; *Myers v. Cron*, 113 N. Y. 608, 21 N. E. Rep. 984; *Black v. Washington*, 65 Miss. 60, 3 So. Rep. 140; *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. Rep. 121; *Knowles v. State*, 27 Texas App. 503, 11 S. W. Rep. 522; *Schriber v. Richmond*, 73 Wis. 5, 40 N. W. Rep. 644; *Eaton v. Rocca*, 75 Cal. 93, 16 Pac. Rep. 529; *Hamilton v. Ames*, 74 Mich. 298, 41 N. W. Rep. 930; *Devecmon v. Shaw*, 70 Md. 219, 16 Atl. Rep. 645; *Dorr v. Rohr*, 82 Va. 359, S. C. 3 Am. St. Rep. 106.

² *Barr v. Hannibal, etc., Co.*, 30 Mo. App. 248; *Booth v. Cottingham*, 126 Ind. 431, 26 N. E. Rep. 84.

³ *La Crosse v. Melrose*, 22 Wis. 459; *Truman v. McCollum*, 20 Wis. 360; *Collins v. Lightle*, 50 Ark. 97, 6 S. W. Rep. 596; *Great Western, etc., Co. v. Woodmas, etc., Co.*, 12 Col. 46, 20 Pac.

Rep. 771; *Bragg v. Olson*, 128 Ill. 540, 21 N. E. Rep. 519; *Alexander v. Steele*, 84 Ala. 332, 4 So. Rep. 281; *Towell v. Hollweg*, 81 Ind. 154; *Reeder v. Maranda*, 66 Ind. 485; *Pate v. First National Bank*, 63 Ind. 254; *Groves v. Ruby*, 24 Ind. 418. The rule in this State is that defect of parties is waived if not opportunely presented by answer or demurrer. *Atkinson v. Mott*, 102 Ind. 431; *Mobley v. Slonaker*, 48 Ind. 256; *Shore v. Taylor*, 46 Ind. 345. The demurrer must assign the proper cause or it will not present the question. *Wright v. Jordan*, 71 Ind. 1; *Cleaveland v. Vajen*, 76 Ind. 146; *Giles v. Canary*, 99 Ind. 116. If a party fails to object to the validity of a contract voidable under the statute of frauds he can not successfully urge the objection on appeal. *Hodges v. Kowing*, 58 Conn. 12, 7 Law. Rep. Anno. 87.

⁴ *Samuels v. Blanchard*, 25 Wis. 329; *Salisbury v. Howe*, 87 N. Y. 128; *Lockwood v. Quackenbush*, 83 N. Y. 607.

the trial court must proceed upon that theory throughout the litigation in the appellate tribunal.¹ So, where a party pleads a judgment simply as an estoppel, he will not be heard on appeal to assert that it is a counter-claim.² Asking instructions upon one definite and designated theory precludes the party from assuming a different one.³ The Court of Appeals of New York has carried the general doctrine very far, for it has held that the question as to the constitutionality of a law can not be made for the first time in that court.⁴

§ 493 The Rule as applied to Cases involving Constitutional Questions—The rule as extended by the Court of Appeals of New York in the cases referred to may be made to operate oppressively, and, in order to prevent this result, it should be held to apply only where the pleadings or proceedings ex-

¹ *Ross v. Citizens' Insurance Co.*, 7 Mo. App. 575. See, upon the general question, *Nance v. Metcalfe*, 19 Mo. App. 183; *Corn v. City of Cameron*, 19 Mo. App. 573; *Wright v. Sanderson*, 20 Mo. App. 534; *Fell v. Rich Hill Coal Mining Co.*, 23 Mo. App. 216.

² *McGill v. Wallace*, 22 Mo. 675. See *Cooper v. City of Big Rapids*, 67 Mich. 607, for an example of an unsuccessful attempt to shift positions.

³ *Louisville, etc., Co. v. Wood*, 113 Ind. 544, 564; *Doty v. Gillett*, 43 Mich. 203.

⁴ *Deleaney v. Brett*, 51 N.Y. 78; *Vose v. Cockcroft*, 44 N. Y. 415. In the case last named the court cited *Lee v. Tilotson*, 24 Wend. 337; *Van Hook v. Whitlock*, 26 Wend. 43; *Homan v. Brinckerhof*, 1 Denio, 184; *Caldwell v. Colgate*, 7 Barb. 253. Earle, J., said: "It would be quite extraordinary if, under our system of pleading, with such an answer, the defendants were permitted to show, as a defense, that the bond given in proceedings under a statute which was unconstitutional and void." In *Deleaney v. Brett*, *supra*, it was said by the court that, "The Court of Appeals is

strictly an appellate tribunal," and it was also said that: "A review of a question contemplates and involves a previous consideration and examination, and its actual determination implies not only that it has been considered and examined, but that it has in fact been decided and determined. This view was taken by the Court of Appeals of the above provisions of the code soon after its adoption, in *Lake v. Gibson* (2 Coms. 188)." There are many analogous cases in the New York reports and we cite a few of them: *Coates v. First National Bank of Emporia*, 91 N. Y. 20, 31; *Powell v. Waldron*, 89 N. Y. 328; *Clarke v. Sawyer*, 2 N. Y. 498; *Truscott v. King*, 6 N. Y. 147; *Fitch v. Rathbun*, 61 N. Y. 579; *Brookman v. Hamill*, 43 N. Y. 554; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; *Muldoon v. Blackwell*, 84 N. Y. 646. Upon the question of estoppel we have in our own reports a decision closely resembling that made in *Vose v. Cockcroft*, *supra*. *Coverdale v. Alexander*, 82 Ind. 503. See, also, *McFadden v. Fritz*, 110 Ind. 1.

pressly or by clear implication concede the constitutionality of the statute. If the course pursued is such as to estop the party, then, clearly enough he should be required to abide by his position in the trial court; but if there is no estoppel and the question of the validity of the statute arises incidentally, or as a mere matter of detail fairly comprehended under the general line of action pursued by the party, it should not be held that he is concluded, nor should he be held to be concluded where the question of the competency of the court to act at all in the case depends upon the validity of the legislative enactment. If there is no jurisdiction without a valid statute, then, it must follow that the question can not be foreclosed by waiver, or even by consent, since a court can not be made competent by the acts of the parties, or, which is the same thing, can not be invested with jurisdiction of the subject save by law. The doctrine that a party may estop himself from questioning the constitutionality of a statute is a settled one,¹ and it is not here questioned, nor is it encroached upon by holding that where jurisdiction of the subject is wholly dependent upon statute an estoppel can not so operate as to create an authority that can come only from the law-making power.

§ 494. **The Theory as Outlined by the Pleadings**—The principal theory is that outlined by the pleadings, and the familiar rule is that parties must keep within the issues made by the pleadings. It is clear that a party can not successfully change his theory on appeal where it is embodied or outlined in the pleadings upon which the issues were framed. It is held that if the parties put a definite construction upon the pleadings in the trial court and induce the court to act upon that construction they must adhere to it on appeal.² It is often declared that

¹ *Daniels v. Tearney*, 102 U. S. 415; *Perryman v. Greenville*, 51 Ala. 507; *Burlington, etc., Co. v. Stewart*, 39 Ia. 267; *People v. Murray*, 5 Hill, 468; *State v. Mitchell*, 31 Ohio St. 592; *Ferguson v. Landram*, 1 Bush, 548, S. C. 5 Bush, 230. It is quite well settled that even where life is at stake constitutional rights may be waived. *Butler v. State*, 97 Ind. 378; *United States v. Sacramento*, 2 Mont. 239, S. C. 25 Am. Rep. 742.

² *San Diego, etc., Co. v. Neale*, 88 Cal. 50, 11 Lawyer's Rep. Anno. 604.

pleadings will be treated on appeal as the parties elected to treat them in the trial court.¹

§ 495. **Requiring adherence to the Opening Statement**—A case decided by the Supreme Court of the United States² furnishes a striking illustration of the doctrine which we are discussing, and proves the necessity for care in assuming positions in the court of original jurisdiction. In the case referred to counsel in opening the case to the jury stated facts showing that the contract his client was seeking to enforce was an illegal one, the trial court instructed that there could be no recovery and the Supreme Court approved its ruling.³ It is, we may say in concluding our consideration of this phase of the subject, of very great importance to assume positions in the trial court that will admit of the presentation to the appellate tribunal of all the questions of law fairly within the scope of the facts.⁴

§ 496. **The doctrine of Election**—The rule under discussion is no more than an application of the familiar doctrine of election which has its foundation in the old adage that "a man can not blow both hot and cold," and hence there is nothing novel in it.⁵ The rule is one required by logic and by practical con-

¹ *Daniels v. Brodie*, 54 Ark. 216, 11 Law. Rep. Anno. 81; *Barndt v. Frederick*, 78 Wis. 1, 11 Law. Rep. Anno. 199, 202. We have many cases in our own reports which declare that pleadings must outline a definite theory, and that to the theory adopted the pleader will be held. *Toledo, etc., Co. v. Levy*, 127 Ind. 168; *Shew v. Hews*, 126 Ind. 474; *Bingham v. Stage*, 123 Ind. 281; *Wagner v. Winton*, 122 Ind. 57; *May v. Reed*, 125 Ind. 199; *Pearson v. Pearson*, 125 Ind. 341; *Horn v. Indianapolis, etc., Bank*, 125 Ind. 381, 385; *Mescall v. Tully*, 91 Ind. 96, and cases cited.

² *Oscanyan v. Arms Co.*, 103 U. S. 261.

³ The case cited above contains a valuable collection of authorities upon the question of the right of the court to direct a verdict, among them *Merchant's Bank v. State Bank*, 10 Wall. 604;

Pleasants v. Fant, 22 Wall. 116; *Railroad Co. v. Fraloff*, 100 U. S. 24, 26.

⁴ In the case of *Wing v. De La Rionda*, 125 N.Y. 678, 25 N.E. Rep. 1064, 1067, the Court of Appeals of New York said: "This shows the theory upon which the case was tried and probably why none of the facts were shown rendering the leases invalid. It is quite too late now to abandon the theory of the trial upon which the leases were put in evidence, and to take ground which is directly opposite to that theory, and to the request to find, made by the defendant, even though such request was, in its entirety, refused. We must still proceed upon the theory of the invalidity of the leases assumed upon the trial."

⁵ Amplified the maxim is, "He is not to be heard who alleges things contradictory to each other."

siderations, since, without it, inconsistent positions might be assumed without any other restriction than that of the party's pleasure. But it is something more than a mere logical rule for securing consistency, inasmuch as its principal purpose is to prevent deception, since, without it, parties might mislead their adversaries by assuming one position in the trial court and another on appeal. Nor could there be an orderly administration of justice without such a rule. It does not, therefore, rest solely upon the principle that only questions once decided can be reviewed on appeal, although that principle gives it strong support.¹

§ 497. **Limitations of the Rule**—It would be a perversion of the rule requiring parties to abide by the theories acted upon in the trial court to hold that additional arguments or authorities can not be adduced on appeal. Such a holding would produce oppression and injustice and the rule authorizes no such result. Within the scope of the theory fairly and distinctly outlined in the trial court a party may bring to his aid all the arguments and authorities he can command. All that the rule demands is that no new general position and no new and independent issue shall be presented on appeal, so that as long as the party confines himself to the general questions which he presented to the trial court for decision he can not be regarded as transgressing the rule, but while this is true it is also true that no new questions (that is, questions not pointed out by the objections made in the trial court) can be successfully urged on appeal.

§ 498. **Exceptions to the Rule**—It may not be improper to add that the rule that a party must adhere to the theory adopted in the trial court does not preclude him from insisting on appeal that the trial court had no jurisdiction of the subject, for nothing that a party can do, short of executing the judgment in some way, can deprive him of the right of objecting to the ju-

¹ In *Whitman v. Weller*, 39 Ind. 515, the court said: "This court sits to review legal questions which have been decided by the courts from which ap- peals are taken, and not to decide questions which are presented here for the first time." See also, *Barnard v. Cox*, 25 Ind. 251.

risdiction.¹ The theory of the law is that where there is an absolute want of jurisdiction there is no court, and it is too clear for controversy that a party can neither create a court, nor endow it with authority over a subject not placed within its jurisdiction by law. The conclusion that the question of jurisdiction remains always open is, it is apparent, implied in the long and well settled doctrine that consent can not confer jurisdiction of the subject. No matter, therefore, what theory a party advances he is at liberty at any step to make the question of jurisdiction. He may not, indeed, make any question on appeal as to the mere election or choice of remedies not made below, but he may make the question as to the right to entertain jurisdiction of the subject.²

§ 499. **The Rule as affecting Jurisdictional Questions**—If, however, there is general jurisdiction of the subject although incomplete or defective, the question of want of jurisdiction can not be first made on appeal. Thus, where a complaint contains two paragraphs, and the court has jurisdiction of one and not of the other, the question must be presented to the trial court.³ The presence of authority to proceed is jurisdiction over the subject,⁴ and where there is jurisdiction, questions affecting only the mode of its acquisition and exercise must, as a general rule, be made in the trial court, so that they can be appropriately presented to the appellate court for review. When once acquired, jurisdiction continues, as a general rule, and is

¹ *Schuylkill County v. Boyer*, 125 Pa. St. 226; *Metcalf v. Watertown*, 128 U. S. 586; *Cameron v. Hodges*, 127 U. S. 322; *Hegler v. Faulkner*, 127 U. S. 482; *Boys v. Simmons*, 72 Ind. 593; *State v. Whitewater, etc., Co.*, 8 Ind. 320; *Strosser v. City of Fort Wayne*, 100 Ind. 443; *Webb v. Carr*, 78 Ind. 455. The decision in *Patterson v. Scottish, etc., Co.*, 107 Ind. 497, is not easily reconcilable with principle or authority.

² It is, however, to be kept in mind that there is a distinction between jurisdiction of a general subject and ju-

risdiction of particular instances. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. Rep. 431; *Rabun County v. Habersham County*, 79 Ga. 248; *Quimby v. Boyd*, 128 U. S. 488.

³ *Louisville, etc., R. Co. v. Fox*, 101 Ind. 416. But, on seasonable objection, evidence tending to prove a cause of action not within the jurisdiction of the trial court should be excluded. *Wabash, etc., Co. v. Rooker*, 90 Ind. 581.

⁴ *Curry v. Miller*, 42 Ind. 320; *Quarl v. Abbett*, 102 Ind. 233.

not lost by subsequent errors,¹ so that no question of loss of jurisdiction can be first made on appeal, if, indeed, it can be successfully made at any time.

§ 500. **Special Cases**—There is a class of cases which it is not easy to bring under any general rule, but of which it may be said that a failure to object below in an appropriate method precludes the party from objecting on appeal, although the question is in the nature of one of jurisdiction, and relates to the subject-matter.² Thus, if a court has jurisdiction in actions of replevin only when the property is situated in the county, the failure to make the point that the property in dispute was not within the county would preclude the party from making it on appeal.³ Kindred cases will suggest themselves in which, although the jurisdiction of the subject-matter is, in some sense, involved, still, it is not involved in that sense which entitles a party, or the court of its own motion, at any stage of the proceedings to make the jurisdictional objection. The truth is that there is, as has been suggested, an essential difference between general jurisdiction of the subject and jurisdiction of the

¹ *Osborn v. Sutton*, 108 Ind. 443; *Stoddard v. Johnson*, 75 Ind. 20, 34; *Black v. Thomson*, 107 Ind. 162. No formal entry asserting jurisdiction is essential. *Cauldwell v. Curry*, 93 Ind. 363; *Platter v. Board*, 103 Ind. 360; *Carr v. State*, 103 Ind. 548; *Jackson v. State*, 104 Ind. 516; *Pickering v. State*, 106 Ind. 228.

² It is, perhaps, hardly necessary to say that jurisdiction of the person may be waived, and that very different rules apply where the question is as to jurisdiction of the person from those which prevail where the question relates to the jurisdiction of the subject, or subject-matter, as it is called.

³ This conclusion seems sound on principle and is fairly supported by such cases as *Grand Rapids, etc., Co. v. Gray*, 38 Mich. 461; *Gott v. Brigham*, 45 Mich. 424. See, generally, *Cox v.*

Albert, 78 Ind. 241; *Robinson v. Shatzley*, 75 Ind. 461. "But the want of jurisdiction because the action is local, and has been brought in the wrong county, and the want of jurisdiction because the court has no power and authority to adjudicate upon the subject involved in the action are two very different things. In the latter case it was always and necessarily the rule of law that consent of parties could not confer jurisdiction for the reason that in any event the court was not by law deemed competent to be intrusted with the question, and therefore its proceedings would be *coram non jndice*, and utterly void, and the parties could not by agreement give faculties to the court which the law withheld." Per *Frazier, J.*, in *Indianapolis, etc., R. Co. v. Solomon*, 23 Ind. 534.

subject-matter of a particular action.¹ Thus, jurisdiction of actions to recover possession of real estate may be possessed by circuit courts generally, and yet the circuit court of Adams county may not have jurisdiction of an action to recover possession of a tract of land in the county of Wayne. It seems impossible to support the cases which declare that where an action is brought to recover land in a court of general jurisdiction the presumption is that the land is within the territorial jurisdiction of the court in which the action is brought,² without affirming that there is a distinction between the general jurisdiction of a subject and jurisdiction of the subject-matter, and yet these cases are everywhere regarded as sound law. On the other hand, it is well settled that where the land involved in the particular case is not within the county where the action is brought, the action will not lie because jurisdiction does not exist in the particular instance.³ In the class of cases last

¹ *Jackson v. Smith*, 120 Ind. 520. The distinction mentioned in the text is suggested in Indianapolis, etc., *R. Co. v. Solomon*, 23 Ind. 534, where it was said: "But where the court was by law competent to entertain the question involved and was only deprived of jurisdiction because the action was local, and required to be brought in another county, it was always held that the action could be waived."

² *Ragan v. Haynes*, 10 Ind. 348; *Brownfield v. Weicht*, 9 Ind. 394; *Wolf v. State*, 11 Ind. 231; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Hyatt v. Cochran*, 69 Ind. 436; *Godfrey v. Godfrey*, 17 Ind. 6; *Culph v. Phillips*, 17 Ind. 209; *Brown v. Anderson*, 90 Ind. 93. These cases are no more than applications to specific instances of the general rule that presumptions are made in favor of the jurisdiction of superior courts. *Shewalter v. Bergman*, 123 Ind. 155; *Bass Foundry v. Board*, 115 Ind. 234; *Board v. Leggett*, 115 Ind. 544; *Chapell v. Shuee*, 117 Ind. 481.

³ *New Albany, etc., Co. v. Huff*, 19

Ind. 444; *Vail v. Jones*, 31 Ind. 467; *Loeb v. Mathis*, 37 Ind. 306; *Ham v. Rogers*, 6 Blackf. 559; *Sherry v. Winton*, 1 Ind. 96; *Dumont v. Lockwood*, 7 Blackf. 576. Some of the earlier cases carried the doctrine asserted in the cases cited far beyond reason and principle and held that a suit to enforce specific performance of a contract must be brought in the county in which the land in controversy is situated. *Parker v. McAllister*, 14 Ind. 12; *Vail v. Jones*, 31 Ind. 467. These decisions are in conflict with *Dehart v. Dehart*, 15 Ind. 167; *Coon v. Cook*, 6 Ind. 268, and are completely overthrown by the later case of *Bethell v. Bethell*, 92 Ind. 318, 322. They are in conflict with the doctrine declared centuries ago in the great case of *William Penn v. Lord Baltimore*, 1 Ves. Sr. 444. See, also, *Watkins v. Holman*, 16 Peters, 25; *Brown v. Desmond*, 100 Mass. 267; *Mitchell v. Bunch*, 2 Paige, Ch. 606; *McQuery v. Gilleland* (Ky.), 12 S.W.Rep. 1037; 1 *Pomeroy Eq. Juris.*, § 135, 1 *Work's Practice*, § 180.

mentioned the subject may be within the general jurisdiction of the court, yet there may be no jurisdiction in the particular case, so that it must be true that there is an essential difference between cases where there is no jurisdiction of the subject, that is of the class, and cases where there is not authority over the particular case, but nevertheless jurisdiction of the general subject, or class.

§ 501. **Nature of Jurisdictional Question**—The confusion and obscurity which exists, and which is so great as to constitute what may not inappropriately be called a legal puzzle, may be cleared away and removed by discriminating between jurisdiction of the subject and jurisdiction of the subject-matter of a particular case. This is the key to the situation. The principle that there is jurisdiction of a class and also jurisdiction of a particular subject-matter is a reasonable one, and is recognized in logical treatises.¹ An objection that there is no jurisdiction

¹ The reasoning of the majority in the case of *Loeb v. Mathis*, 37 Ind. 306, is probably opposed to this view, but the reasoning of Frazier, J., in the dissenting opinion is far stronger and much better supported. The majority opinion confounds the right to make an objection as to the competency of the court to assume to take any action at all in cases belonging to a general class with the right to object to jurisdiction in a particular case. It is undoubtedly true, as has been repeatedly said, that an objection that there is no jurisdictional capacity whatever may be made at any time, but it by no means follows from this that there is a right, notwithstanding acquiescence, to object for the first time on appeal that a local action is improperly brought. The majority lost sight of the distinction between cases, where the question is as to the right to hold jurisdiction where jurisdiction may be presumed and cases where there can be no such presumption. If it be granted

that jurisdiction in a court of general jurisdiction may be presumed (and this can not be controverted), then it inevitably follows that the presumption continues until countervailing facts are made to appear. The rule, indeed, is that nothing is to be presumed to be out of the jurisdiction of such a court. *Hays v. Ford*, 55 Ind. 52; *Galpin v. Page*, 18 Wall. 350, 364; *Hahn v. Kelly*, 34 Cal. 391; *Adams v. Jeffries*, 12 Ohio, 253, S. C. 40 Am. Dec. 477; *State v. Lewis*, 22 N. J. L. 564; *Wallace v. Cox*, 71 Ill. 548; *Davis v. Hudson*, 29 Minn. 27; *Reed v. Vaughan*, 15 Mo. 137, 141; *Butcher v. Bank*, 2 Kan. 70, 80; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, S. C. 47 Am. Dec. 40. As this is the presumption, it seems quite clear that a party who seeks to take a single case out of a jurisdiction existing over the general class of which it is a member should make his objection in the trial court, since he may well be deemed to rightfully submit his case to a court having authority over the general subject. It would, of course, be

of the subject, that is, of the general class, reaches the competency of the court and may be made at any time, since, if the court is not competent to entertain authority over the class, it is, as to that class, as if there were no court. As an illustration of a case where a court is incompetent because of want of authority may be taken the instance of a justice of the peace assuming to exercise jurisdiction in a case of purely equitable cognizance.¹ In such a case it is proper to hold that the question of jurisdiction may be made in the first instance in the appellate tribunal.² As a case illustrating the rule that where there is general authority over the subject no objection of a jurisdictional character not in some mode presented to the trial court, may be taken that of a party liable to an action in the county where the wrong was committed voluntarily and without objection submitting it to a trial in a different county.³

§ 502. Original Objections to Jurisdiction—The question whether upon due and opportune objection the jurisdiction of the trial court over a particular case can be successfully challenged is different, as appears from what has been said, from a question whether the court has any capacity at all to act. So far as concerns the present discussion, the question is important chiefly for its bearing upon the right of a party to interpose an original objection on appeal, since we are here concerned with that right. The presumption of jurisdiction which attaches in the trial court must, we may say by way of recapitulation, continue on appeal unless broken by an objection in

otherwise where there was no capacity to act at all, because no jurisdiction of the subject was by law conferred upon the court.

¹ *Brown v. Goble*, 97 Ind. 86.

² It has been held that where the statute provides that jurisdiction shall be presumed the appellate tribunal will enforce the presumption unless it appears affirmatively that it was impossible that jurisdiction could have existed in the trial court. *Bidwell v. Astor Mutual Insurance Co.*, 16 N. Y. 263.

It is difficult, if not impossible, to perceive why the rule should not be the same where the presumption arises from the fact that the law gives the tribunal jurisdiction over a general class of cases.

The presumption, whether created by the written or the unwritten law, is, in all essential respects, the same, and should prevail against collateral attacks as well as in cases where no question was made in the trial court.

³ *Indianapolis, etc., Co. v. Solomon*, 23 Ind. 534.

that court, so that, at last, the question is to be solved by ascertaining whether the presumption ever did attach. It seems that the just conclusion is that if the particular case is one within the general subject over which jurisdiction is conferred the presumption did attach, but if it is not then the presumption never prevailed. If it never could have prevailed, of course, it could not continue, and the objection may be successfully pressed as an original one on appeal.

§ 503. **Jurisdiction of the Subject not the same thing as Jurisdiction of the Particular Case**—That there are instances where there is jurisdiction of the general subject, but no jurisdiction of the particular case is quite clear, and yet the difference between jurisdiction of the general subject and jurisdiction of the particular instance has seldom been marked, and still less often discussed. That there is a radical difference between jurisdiction of the particular case and jurisdiction of the general subject is shown by the cases referred to in the preceding paragraphs. It is also shown in the cases wherein it is held that although a bond is essential to complete jurisdiction on appeal a failure to file the bond does not necessarily deprive the court of jurisdiction, although it may defeat jurisdiction of the particular case if there is a timely and appropriate objection proposed. So, in cases where there is a failure to perfect appeal in time, there is ordinarily no jurisdiction of the case, but the court may, upon a proper application, grant relief by exercising its general equity powers. In neither of the cases just mentioned could there be authority to assume control of the case if there were no general jurisdiction of the subject, for where there is no such jurisdiction there is no court, if no court, there is of course, no officer or tribunal capable of acting in the matter at all. The phrase *coram non iudice* does not mean that the person who assumes to be a judge is not a judge but an intruder, or usurper; on the contrary, it simply means that he is not a judge in the particular or class of cases. Thus, if a prosecution for a violation of a statute of the United States should be instituted in a State, as to that case, or as to the class of which it is a member, the proceedings would be *coram non iudice*, but the judges

of the State courts would not be intruders or usurpers; they would simply be without jurisdiction in the particular class of case. So, where an appeal is not taken within the time prescribed by law, there is no jurisdiction of the particular appeal unless peculiar facts exist authorizing the court to exercise its general inherent power to prevent injustice resulting from accident or fraud, but as the inherent power may be exercised in the proper case there is, in a general sense, jurisdiction of the subject.¹ There is always jurisdiction of the abstract subject of appeals, but there is not always jurisdiction of particular cases. It is quite safe to conclude that there may be instances where the jurisdiction does not relate to the person but to the subject (and to the subject directly and materially), in which there is authority over a general subject or class, yet no jurisdiction over a particular member of the class.² The difference between jurisdiction of a general subject, or class, and jurisdiction of a particular case is often of importance in appellate procedure, for there are many cases where an objection not made below to the jurisdiction of the particular case will not prevail on appeal, but there are no cases where there is an utter lack of jurisdiction of the general subject or class where the objection may not be successfully made at any stage of the proceedings.

¹ General jurisdiction of the subject of appeals is very different from jurisdiction of a special instance. So is jurisdiction of a class of actions different from jurisdiction of a particular action.

² We think that the decisions when closely analyzed will be found to recognize the distinction we have endeavored to establish. *Furnival v. Stronger*, 1 Bing. N. C. 68; *Andrewes v. Elliott*, 6 E. & B. 338; *Tyerman v. Smith*, 6 E. & B. 719, 724; *Lawrence v. Wilcock*, 11 A. & E. 941; *Vansittart v. Taylor*, 4 E. & B. 910. The principle we have asserted is declared in some of the earliest reported cases. It is asserted in the cases which hold that an action brought in the wrong county may be maintained where there is a waiver of objection to jurisdiction although an act of Parlia-

ment declares where the venue shall be laid. *Furnival v. Stringer*, *supra*; *Fineux v. Hovenden*, Croke Eliz. 664, Coke's Litt. 126 a, Hargrave's note, 5 Rep. 37, Dyer, 367; *Crow v. Edwards*, Hob. 5 b. It is evident that if there was no jurisdiction of the general subject this conclusion could not be sound, but it is sound because such jurisdiction exists, although if objection had been made it could not have been exercised in the particular case. The general jurisdiction of a class may exist and yet not cover a particular member of the class. "By subject-matter is meant the abstract thing and not the particular case." *Yates v. Lansing*, 5 Johns. 282; *State v. Wolever*, 127 Ind. 306, 315.

CHAPTER XXV.

AUXILIARY PROCEEDINGS.

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| <p>504. Auxiliary power of appellate tribunals.</p> <p>505. The nature of auxiliary jurisdiction.</p> <p>506. The principal classes of auxiliary proceedings.</p> <p>507. Appeal must be pending to authorize the exercise of the auxiliary jurisdiction—General rule.</p> <p>508. Exceptions to the rule requiring the transcript to be filed before asking assistance.</p> <p>509. The application for assistance.</p> | <p>510. Statutory provisions — Injunctions.</p> <p>511. Statutory provisions — Mandamus and Prohibition.</p> <p>512. Injunctions.</p> <p>513. Injunctions — Matters of practice.</p> <p>514. Mandamus—Power to issue.</p> <p>515. Mandamus—Cases in which it will not issue.</p> <p>516. Mandamus—Cases in which it will issue.</p> <p>517. Mandamus—Matters of practice.</p> <p>518. Prohibition.</p> |
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504. Auxiliary Power of Appellate Tribunals—As we have recently said, appellate jurisdiction is essentially and primarily of review, and, while it is true that both appellate and original jurisdiction may reside in the same tribunal, still, the two species of jurisdiction are radically different and distinct. In giving a tribunal with both original and appellate jurisdiction not to blend the two species of jurisdiction, for they are so essentially unlike that they can not be harmoniously combined. While the two kinds of jurisdiction are distinct, yet jurisdiction in its nature original must necessarily reside in all appellate tribunals of high rank, since, without such jurisdiction, they could not effectively carry out the purpose for which they are created. There must, therefore, dwell in all such tribunals a species of jurisdiction which may be denominated auxiliary. This auxiliary jurisdiction is an incidental attribute, and it exists in all high courts as a necessary element of their existence. A power essential to the existence of a high court of law, and necessary to enable it to accomplish the great objects of its existence comes into being with the court itself.

Such a court must have power to cause its judgments to be carried into effect, otherwise its judgments would be mere empty declarations. So, it must have power to cause records to be truly presented to it, and so, too, it must have power to protect its own records and maintain its own existence. These, and other powers, are inherent, and hence are implied in the very act of creating an appellate tribunal and investing it with the power to review the decisions and judgments of the trial courts of the commonwealth. A court without such powers would be little else than a court in name.

§ 505. **The nature of Auxiliary Jurisdiction**—Auxiliary jurisdiction, under a system such as ours, is essentially an incident, or appendage, of the power to review judgments and decrees pronounced by courts of original jurisdiction. It is not, in the strict sense, in any respect original. It does not exist because of any right to pronounce original judgments, but it exists because it is necessary to enable the court to properly conduct its business, make its judgments effective, maintain its independence and administer justice.

§ 506. **The principal Classes of Auxiliary Proceedings**—One of the most important of the classes of auxiliary proceedings is that to which the name *certiorari* is usually given. The term "*certiorari*," as generally employed in appellate procedure, means an order or writ issued to a trial court, or an officer, commanding the correction of a record, or the proper certification of it to the appellate tribunal. But we have elsewhere fully discussed the proceeding by *certiorari*,¹ and we need do no more here than mention the proceeding. The remaining classes of auxiliary proceedings which are of sufficient practical importance to require consideration are injunction, mandamus and prohibition. It is probably true that in very rare instances, writs of injunction, writs of mandamus, and writs of prohibition may issue in a proceeding strictly original, but we are not to treat of them as original writs. Our discussion will be confined to such writs as are employed as assistants or auxiliaries

¹ *Ante*, §§ 216, 217, 218, 219.

the power to review judgments or decrees pronounced by courts of original jurisdiction.

§ 507. Appeal must be Pending to authorize the exercise of the auxiliary Jurisdiction—General Rule—The general rule is that an appeal must be pending or the auxiliary jurisdiction of the appellate tribunal can not be successfully invoked. This rule rests on the principle that until the case reaches the appellate tribunal it has no power to make any order or pronounce any judgment concerning the controversy. It further results from this principle that a party must do all that is in his power to perfect an appeal before asking aid of the appellate tribunal. If it is within his power to file the transcript, assign errors and give notice, he must do so before asking the court to assist him in securing an appeal. After he has done all that he can do to assist in bringing the case into the appellate tribunal, that tribunal will help him by removing obstacles wrongfully placed in his way and by compelling courts and officers to perform the duties enjoined by law.¹ Until the party has done all that he can do unassisted, there is no ground upon which the extraordinary powers of the court can be invoked for his relief. It is evident that the rule stated is the only defensible and practical one, for if a party were allowed to invoke the assistance of the court before filing a transcript or taking other steps to perfect an appeal he might secure extraordinary aid in a case where general jurisdiction might never attach.

508. Exceptions to the Rule requiring Transcript to be filed before asking Assistance—It is obvious that there must necessarily be exceptions to the rule that the transcript must be filed in the appellate tribunal before its assistance in perfecting the appeal can be invoked, for if it were otherwise, it would be in the power of the trial court to prevent an appeal, and that it has

here are few, if any, reported cases on this subject, but the practice has been, so far as we are aware, to require a party to do all that he can to perfect his appeal. It is only when he has done this that the court will aid him in perfecting his appeal and securing his rights. He must secure such a transcript as he can obtain and file it, then ask the needed assistance. See the next paragraph for a consideration of exceptional cases.

no right to do. Where a trial judge refuses to take such steps as are necessary to enable the appellant to secure an appeal, the appellate tribunal will grant him relief if he has been diligent and is free from fault. It may be in rare cases that no transcript can be obtained because of the wrongful conduct of a judge or a ministerial officer, and in such cases the appellant may apply to the appellate tribunal for relief without filing a transcript, but he must show in his application that the failure to secure a transcript was not owing to any fault on his part. Where a transcript can be secured, even though it may be imperfect and incomplete, it should be obtained and filed.

§ 509. **The Application for Assistance**—The party who asks assistance to enable him to perfect an appeal must make a clear and strong case. This is so because he asks that an extraordinary remedy be applied for his benefit and that public officers be coerced into a performance of duty.¹ It is necessary that the facts should be clearly and fully set forth in the petition, that the allegations should show inexcusable fault on the part of those against whom the petition is directed, and that the petitioner has been diligent and is free from fault. The appellate courts grant extraordinary relief with caution and only in clear cases, so that it is always necessary to make a case strong and full in all essential particulars. With respect to injunctions this is especially true as will appear from what is said in the paragraphs that follow.

§ 510. **Statutory provisions—Injunctions**—The provisions of the code respecting the granting of injunctions are, in effect, nothing more than the declaration of a general principle of law.²

¹ He must overcome the presumption that the officers have performed their duties. It is a rudimental rule that one who charges an officer with a breach of duty, either negligent or wilful, must affirmatively and clearly show such facts as rebut the presumption that the officer did his duty. *Jackson School Tp. v. Farlow*, 75 Ind. 118, and authorities cited.

² R. S. 1881, § 1147. The statute provides that "Restraining orders and injunctions may be granted by the Supreme Court in term time, when necessary for the due exercise of the jurisdiction and powers of such court, or by any judge thereof in vacation or recess." There can be little doubt that under this provision the right to an injunction exists only in cases where it

They do not confer original jurisdiction but simply declare that the court may grant an injunction in aid of its appellate power and jurisdiction. It is evident, therefore, that injunctions or restraining orders can only be granted in cases where there is a pending appeal, and where such relief is essential to a due and effective exercise of appellate jurisdiction.

§ 511. Statutory provisions—Mandamus and Prohibition—The statute does not authorize either of the appellate courts to entertain original jurisdiction in mandamus or prohibition proceedings, but, on the contrary, carefully limits their power to issue writs of mandamus or prohibition to cases where such writs are essential to a due and effective exercise of appellate jurisdiction.¹ But, notwithstanding the limitation of the statute, there must be cases where a writ of mandamus or prohibition will issue, although at the time it is issued there is no pending appeal. In a former paragraph of this chapter we have given reasons for this conclusion.² Ordinarily, however, neither a writ of mandamus nor a writ of prohibition can issue unless there is an appeal calling into active exercise the appellate jurisdiction. That exceptions to this general rule do exist we have already affirmed,³ but these exceptions by no means prove that the general rule does not exist.

§ 512. Injunctions—It is no doubt true that the appellate tribunals of a State are invested with power to issue injunctions when necessary to enable them to fully and effectively exercise appellate jurisdiction.⁴ The only question that can arise is as

is clearly made to appear that the writ is required to enable the court to effectively perform its functions as a court of review.

¹ The statutory provision is this: "Writs of mandate and prohibition may issue from the Supreme and Circuit Courts of this State, but such writs shall issue from the Supreme Court only when necessary for the exercise of its functions and powers." R. S. 1881, § 1167.

² *Ante*, §§ 504, 505.

³ *Ante*, Chapter II, "Appellate Tribunals."

⁴ In the case of *Hicks v. Michael*, 15 Cal. 107, 114, the power of the appellate tribunal to issue an injunction pending an appeal was denied, but the question received very little consideration. All that was said upon the subject was this: "An examination of the question has satisfied us that we had no authority to issue the writ. No such authority has been given us by the legislature, and we regard the matter as one involving a

to what matters are embraced within the appellate jurisdiction, so that the inquiry goes to the extent and scope of the power rather than to the existence of the power itself. Where there is an attempt to disobey an order or judgment made or given in a pending appeal the power of the court to prevent disobedience by an injunction is clear, but where there is no such order or judgment it is difficult to set bounds to the power. It is entirely safe to affirm that a writ of injunction can not be issued save in the exercise of some function of appellate jurisdiction. Original jurisdiction can only be exercised by the courts to which original jurisdiction is confided by the constitution or the laws.¹ Mischievous and evil results would inevitably follow

mere question of practice, and the legislature as having full and entire control of the subject." We venture to say that this is a narrower view of the subject than is warranted by principle or authority. The fundamental principle that all high courts of justice possess inherent powers was, as we believe, overlooked. We do not believe that it is necessary to specifically enumerate the powers of a judicial tribunal of the highest rank, since many powers are implied in the very act of establishing such a court. A sounder view of the general subject is that of the Supreme Court of Ohio in the case of *Kent v. Mahaffy*, 2 Ohio St. 498, where Thurman, J., speaking for the court, said: "That we can allow an injunction, in a case pending in this court, upon an appeal is very clear. A decree may be the very object of the suit—the final decree sought—and so a provisional injunction, during the pendency of the suit, may be necessary for the purposes of justice. The power to allow these is a part of the appellate jurisdiction, the grant of which is authorized by the constitution, and has been made by the law. But to allow an injunction in a suit pending in another court, would be an exercise of original and not of appellate ju-

risdiction. Now, the original jurisdiction conferred upon this court by the constitution is limited to *quo warranto mandamus, habeas corpus* and *procedendo*, Art. IV, § 2. This is the only original jurisdiction granted by that instrument, and it would be wholly inconsistent with, and, in a great measure, destructive of the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. It is true there is no express prohibition against it, but none was necessary. We can exercise only such powers as the constitution itself confers, or authorizes the legislature to grant. We can derive no power elsewhere. It follows, that, to negative the existence of a power it is not necessary to show that it is forbidden by the constitution. It is sufficient that that instrument neither directly nor indirectly confers it."

¹ *Ex parte Logan Branch, etc.*, Bank. 1 Ohio St. 433; *Merrill v. Lake*, 16 Ohio. 373; *Campbell v. Campbell*, 22 Ill. 664; *Bryant v. People*, 71 Ill. 32. In *Campbell v. Campbell*, *supra*, the court said: "Now unless it can be shown that original applications for injunction is an exercise of the appellate jurisdiction of this court we can not act. That it is not such an exercise no one will deny."

from a blending of appellate and original jurisdiction,¹ since the machinery of the appellate and trial courts is of such a radically different character. It is with reason, therefore, that the appellate tribunals are reluctant to exercise jurisdiction that is in its nature original.² Sound principle, as well as wise policy, demands that these independent jurisdictions, for such they are, be kept separate, for deplorable consequences must, of necessity, result from blending them. The power to review is in its nature different from the power to originally try and decide, and only evil can flow from an attempt to break down the barrier which separates them. Such an attempt can only be arbitrary since there is no principle upon which a union of the two jurisdictions can be effected. Our court has, as we believe, gone counter to true principle in holding, as it has, that an injunction may be granted to prevent a party from entering a

Emphatically this is an appellate court only, having original jurisdiction in a few specified cases." Some of the courts hold that even where the constitution confers original concurrent jurisdiction that whether such jurisdiction shall or shall not be exercised is a matter to be determined by the court in the exercise of a sound discretion. *Commonwealth v. Smith*, 4 Binney, 117; *State v. Stewart*, 32 Mo. 379. In every instance which has come to our notice the courts have declined to exercise original jurisdiction unless the duty to exercise it was imperative. *State v. Lawrence*, 38 Mo. 535; *State v. Vail*, 53 Mo. 97, 107. See, also, *Foster v. State*, 41 Mo. 61; *Vail v. Dining*, 44 Mo. 210.

¹ Since the text was written the subject has received consideration from the Indiana Appellate Court. In the case of *Sheeks v. Fillior*, 29 N. E. Rep. 443; that court decided that injunction may be awarded in aid of the appellate jurisdiction but not in an original proceeding. It was said, in the course of the opinion, that: "An authority to issue injunctions is ancillary to our ap-

pellate jurisdiction. We may exercise such authority to preserve the rights involved in a cause pending on appeal."

² In Wisconsin the constitution invests the Supreme Court with original jurisdiction in specified cases, but the court has done all in its power to limit the constitutional provision. In *Attorney General v. Railroad Companies*, 35 Wis. 425, 517, the subject is discussed with vigor and ability, and it was said, in the course of the opinion, that, "The grant of original jurisdiction is one entire thing, given in one general policy, for one general purpose, though it may have many objects and many modes of execution. So it is of the appellate power. So it is of the superintending control. These are three independent and distinct grants of jurisdiction, each compact and congruous in itself, each a uniform group of analogous remedies, though to be exercised in several ways, by several writs in legal and equitable proceedings, on many objects in great variety of detail." See, also, *Attorney General v. Blossom*, 1 Wis. 317; *Attorney General v. City of Eau Claire*, 37 Wis. 400, 443.

public office to which he was adjudged to be entitled by the judgment of the trial court.¹ It is difficult to conceive upon what principle such a ruling can be said to be made in the exercise of appellate jurisdiction, since whether a party shall or shall not be inducted into office is an original question. But since the decision referred to was made injunctions have been occasionally granted to maintain the *status quo* as it existed at the time the appeal was taken. The power has, however, been sparingly exercised and an injunction awarded only in unusual cases. A strong case, fully exhibited, has been uniformly required. More applications by far have been denied than granted.

§ 513. Injunctions—Matters of Practice—The statute makes no provision as to the procedure in obtaining a restraining order or injunction on appeal, but the practice is substantially that prescribed for the trial court. A verified petition is required. Notice must be given or such an emergency shown as dispenses with notice. A bond or undertaking must also be filed.

§ 514. Mandamus—Power to Issue—The general “superintending control” of appellate tribunals, as it is called by an able judge,² empowers them to coerce the performance of duties imposed by law upon judicial and ministerial officers. It is manifest that some supreme controlling and supervisory power must be lodged in the courts of last resort, for otherwise trial judges or ministerial officers might completely defeat the right of appeal. This “superintending control” is not an independent and distinct power, but, on the contrary, is an incident of su-

¹ *Leech v. State*, 78 Ind. 570, 579. In the case cited, Worden, J., speaking for the majority of the court, said: “This statute we construe to mean that restraining orders, etc., may be issued by this court, or by any judge thereof in vacation, whenever it may be necessary and proper, in the exercise of its appellate jurisdiction to preserve the rights of the parties to a cause pending before it, until the decision of the cause

by this court. In many cases in this court restraining orders have been issued to prevent advantage being taken of a judgment below until the determination of the cause here, though the reports may not show them, because in the opinions pronounced no notice has been taken of them.”

² *Ryan, C. J.*, in *Attorney General v. Railroad Companies*, 35 Wis. 425, 517.

perior appellate jurisdiction.¹ It is not a power to be exerted by appellate tribunals in the exercise of original jurisdiction except where the law commands that it shall be so exerted. But while it is true that the power is an attribute of appellate jurisdiction it is, nevertheless, true that it may be exercised, although no appeal is actually pending. The decision of pending appeals is by no means all there is of appellate jurisdiction, for appellate jurisdiction extends much farther; it includes the power to remove obstacles to appeals, the power to assist a party to perfect an appeal, and the power to compel decisions by inferior tribunals.

§ 515. **Mandamus—Cases in which it will not issue**—Where the proceeding is an original one and is not in any way connected with the right of appeal, or the exercise of appellate jurisdiction, mandamus will not be awarded. This general doctrine is illustrated by a case in which it was held that the writ would not issue to compel the trial court to proceed with a case in which a decree forfeiting corporate franchises was sought.²

¹ The authorities fully support the doctrine that the high courts of justice possess, as an inherent power, the general superintending control of inferior tribunals. The common law fully recognized the principle. 3 Blackst. Com., 110. *Queen v. Eastern Counties Ry. Co.*, 10 Ad. & Ell. 531, 547. In *Strong's Case*, 20 Pick. 484, 495, the doctrine was admirably stated by Morton, J. Speaking for the court he said: "In every well constituted government the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates and others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty it will compel them. In the former case by writ of error, in the latter by mandamus. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy, resort may be had to

this high judicial writ. It not only lies to ministerial, but to judicial officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion upon a particular subject." See, also, *Attorney General v. Boston*, 123 Mass. 460, 472; *Chase v. Blackstone, etc., Co.*, 10 Pick. 244, 246; *Carpenter v. County Commissioners*, 21 Pick. 258.

² *State v. Biddle*, 36 Ind. 138. It is to be said of the case cited that, while the reasoning of the court in the main is sound, it is not altogether clear that there was not error in applying the rule declared. The rule was correctly asserted, but it is not so clear that it was not misapplied. This we say because we think it settled that parties have a right to a decision, and the refusal to decide is an obstacle to an appeal which the appellate tribunal may remove. The question in the case cited was, however, as to the right to compel

Another illustrative case is that wherein an application was unsuccessfully made by an attorney, who had been disbarred by the judgment of the trial court, for a writ of mandamus to compel the trial court to restore him to the place formerly held by him as a member of its bar.¹ Mandamus will not lie to correct an error in a decision or judgment of a judicial tribunal; the remedy for the review and correction of erroneous decisions

the trial court to proceed after a supersedeas had been issued in a dependent proceeding. In the course of the opinion the court said: "But so far as this court is concerned, the power to award the writ is confined, as we have seen, to those cases where it is necessary in the appropriate discharge of its duties as an appellate court, such, for instance, as to compel a judge to sign a bill of exceptions, or to carry out instructions given by the court with regard to further proceedings in a cause remanded by this court, etc. The case at bar seems to be an independent proceeding, not in any way necessary to a discharge of the functions of this court. We are, therefore, of the opinion that we have no jurisdiction or power to award the writ in this case." In *Cluck v. State*, 40 Ind. 263, the court asserted a general principle applicable here, although there addressed to a different proceeding. It was said by the court: "This court possesses no original jurisdiction. This court acts alone upon the record as made in the inferior court, and as certified to us in the manner prescribed by law." See, also, *Whittem v. State*, 36 Ind. 196. It is, however, to be borne in mind that appellate jurisdiction covers a much wider field than some of the expressions used in the cases referred to indicate. Whatever powers lie within that field may be rightfully exercised, although there may be no pending appeal. Mandamus is ordinarily an original remedy, and as such it is to be awarded and applied

by courts of original jurisdiction, except where it is a necessary adjunct of appellate jurisdiction. *Daniel v. County of Warren*, 1 Bibb 496; *King v. Hampton*, 3 Hayw. (Tenn.), 59; *Cowell v. Buckelew*, 14 Cal. 640; *Howell v. Crutchfield*, Hemp. 99; *Westbrooks v. Wicks*, 36 Ia. 382; *Whitefield v. Greer*, 3 Baxt. 78. See, generally, *Commonwealth v. Wickersham*, 90 Pa. St. 311; *Hinkle v. Ball*, 34 Ark. 177; *State v. Supervisors*, 38 Wis. 554; *State v. Breese*, 15 Kan. 123; *State v. County Court*, etc., 64 Mo. 170. The solution of the question whether the appellate tribunal can award a writ of mandamus is reached when it is satisfactorily determined that the award of the writ is a proper adjunct or incident of appellate jurisdiction. It may be said, in a general way, that if the writ is necessary to enable a party to perfect an appeal, where there is a clear right to appeal appropriately asserted, or to carry into execution an order or judgment of the appellate tribunal, the power to award the writ may properly be regarded as an adjunct or appendage of the jurisdiction of the appellate tribunal.

¹ *Walls v. Palmer*, 64 Ind. 493. In the case cited it was held that mandamus was an appropriate remedy in the court of original jurisdiction, but that the writ could not be awarded in such a case by the Supreme Court for the reason that it could not exercise original jurisdiction.

and judgments is by writ of error or by appeal.¹ Action may be coerced by mandamus, but the decision will not be dictated by the appellate tribunal.² The exercise of a discretionary power may be compelled by mandamus, that is, the tribunal may be put in motion, but the exercise of the power will not be controlled. The inferior tribunal will be commanded to act, but it will not be commanded to make or refrain from making a particular decision.³ Mandamus will not lie to compel the granting of a new trial,⁴ for an erroneous denial of a new trial is a wrong to be corrected on appeal.⁵

¹ *Rex v. Justices of Monmouth*, 7 Dowl. & Ry. 334; *Queen v. Lord's Commissioners, etc.*, 10 A. & E. 179; *Queen v. Lord Steward of Old Manor Hall*, 10 A. & E. 248; *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183; *Ex parte Parker*, 120 U. S. 737; *Ex parte Morgan*, 114 U. S. 174. It has been held that a party may move for judgment against himself, and upon the refusal of the court to render it obtain a writ of mandamus. *Fish v. Weatherwax*, 2 Johns. Cases, 215.

² *Ex parte Railway Co.*, 101 U. S. 711, 720; *Ex parte Brown*, 116 U. S. 401; *Decatur v. Paulding*, 14 Pet. 497, 499; *United States v. Guthrie*, 17 How. 284; *United States v. Edwards, etc., Commissioners*, 5 Wall. 563; *Litchfield v. Richards Register, etc.*, 9 Wall. 575, 577; *Carrick v. Lamar*, 116 U. S. 423; *State v. Board*, 45 Ind. 501; *State v. Demaree*, 80 Ind. 519; *Ex parte Bostwick*, 1 Cow. 143; *People v. Judges*, 2 Johns. Cases, 68.

³ *State v. Board*, 63 Ind. 497; *Mitchell v. Wiles*, 59 Ind. 364; *Holliday v. Henderson*, 67 Ind. 103; *Burnett v. Trustees*, 50 Ind. 251; *State v. Norton*, 20 Kan. 506.

⁴ *Ex parte Smyth*, 3 A. & E. 319, 722; *State v. Watts*, 8 La. (O. S.) 76; *Ex parte Bailly*, 2 Cowen, 479.

⁵ This is nothing more than a particular application of the settled general

principle that erroneous decisions can not be reviewed or corrected in an action brought to secure a writ of mandamus. The doctrine is illustrated and enforced by many decisions, for the question has been presented in many phases and in a great variety of cases. *Ex parte Coster*, 7 Cow. 523; *Thomas v. His Creditors*, 1 Har. (N. J.) 272; *Respublica v. Clarkson*, 1 Yeates (2d ed.), 46; *Judges of Oneida Common Pleas v. People*, 18 Wend. 79; *People v. Superior Court*, 19 Wend. 68; *Rex v. Conyers*, 8 Q. B. 981; *Wilkins v. Mitchell*, 3 Salk. 229. For an able discussion of the subject see the opinion in *Ex parte Morgan*, 114 U. S. 174. See, also, *Ex parte Hayes* (Ala.), 9 So. Rep. 156; *Ex parte Hurn* (Ala.), 9 So. Rep. 515; *Burt v. Reilly*, 82 Mich. 251, 46 N. W. Rep. 380; *Tomkin v. Harris*, 90 Cal. 201, 27 Pac. Rep. 202. Mandamus will not lie to compel a court to resume jurisdiction of a case dismissed by it. *People v. Garnett*, 130 Ill. 340, 23 N. E. Rep. 331; *State v. Judges, etc.*, 41 La. Ann. 1012, 6 So. Rep. 804. It is probably true that the rule as to courts of limited jurisdiction, such as justices of the peace, county commissioners and the like, is somewhat different from that which prevails where the decisions and rulings of courts of general superior jurisdiction are involved. *State v. Clayton*, 34 Mo. App. 563, 566; *Dorr v.*

§ 516. **Mandamus—Cases in which it will issue**—It may be said by way of preface, although at the expense of repetition, that mandamus will lie wherever there is a clear right of appeal and the party has done all that he can to enforce the right and assistance is required to enable him to perfect his appeal, as well as where the writ is required to secure the execution of an order, decision, or judgment of the appellate tribunal. The power to issue a writ of mandamus in aid of appellate jurisdiction is much more comprehensive than fugitive expressions in some of the decided cases indicate. The power is, indeed, very closely akin to an original one, but is, nevertheless, an attribute of appellate jurisdiction. It has been held that mandamus lies where the trial court refuses to entertain jurisdiction when it ought to do so, or refuses to proceed with the trial in a case where it is its duty under the law to proceed.¹ The doctrine stated is the correct one, but, we venture to affirm, it is

Hill, 62 N. H. 506. We are, however, not dealing with appeals from courts of limited statutory jurisdiction.

¹ *Ex parte* Parker, 131 U. S. 221, citing *Thompson v. United States*, 103 U. S. 480, 483; *People v. Collins*, 19 Wend. 56; *State v. Warner*, 55 Wis. 271. In the first named case it was said: "The right of mandamus lies as held in *Ex parte* Parker, 120 U. S. 737, where the inferior court refuses to take jurisdiction when by law it ought to do so, or where having obtained jurisdiction, it refuses to proceed in its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion. *Ex parte* Morgan, 114 U. S. 174; *Chateauquay Ore and Iron Co., Petitioner*, 128 U. S. 544, 557. This general doctrine is pressed very far in *State v. Ellis*, 41 La. Ann. 41, 6 So. Rep. 55. In *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. Rep. 924, it was held that mandamus will lie to compel a special judge to try a cause. It has also been held that mandamus will lie to compel a trial court to reinstate a case. *In re* Parker,

131 U. S. 221; *State v. Kansas City Court*, 97 Mo. 331, 10 S. W. Rep. 855. We suppose, however, that the doctrine can not obtain where the ruling refusing to reinstate can be fully reviewed on appeal. To award a mandamus where the error can be reviewed and corrected on appeal would violate the elementary rule that mandamus will not lie where there is an adequate ordinary remedy, as well as the rule that mandamus will not lie to correct or review erroneous rulings or decisions. See the authorities cited in the notes to the preceding paragraph, and, *Scott v. Yolo County Superior Court*, 75 Cal. 114; *Wilson v. Holt*, 85 Ala. 95, 4 So. Rep. 625; *Brown County v. Winona, etc., Co.*, 38 Minn. 397; *In re Wilson*, 75 Cal. 580, 17 Pac. Rep. 698; *State v. Ellis*, 40 La. Ann. 818, 5 So. Rep. 539; *State v. District Judge*, 41 La. Ann. 73, 5 So. Rep. 648; *Dixon v. Judge*, 4 Mo. 286; *King v. Justices, etc.*, 5 Nev. & Man. 139; *People v. Judge of Wayne County*, 1 Mich. 359.

carried too far by some of the courts. It seems to us that it is a radical departure from principle to hold that errors which may be made available on appeal may be reviewed and corrected in a proceeding to obtain a writ of mandamus. For this conclusion we assign two reasons, namely, where there is a right of review by appeal there is an adequate remedy, and, where errors occur in deciding or refusing to decide, they may be made available on appeal. Neither of these reasons applies, however, where the court refuses to entertain jurisdiction or refuses to proceed,¹ but they do apply where the trial court erroneously decides that it has no jurisdiction, as well as where it erroneously decides that it has jurisdiction. It is manifest that where a trial court refuses to act the appellate court may coerce a decision, for the refusal to decide is an obstacle to the exercise of the right of appeal which the appellate tribunal has plenary power to remove. Upon the principle that the appellate tribunal may assist a party in perfecting an appeal, it is rightly held that mandamus will lie to compel the trial judge to

¹ This conclusion is probably opposed to the doctrine of *State v. Biddle*, 36 Ind. 138, for it seems to have been held in that case that the trial court could not be compelled to proceed with a cause. We can not believe that the doctrine stated in that case is correct. As indicated in another place, our opinion is that the case referred to limits the scope of appellate jurisdiction much more than principle or authority warrant. It must be true that the trial court can be compelled to proceed with a cause to judgment, for a judgment must be rendered in order to give a right of appeal, and the trial court can not nullify that right by wrongfully refusing to act. In compelling it to proceed to judgment the appellate tribunal does no more than remove an impediment to the right of appeal. The authorities already cited sustain our conclusion and to those cited may be added *People v. Swift*, 59 Mich. 529;

Temple v. Superior Court, 70 Cal. 211; *Ex parte Graves*, 61 Ala. 381; *Floral Springs Water Co. v. Rives*, 14 Nev. 431; *Beguhl v. Swan*, 39 Cal. 411; *State v. Cape Girardeau Court*, 73 Mo. 560; *State v. Horner*, 10 Mo. App. 307; *Blackberry v. People*, 10 Ill. (5 Gilm.) 266; *Ex parte Thornton*, 46 Ala. 384; *State v. Ellis*, 41 La. Ann. 41, 6 So. Rep. 55. If the decision in *State v. Biddle*, *supra*, can be construed as meaning no more than that mandamus will not lie where a ruling may be made available on appeal, or as simply asserting that original jurisdiction can not be exercised by the Supreme Court it may be deemed correct, but if it is to be understood as meaning that the Supreme Court can not compel a trial court to proceed to judgment it is in conflict with the cases cited and with the case of *State v. Board*, 45 Ind. 501. See, also, *Moore v. State*, 72 Ind. 358.

settle and sign the proper bill of exceptions, but it would be a violation of principle to specifically direct him what to put in the bill in a case where there is a controversy as to what the bill should contain.¹ Mandamus will lie to enforce a mandatory duty to make a record entry, but a fair deduction from the authorities cited is, that it will not lie where there is a controversy of such a character as to require a judicial decision as to what the entry shall be, for where there is such a controversy, the appellate tribunal will not assume to dictate what the decision shall be, although it may compel a decision.² Upon the gen-

¹ *Jelley v. Roberts*, 50 Ind. 1; *People v. Anthony*, 25 Ill. App. Ct. 532; *Che-Gong v. Stearns*, 16 Ore. 219, 17 Pac. Rep. 871; *Poteet v. County Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97; *In re Chateaugay Ore and Iron Co.*, 128 U. S. 544; *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. Rep. 742; *People v. Hawes*, 25 Ill. App. 326; *State v. Field*, 37 Mo. App. 83; *In re Vanvabry v. Staton*, 88 Tenn. 334, 12 S. W. Rep. 786; *Ex parte Henderson*, 84 Ala. 36, 4 So. Rep. 284. Where the trial judge settles and signs a bill of exceptions the court will not award a peremptory mandamus. This was so decided after full consideration in *Jelley v. Roberts*, *supra*. A like conclusion was affirmed by the Supreme Court of Illinois in the case of *People v. Anthony*, 129 Ill. 218, 21 N. E. Rep. 780. See, also, *Tweed v. Davis*, 4 Thomp. & C. (N. Y.) 1. See, also, *Ex parte Bradstreet*, 4 Pet. 102; *Ex parte Story*, 12 Pet. 339. If the judge does not answer, or if his answer, or return, is insufficient, a peremptory writ will be awarded. *Springer v. Peterson*, 1 Blackf. 188; *State v. Hawes*, 43 Ohio St. 16. See, generally, *Conrow v. Schloss*, 55 Pa. St. 28; *People v. Lee*, 14 Cal. 510; *Ex parte Crane*, 5 Pet. 190; *State v. McDonald*, 30 Minn. 98; *State v. Sheldon*, 2 Kan. 322.

² The conclusion that the appellate tribunal will not assume to decide what

the particular entry shall be where there is a dispute, is fortified by the rule that an appeal will lie from a refusal to make a *nunc pro tunc* order in the proper case. *Ante*, § 214, and authorities cited. As an appeal will lie the error may be corrected in an ordinary proceeding, and resort can not be had to the extraordinary remedy. *Marshall v. State*, 1 Ind. 72; *Board v. Hlicks*, 2 Ind. 527; *State v. Board*, 25 Ind. 210; *State v. Board*, 45 Ind. 501; *Harrison School Tp. v. McGregor*, 96 Ind. 185; *White v. Burkett*, 119 Ind. 431; *State v. County Judge*, 5 Ia. 380; *People v. Hawkins*, 46 N. Y. 9; *Polindexter v. Greenhow*, 84 Va. 441; *Ex parte Stickney*, 40 Ala. 160; *Territory v. Shearer*, 2 Dak. 332; *Moody v. Fleming*, 4 Ga. 115, S. C. 48 Am. Dec. 210; *Ex parte Virginia Commissioners*, 112 U. S. 177; *State v. Rightor*, 36 La. Ann. 112; *State v. McGown*, 89 Mo. 156; *Hemphill v. Collins*, 117 Ill. 396; *State v. Justices of Mocre County*, 2 Ired. L. 430. The only consistent doctrine is that which restricts the right to the writ to cases where there is no dispute as to the character of the entry or no right to make the question on appeal. *Leavitt v. Judge of Superior Court*, 52 Mich. 595. The right to make the question on appeal is an element of controlling influence. *Ex parte King*, 27 Ala. 387; *Ex parte Hughes*, 114 U. S. 147; *Ex parte Hoyt*,

al principle that a function of appellate jurisdiction is to assist parties rightfully entitled to prosecute an appeal to perfect the appeal by coercing the performance of duty by ministerial, as well as by judicial officers, mandamus will lie to compel the making of the proper record and the certification of the necessary transcript.¹ Within this general principle as to the wrongful denial of an appeal, or the wrongful interposition of obstacles to the prosecution and perfecting of the appeal fall many particular instances.² While, as we have elsewhere said, mandamus can not rightfully be made to take the place of a writ of error or of an appeal, it may, nevertheless, be employed to put a case in a situation to appeal, and, to do this, it may lie to compel the trial court to make and enter a decision.³ It is quite true that mandamus will lie to compel the trial court to obey directions, instructions and judgments of the appellate tribunal,⁴ for in such cases the duty is a mandatory one and the court has no discretion to exercise.

§17. Mandamus—Matters of Practice—Mandamus is an extraordinary remedy and not a writ of right.⁵ A party who asks

Field, 37 Mo. App. 83; *York v. Ingham*, Circuit Judge, 57 Mich. 421, 24 N. W. Rep. 157; *Ex parte Newman*, 14 Wall. 152; *Life, etc., Ins. Co. v. Adams*, 9 Pet. 573; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore, etc., Co.*, 108 U. S. 566; *White v. United States*, 1 Wall. 660; *State v. Murphy*, 41 La. Ann. 526, 6 So. Rep. 816. The merits of a cause can not be determined upon an auxiliary application for mandamus. *State v. King*, 42 La. Ann. 77, 7 So. Rep. 72; *Shine v. Kentucky, etc., Co.*, 85 Ky. 177, 3 S. W. Rep. 18.

¹ *Perkins v. Fourniquet*, 14 How. (U. S.) 328; *Ex parte Sawyer*, 21 Wall. 235; *Ex parte Railway Co.*, 101 U. S. 711. See, generally, *Ex parte Roberts*, 15 Wall. 384; *Ex parte United States*, 16 Wall. 699; *Jared v. Hill*, 1 Blackf. 155.

² *Durand v. Gage*, 76 Mich. 624, 43 N. W. Rep. 583; *State v. Flad*, 26 Mo. App. 500; *Holborn Union v. St. Leonard's Parish*, 2 Q. B. D. 145, 149; *Ex*

parte *De Groot*, 6 Wall. 497. *United States v. Gomez*, 3 Wall. 411; *Wallace*, 41 Ind. 445.

It will lie to compel the signing of a minute. *Life, etc., Ins. Co. v. Ad-*

met, 306; *Life, etc., Co. v. Wilson*, 31

It will coerce the entry of a minute. *State v. Engle*, 127 Ind. 457, 10 Rep. 1077. A clerk can not

the correctness of the minutes made in a case where an application for a mandamus to compel the making out a transcript. *State v.*

La. Ann. 637, 8 So. Rep. 52; *Cressinger*, 88 Ind. 499. See, also, *Stafford v. Union Bank*, 17

S.) 275; *Quan Wo Chung v. State*, 83 Cal. 384, 23 Pac. Rep.

Ex parte *Alabama State Bar* (a.), 8 So. Rep. 768; *State v.*

that the writ be awarded him must make a very strong case.¹ The rule stated applies even in ordinary cases, but there is a stronger reason for its application in a case where the writ is asked to coerce action by a judge of a court of general superior jurisdiction, for the strong presumption is that he has performed his duty fully and faithfully.² A verified petition is required, and the petition must show a clear right to the relief prayed. It must show diligence and that the petitioner has left nothing undone which it was incumbent upon him to do, or show that the judge, or other officer, wrongfully prevented him from doing what the law required him to do.³ It is, of course, necessary to plead the facts fully and positively and not by way of mere conclusions or recitals. The facts pleaded must show the judge or officer to be in the wrong,⁴ that the petitioner is in the right, and that he has placed himself in a position to ask assistance from the appellate tribunal. Where a transcript can be procured it should be filed before or at the time of applying for the mandamus, for the party must proceed as far as he can without assistance, and he must show, as far as in his power, a willingness and an attempt to get the case into the appellate

parte Commissioners, 112 U. S. 177; Knox County v. Aspinwall, 24 How. (U. S.) 376; Kentucky v. Denison, 24 How. (U. S.) 66; Gardner v. Haney, 86 Ind. 17; City of Indianapolis v. McAvoy, 86 Ind. 587; Shelby Tp. v. Randles, 57 Ind. 390.

¹ State v. McCabe, 74 Wis. 481, 43 N. W. Rep. 322; State v. Williams, 99 Mo. 291, 12 S. W. Rep. 905; State v. Knight, 31 So. Car. 81, 9 S. E. Rep. 692; Bayard v. United States, 127 U. S. 246; State v. Kinkaid, 23 Neb. 641, 37 N. W. Rep. 612. In the appellate tribunal the writ is issued in aid of the appellate jurisdiction, and only in clear cases. Riggs v. Johnson County, 6 Wall. 166; United States v. Boutwell, 17 Wall. 604.

² Vanvabry v. Staton, 88 Tenn. 334, 12 S. W. Rep. 786; Cummings v. Armstrong, 34 W. Va. 1, 11 S. E. Rep. 742. The party must show a right to a decision

and a wrongful refusal. Where there is a decision it must be challenged upon appeal or by a writ of error, not by mandamus. *Ex parte* Koon, 1 Denio, 644; People v. Justices, 20 Wend. 663; *Ex parte* Ostrander, 1 Denio, 679; People v. Tracy, 1 Denio, 617; Peralta v. Adams, 2 Cal. 594; *Ex parte* Milner, 6 Eng. Law & Equ. 371; County Court of Warren v. Daniel, 2 Bibb. 573; *Ex parte* Taylor, 14 How. (U. S.) 3; *Ex parte* Bacon, 6 Cowen, 392.

³ Unexplained delay will be fatal to the application, for the law exacts diligence. State v. Dyer, 99 Ind. 426.

⁴ It is upon this principle that it was held that the party asking the extraordinary relief must show a demand or request. State v. Slick, 86 Ind. 501. See, generally, Ingerman v. State, 128 Ind. 225, and authorities cited.

tribunal.¹ A party who asks a mandamus where there is a pending appeal invokes an extraordinary remedy, but when he asks it where there is no pending appeal he asks the court for extraordinary relief in an unusual case, and hence must show a very clear right to the relief; this he can not do without showing that he has left nothing undone that he could do without assistance. If he can unassisted take such steps as secure a pending appeal, he is bound to do so, but if he can not proceed that far he may ask assistance, since the court will not allow his right of appeal to be defeated or its jurisdiction to be wrongfully impaired. It may be added that a party who has no pending appeal can not obtain mandamus without showing sufficient reason why his case constitutes an exception to the general rule. If no such reasons are shown the general rule will prevail.²

§ 518. **Prohibition**—The rules which govern the writ of prohibition are similar to those which prevail in proceedings to obtain a writ of mandamus from an appellate tribunal. The writ of prohibition may be employed by an appellate tribunal to prevent an unlawful invasion of its jurisdiction, and to prevent a wrongful interference with its records. The writ can not be made to take the place of an appeal or of a writ of error.³ Errors available on appeal can not be made available upon a petition for a writ of prohibition, any more than they can be upon a petition for a mandamus. Under a system such as ours prohibition can seldom be an appropriate remedy where the action of a court of superior general jurisdiction is sought to be con-

¹ *Hawes v. People*, 124 Ill. 560, 17 N. E. Rep. 13. We cite this case as showing that, as a general rule, an appellate tribunal will not issue a mandamus where there is no pending appeal.

² As illustrating the general doctrine of the text, see *Hoxie v. County Commissioners*, 25 Me. 333; *Sikes v. Ransom*, 6 Johns. 279; *Midberry v. Collins*, 9 Johns. 345; *State v. Tool*, 4 Ohio St. 553; *Gray v. Bridge*, 11 Pick. 189; *Squier v. Gale*, 1 Halst. (N. J. L.) 157.

³ *Home v. Camden*, 2 H. Bl. 533, 536.

It is held that where there is jurisdiction in the lower court prohibition will not issue to control its proceedings. *State v. Judge of the Superior Court*, 29 La. Ann. 360. But it is also held that where there is no jurisdiction the writ may be awarded. *Swinburn v. Swift*, 15 W. Va. 483. See *Bacon's Abridg. Title Prohibition*, 3 Blackstone's Com. 112; *Smith v. Whitney*, 116 U. S. 167, 174; *Thomson v. Tracy*, 60 N. Y. 31; *Connecticut, etc., Co. v. Franklin County Commissioners*, 127 Mass. 50.

trolled, for decisions upon the question of jurisdiction may be reviewed on appeal.¹ We suppose, notwithstanding some of the expressions used in the case referred to in the note, that there may be cases where a writ of prohibition will issue to a trial court although it may have jurisdiction of the general subject, as, for instance, in a case where the trial court attempts to do something positively forbidden by the directions or instructions contained in the mandate of the appellate tribunal. It is the imperative duty of the trial court to obey the mandate, and the appellate tribunal must necessarily have power to coerce obedience by mandamus or by prohibition.

¹ Board of Commissioners *v.* Spittler, 13 Ind. 235. In the case cited it was said: "This exposition of the causes for which a writ of prohibition may issue at common law, at once shows that under our system of procedure, it can only be used for one cause, namely to command the judge and parties of a suit in an inferior court to cease the prosecution thereof, upon a suggestion that the case originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. If this position be correct, and we think it is, the writ of prohibition in this instance was not the proper remedy, because the Board of Commissioners of Jasper county had, in the case pending before it, original and exclusive jurisdiction. Indeed, we perceive no reason why the party, instead of prosecuting the writ in question, did not adopt the usual remedy of appeal." We think the decision from which we have quoted a sound one, for under the American system, as it generally prevails, a decision affecting the question of jurisdiction may be reviewed in an ordinary appeal and hence there is no reason for resorting to the extraordinary remedy.

CHAPTER XXVI.

DISMISSAL AND REINSTATEMENT.

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| 519. The motion to dismiss the appeal is generally a preliminary motion. | § 528. Two appeals. |
| 520. The court may dismiss on its own motion. | 529. Appeal from judgment rendered in obedience to the mandate remanding the case. |
| 521. Second motion to dismiss not entertained. | 530. Bill of review. |
| 522. Merits not considered on the motion to dismiss. | 531. Parties to the motion to dismiss. |
| 523. Failure to comply with the rules of the court. | 532. Requisites of the motion. |
| 524. Failure to perfect the appeal within the time prescribed. | 533. Notice of the motion to dismiss. |
| 525. Failure to give notice. | 534. Dismissal by the appellant. |
| 526. No appealable interest. | 535. Effect of a dismissal. |
| 527. Failure to file a bond. | 536. Withdrawing the transcript. |
| | 537. Reinstatement—The power to order. |
| | 538. Cause must be shown. |
| | 539. Notice of the motion to reinstate. |
| | 540. Practice on motion to reinstate. |

§ 519. **The Motion to Dismiss the Appeal is generally a Preliminary Motion**—A motion to dismiss the appeal is usually, but not always, a preliminary motion. In most cases it should be interposed before a general appearance is entered.¹ Many causes available on a motion to dismiss, in cases where the motion is promptly made, and made before a general appearance, are unavailable where there is delay or a full appearance.² A safe general rule is to move to dismiss before appearing generally and to interpose the motion promptly, otherwise the causes assigned may be regarded as waived. The doctrine of waiver exerts an important influence upon motions to dismiss the ap-

¹ *Peoples Bank v. Finney*, 63 Ind. 460; *Archev v. Knight*, 61 Ind. 311; *Bender v. Wampler*, 84 Ind. 172; *Ridenour v. Beekman*, 68 Ind. 236; *Beck v. State*, 72 Ind. 250; *Burnett v. Abbott*, 51 Ind. 254. The exceptions to the general rule stated are rare.

² *Walker v. Hill*, 111 Ind. 223; *State v. Walters*, 64 Ind. 226; *Field v. Burton*, 71 Ind. 380; *Truman v. Scott*, 72 Ind. 258; *Brooks v. Doxey*, 72 Ind. 327; *West v. Cavins*, 74 Ind. 265; *Lloyd v. Reynolds*, 26 Neb. 63, 41 N. W. Rep. 1072.

peal, and delay will often give effect to that doctrine to the injury of the appellee.

§ 520. **The Court may Dismiss on its own Motion**—Where it appears that there is no jurisdiction the court will dismiss the appeal on its own motion. If there is no jurisdiction of the subject the appeal will be dismissed by the court at any stage of the proceedings.¹ Where there is no final judgment, and the case is not one in which an appeal lies from an interlocutory judgment, the court will not entertain the appeal but will direct a dismissal.² So, where the record shows that there is no actual controversy but a mere feigned case, the court may, on its own motion dismiss the appeal.³ And the court may, upon the same principle, dismiss an appeal where it appears that the controversy has fully terminated.⁴ But a party is not bound to act upon the assumption that the court will, of its own motion, dismiss the appeal, so that it is always proper for him to move for a dismissal in such cases as those indicated, and, it may be added, it is generally safer for him to make the proper motion.

§ 521. **Second Motion to Dismiss not Entertained**—A second motion to dismiss an appeal based upon the same grounds as those

¹ *New Orleans v. Scalzo*, 41 La. Ann. 1141; *Robinson v. Oceanic, etc., Co.*, 112 N. Y. 315; *Doctor v. Hartman*, 74 Ind. 221; *Smith v. Myers*, 109 Ind. 1, 9; *Robertson v. Smith*, 109 Ind. 79; *United States v. Yates*, 6 How. (U. S.) 605; *Breidert v. Krueger*, 76 Ind. 55; *Louisville, etc., Co. v. Jackson*, 64 Ind. 398; *Evansville, etc., Co. v. Barbee*, 59 Ind. 592; *United States v. Morillo*, 1 Wall. 706; *Parker v. Morrill*, 106 U. S. 1. See "Questions that may be first made on appeal." *Ante*, Chapter XX. See, also, *Hart v. Burch*, 31 Ill. App. 22. S. C. 22 N. E. Rep. 831; *Rohn v. Harris*, 31 Ill. App. 26, S. C. 22 N. E. Rep. 587; *Douglass v. Neguelona*, 88 Tenn. 769, 14 S. W. Rep. 283.

² *Reese v. Beck*, 9 Ind. 238; *Miller v. State*, 8 Ind. 325; *Taylor v. Board*, 120 Ind. 121. See "From what an appeal may be taken." *Ante*, Chapter V. See, also, *Wilcox v. Wilcox* (Vt.), 21 Atl. Rep. 423; *Laiwdley v. Kline*, 21 W. Va. 21; *Bacas v. Smith*, 33 La. Ann. 139; *Hoover v. York*, 33 La. Ann. 652; *Carswell v. Crowther* (Texas), 16 S. W. Rep. 172; *Fitzgerald v. Evans*, 53 Texas, 461.

³ *United States v. Phillips*, 6 Peters. 776; *Peck v. Young*, 1 How. (U. S.) 250; *Cartwright v. Howe*, 1 How. (U. S.) 188; *San Mateo County v. Southern Pacific R. R. Co.*, 116 U. S. 138.

⁴ *Schmohl v. Fusco*, 13 N. Y. Supp. 583.

assigned in the first motion will not be entertained.¹ The reason for this rule is obvious. Nor will a second motion be entertained upon new reasons unless it appears that diligence and care would not have enabled the party to discover and present such new reasons in the first instance. The court may, of course, enter a *pro forma* order provisionally overruling the motion to dismiss and subsequently consider it.² The practice of our court has been to hold motions to dismiss an appeal which present special difficulties or which require a full examination of the record until the case is taken up for final consideration. It is barely proper, at all events, hardly necessary, to add that the matter is one largely within the discretion of the court.

§ 522. **Merits not considered on the Motion to Dismiss**—A motion to dismiss does not involve any questions concerning the merits of the controversy; it simply brings in question the effectiveness of the appeal. On such a motion the court will only inquire whether the appeal lies and whether it is properly taken and perfected. It will not decide any question affecting the merits of the controversy upon the motion to dismiss.³

§ 523. **Failure to Comply with the Rules of the Court**—It is evident from the authorities referred to in the preceding para-

¹ *Stevens v. Higginbotham* (Utah), 23 Pac. Rep. 757; *Bingham v. Brumback*, 24 Ill. App. 332; *Tyrrell v. Baldwin*, 78 Cal. 470, 21 Pac. Rep. 116. See *Truelock v. Friendship Lodge*, 75 Ia. 381, 39 N. W. Rep. 654.

² *Green v. Ronen*, 62 Iowa, 89.

³ *Swasey v. Adair*, 83 Cal. 136, 23 Pac. Rep. 284; *Hill v. Chicago, etc., Co.* 129 U. S. 170; *Graham v. Board*, 25 Ind. 333; *Hooper v. Beecher*, 109 N. Y. 609. In the case last cited the court, in speaking of a motion to dismiss upon the ground that there was no merit in the appeal, said: "The judgment is final and, therefore, appealable. The legal questions involved are the validity or invalidity of an assignment for the benefit of creditors made and executed as

above mentioned, and these questions are made to depend upon the consideration of the pleadings and proofs. These questions should be discussed in the argument when reached in regular order. To dispose of such questions on a motion to dismiss is to dispense with the rules prescribed for the orderly disposition of appealed cases. We can not countenance such a course and thereby open up a short cut for the resort of litigants anxious to gain an earlier hearing from us than they are entitled to have by the rules." See, also, *State v. Bradley*, 29 Mo. App. 366; *Dzialynski v. Bank of Jacksonville*, 23 Fla. 44, 1 So. Rep. 338; *Burke v. Pepper*, 29 Neb. 320, 45 N. W. Rep. 466; *State v. Prater*, 26 So. Car. 613.

graphs and from the principles there stated, that a motion to dismiss must assign some cause or some reason which establishes the claim that the appeal will not lie or that some step essential to the effectiveness of the appeal has not been taken in the manner and within the time prescribed by the statute or by the rules of practice. It is not enough to comply with the statutory commands or the common law requirements, for the rules established by the court must also be complied with or the appeal may be dismissed.¹ Our decisions have not given such strict effect and force to the rules of the court as the courts elsewhere have done, and it is, perhaps, to be regretted that the court has been so lax in the enforcement of its rules. We venture to say that it is much better and much more satisfactory to strictly and uniformly enforce the rules than to spasmodically relax them and now and then rigidly enforce them. Our court has enforced the rules respecting the filing of briefs² with considerable strictness, but the rules in other respects have not been very strictly enforced. It is, as the authorities to which we

¹ *Whitehurst v. Pettipher*, 105 N. C. 39, 10 S. E. Rep. 857; *Avery v. Pritchard*, 106 N. C. 344; *Dodd v. Bowles*, 3 Wash. Ty. 11, 13 Pac. Rep. 681; *Griffin v. Nelson*, 106 N. C. 235, 11 S. E. Rep. 414; *Gant v. Timmons*, 78 Tex. 11, 14 S. W. Rep. 236; *Ashe v. Glenn*, 33 So. Car. 606; *Armijo v. Abeytia* (New Mex.), 25 Pac. Rep. 777; *Martin v. Nugent* (Mo.), 15 S. W. Rep. 422; *Pearson v. Household, etc., Co.*, 78 Tex. 385, 14 S. W. Rep. 890; *Veronee v. Bell* (So. Car.), 12 S. E. Rep. 664; *Randolph v. Hahn*, 33 So. Car. 609, 12 S. E. Rep. 600; *Dial v. Dial*, 33 So. Car. 306, 12 S. E. Rep. 474; *Hinton v. Pritchard*, 107 N. C. 128, 12 S. E. Rep. 242; *People v. Flack*, 15 Daly, 442; *Murphy v. Ross*, 2 Wash. 327, 26 Pac. Rep. 222; *Donahue v. Enterprise, etc., Co.*, 33 So. Car. 608, 12 S. E. Rep. 665. These cases, to which many more might be easily added, prove that the failure to comply with the rules of the court makes a dismissal necessary—not mere-

ly proper. This is the only consistent doctrine.

² *Deford v. Urbain*, 42 Ind. 476; *Stephens v. Stephens*, 51 Ind. 542; *Cutler v. State*, 62 Ind. 398; *Gardner v. Stover*, 43 Ind. 356; *Murray v. Williamson*, 79 Ind. 287. It has enforced the rule as to briefs, although some brief has been filed, but not such as the rule requires. *Harrison v. Hedges*, 68 Ind. 266; *Bray v. Franklin Co.*, 60 Ind. 6; *Northwestern, etc., Co. v. Hazelett*, 105 Ind. 212; *Landwerlen v. Wheeler*, 106 Ind. 523; *Louisville, etc., Co. v. Donnegan*, 111 Ind. 179; *Henderson v. Burch*, 10 Ind. 54; *Couse v. Havens*, 44 Ind. 282; *Zehnor v. Crull*, 10 Ind. 547. But as to other matters, as for instance, making marginal notes on transcript, the practice has not been uniform. *O'Neil v. Chandler*, 42 Ind. 471; *Bass v. Doerman*, 112 Ind. 390; *Beigh v. Smarr*, 62 Ind. 400.

have referred very clearly show, not only proper to dismiss an appeal for a failure to comply with the rules of the court, but it is a duty. The rules constitute the law,¹ and can not be disregarded.

§ 524. **Failure to perfect the Appeal within the Time Prescribed—** In a former chapter we considered at length the rules which govern as to the time within which an appeal must be taken, and affirmed that the provisions of the law limiting the time within which an appeal may be taken are mandatory.² We declared, also, that all the essential steps, and not merely some of them, must be taken within the time designated by the law. It results from the doctrines stated that if an appeal is not perfected by doing all that the law commands within the time fixed, the court should dismiss it, and so the authorities declare.³

¹ *Ante*, § 7, and authorities cited in the notes. It seems to us that it is the duty of the court to uniformly and strictly enforce its rules, and this is the doctrine of some of our own cases, and should be of all, but it is not, for the decisions are conflicting. *Beigh v. Smarr, supra*; *Bass v. Doerman, supra*; *Bowman v. Simpson*, 68 Ind. 229; *Kiley v. Perrin*, 69 Ind. 387; *Contra Mitchell v. American Ins. Co.*, 51 Ind. 396; *Trueblood v. Nicholson*, 52 Ind. 420, and cases cited in preceding note.

² *Ante*, Chapter VI. See, also, *Whitcomb v. Union, etc., Co.*, 122 U. S. 363.

³ *Holloran v. Midland, etc., Co.* (Ind.), 28 N. E. Rep. 549, and cases cited; *Vitorino v. Corea* (Cal.), 25 Pac. Rep. 420; *Hull v. Westcott*, 17 Fla. 280; *Page v. Latham*, 60 Cal. 601; *Heinlen v. Southern, etc., Co.* 65 Cal. 304; *N. P. Terminal Co. v. Lowenberg*, 11 Oregon 286; *Struber v. Rohlf*, 36 Kan. 202; *Kasson, v. Follett*, 9 Col. 348; *Judge v. Ohm*, 89 Cal. 134, 26 Pac. Rep. 694; *State v. James* (N. C.), 13 S. E. Rep. 112; *Joseph Schnaider's Brewing Co. v. Levvie*, 41

Mo. App. 584; *Williams v. Hutchinson* (Fla.), 7 So. Rep. 852; *Sturtevant v. Wineland*, 22 Neb. 702, 36 N. W. Rep. 277; *Talbird v. Whipple*, 31 So. Car. 600, 9 S. E. Rep. 742; *Pregnall v. Miller*, 26 So. Car. 612, 7 S. E. Rep. 71; *Gulf, etc., Co. v. Edwards*, 72 Tex. 303, 10 S. W. Rep. 525; *Williams v. La Penotiere*, 25 Fla. 473, 6 So. Rep. 167; *Glos v. Randolph*, 130 Ill. 245, 22 N. E. Rep. 797; *Viera v. Dobyus* (Cal.), 24 Pac. Rep. 181. *Corinne Mill Co. v. Johnston*, 5 Utah 147, 13 Pac. Rep. 17; *Lincoln v. Milstead*, 38 Mo. App. 350; *Dean v. Jones*, 27 Mo. App. 468; *Turner v. Hine*, 37 Iowa, 500. See, also, authorities collected in note *ante*, § 128. While the authorities uniformly hold that the failure to perfect the appeal in time makes a dismissal imperative, yet it is held that a case may be made excusing the delay. *Chapman v. Bank*, 88 Cal. 419, 26 Pac. Rep. 608; *Garitte v. Popplein*, 73 Md. 322, 20 Atl. Rep. 1070. But a very strong case must be made in order to break the force of the general rule. *Ante*, §§ 116, 117, and authorities cited.

§ 525. **Failure to give Notice**—Where the appellant fails to give notice, the appellee, unless he waives notice by some act, is entitled, upon a due and seasonable motion, to a dismissal of the appeal. This is plainly so for the reason that notice is essential to the jurisdiction over the person by the appellate tribunal. This rule does not, of course, apply where notice is not required, as, for instance, where the appeal is fully perfected in term. It is hardly necessary to refer to authorities upon the plain elementary proposition stated, especially as the subject has already received attention.¹ Notice to co-parties is, as we have elsewhere shown, essential, but, under the decisions of our court, all objections grounded on a failure to give notice to co-parties are waived if not made before joining in error.² A failure to promptly object is, as said in the first paragraph of this chapter,³ a waiver of mere irregularities or defects in a notice, and a general appearance without objection is regarded as a waiver of all objections based on a failure to give notice.

§ 526. **No Appealable Interest**—If it appears from an inspection of the record that the party who assumes to appeal has no appealable interest, the appeal may be dismissed on motion.⁴

¹ *Ante*, § 173; *Holloran v. Midland Ry. Co.*, 28 N. E. Rep. 549; *Herman v. Francis Co.*, 7 Mo. App. 562; *Raymond v. Richmond*, 76 N. Y. 106; *Hastings v. Halleck*, 10 Cal. 31; *Franklin v. Reiner*, 8 Cal. 340; *Whipley v. Mills*, 9 Cal. 641; *Boston v. Haynes*, 31 Cal. 107; *Foy v. Domec*, 33 Cal. 317; *Lynch v. Dunn*, 34 Cal. 518; *Hendrickson v. Sullivan*, 28 Neb. 790, 44 N. W. Rep. 1135.

² *Knarr v. Conway*, 37 Ind. 257; *Wickham v. Hess*, 38 Ind. 183; *Hunter v. Chrisman*, 70 Ind. 439; *Burk v. Simonson*, 104 Ind. 173; *Aylesworth v. Milford*, 38 Ind. 226; *Erwin v. Scotten*, 38 Ind. 289. As to who are deemed co-parties, see *Keller v. Boatman*, 49 Ind. 101; *Hammon v. Sexton*, 69 Ind. 37; *Koons v. Mellett*, 121 Ind. 585; *Hadley v. Hill*, 73 Ind. 442. For a full discussion of the subject of co-parties and notice, see *ante*, §§ 139, 144, 156, 162, 163.

It is evident that the later cases have departed from the rule respecting notice to co-parties, for the earlier decisions certainly regarded the rule as of a substantial and important character while some of the later ones declare it to be somewhat technical. See, in addition to the cases first cited in this note, *McClure v. Taylor*, 38 Ind. 427. As a type of the later cases, see *Field v. Burton*, 71 Ind. 380. A discussion of the subject will be found at another place. *Ante*, §§ 143, 144. See, also, *Shannon v. Cavazos*, 131 U. S. App. LXXI.

³ See, also, *Archey v. Knight*, 61 Ind. 311, 314.

⁴ *Independent District, etc., v. District, etc.*, 44 Ia. 201; *Faucher v. Grass*, 60 Ia. 505; *Gresham v. Chantry*, 69 Ia. 728; *Rivers v. Olmstead*, 66 Ia. 186; *Hyatt v. Dusenbury*, 1 Silvernail (N. Y.), 475.

It is clear that there can be no right of appeal in a stranger, or in one who has no substantial interest in the controversy. We suppose, however, that where the question of interest or no interest is an original one, where it goes to the merits and requires an examination of the whole record, the court will not decide it upon a motion to dismiss the appeal.

§ 527. **Failure to file a Bond**—Although a bond is not usually essential to the effectiveness of an appeal, yet there are cases in which a bond is indispensably essential.¹ Whether a bond is essential to the appeal or is merely necessary to secure a stay of proceedings is to be determined from the provisions of the statute. Where a bond is required as a part of the procedure and as necessary to the perfection of an appeal, it must be filed within the time prescribed or the appeal may be dismissed on motion.² A party who assumes to file a bond in compliance with the requirements of the law occupies a very different position from one who makes no attempt to file a bond. If a bond is filed, and it appears to have been filed in conformity to the requirements of the law, it will confer jurisdiction of the appeal although it may be radically defective. The statute provides that appeals shall not be dismissed for informalities or defects in a bond, and provides, also, that the appellant shall be given a reasonable time in which to file a new bond.³ These provisions, by the clearest implication, vest jurisdiction in the appellate tribunal, since they provide for action by that tribunal in cases where the bond is defective, and, upon the familiar rule that the power to decide is jurisdiction, there can be no doubt that jurisdiction attaches, although the bond may be insufficient.⁴

¹ *Ante*, §§ 247, 248, and authorities cited.

² In addition to the authorities referred to in the paragraphs designated in the preceding note may be cited the following: *Clelland v. Tanner*, 8 Col. 252; *Boyden v. Williams*, 92 N. C. 546; *Eshon v. Chowan Co.*, 95 N. C. 75; *Putnam v. Boyer*, 140 Mass. 235; *Turner v. Quinn*, 92 N. C. 501; *McMillan*

v. Nye, 90 N. C. 11; *Hemphill v. Black*, 90 N. C. 14; *Perkins v. Bates*, 61 Tex. 190; *Bellegarde v. San Francisco Bridge Co.*, 80 Cal. 61, 22 Pac. Rep. 57; *Nelson v. Tenney*, 113 N. Y. 616.

³ R. S. 1881, § 657.

⁴ *Fischer v. Langbein*, 103 N. Y. 84. See *ante*, "Appellate Jurisdiction," Chapter II.

The cases declare the rule as we have stated it even where there is no such statute as ours.¹

§ 528. **Two Appeals**—Upon the general principle illustrated in the many cases which hold that a party can not prosecute a suit to review a judgment and an appeal to reverse it at the same time, it must be held that a party can not prosecute two appeals in the same case and against the same judgment. The prosecution of the second appeal will not be permitted, but an order dismissing it will be granted upon motion.² In cases where a motion is grounded upon the fact that the appellant is attempting to prosecute two appeals in the same case, it is proper to hear evidence *dehors* the record. We have said that a motion to dismiss is appropriate because our cases assert that such an issue may be made by a plea or by a motion as the party may elect.³

§ 529. **Appeal from Judgment rendered in obedience to the Mandate Remanding the Case**—An appeal from a judgment rendered in obedience to the mandate of the appellate tribunal may be dismissed on motion. This conclusion results from the principles declared and the authorities cited in another chapter.⁴ Where the appellate tribunal specifically directs the judgment that the trial court shall enter, the latter court does not in entering the judgment directed do anything more, in contemplation of law, than enter the judgment of the higher court. As the judgment entered in such a case is, in effect, the judgment of the appellate tribunal, to permit a second appeal would be to affirm that an appeal will lie from the judgment of the appellate tribunal, and this no precedent will justify nor any principle warrant.⁵

¹ State *v.* Thompson, 81 Mo. 163; Jacobs *v.* Morrow, 21 Neb. 233.

² In *re* Young, 22 Wis. 205; Hopkins *v.* Hopkins, 39 Wis. 165; Moe *v.* Moe, 39 Wis. 308; Wisconsin, etc., Co. *v.* Plumer, 49 Wis. 668.

³ Buntin *v.* Hooper, 59 Ind. 589; Day *v.* School City of Huntington, 78 Ind. 280. See, "Pleadings of the Appellee," *ante*, Chapter XXIII.

⁴ *Post*, "The Judgment on Appeal," Chapter XXIX.

⁵ Mackall *v.* Richards, 116 U. S. 45; Stewart *v.* Salamon, 97 U. S. 361; Humphrey *v.* Baker, 103 U. S. 736; Kimberly *v.* Arms Co., 40 Fed. Rep. 548. See, generally, Shillern *v.* May, 6 Cranch. 267; *Ex parte* Story, 12 Pet. 339; *Ex parte* Sibbald, 12 Pet. 488.

§ 530. **Bill of Review**—In a former chapter we stated the general rule to be that a party can not prosecute a suit to review a judgment and also prosecute an appeal to reverse the same judgment.¹ That this is the general rule is beyond controversy, and it is likewise settled that, where there is a binding election by prosecuting proceedings to review, the court will, upon the proper showing and appropriate application, dismiss the appeal.² But there is an exception to the general rule that a party can not appeal and prosecute a suit to review. A party may, after an unsuccessful appeal, prosecute a suit to review, but the suit must be upon the ground of newly discovered matter,³ and questions before the court on appeal, and there decided, can not be again litigated.⁴

§ 531. **Parties to the Motion to Dismiss**—The motion to dismiss must ordinarily be made by one who has a right, as a party or privy, to have the appeal dismissed. But the court may, no doubt, entertain a motion even from a stranger, where the ground of the motion is the want of jurisdiction or the like, for, as we have seen, the court may dismiss an appeal of its own motion. A stranger can not, however, be heard to insist upon a dismissal on the ground that there is an insufficient notice, a defect of parties, or the like, since such grounds can

¹ *Ante*, § 149; *Humphrey v. Baker*, 103 U. S. 736; *Buscher v. Knapp*, 107 Ind. 340; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Whiting v. Bank*, 13 Pet. 6; *Buffington v. Harvey*, 95 U. S. 99; *Shelton v. Van Kleeck*, 106 U. S. 532; *Ricker v. Powell*, 100 U. S. 104. A party may appeal from a judgment rendered in a suit to review. *Brown v. Keyser*, 53 Ind. 85; *Keepfer v. Force*, 86 Ind. 81.

² *Hill v. Roach*, 72 Ind. 57. In the case cited it was said: "It is unquestionably true that in this State a complaint for the review of a judgment for error of law in the proceedings will not lie after the judgment has been affirmed upon appeal to this court." The rule must be, in effect, the same where there

is a suit to review, and an appeal, and so it is held. *Davis v. Binford*, 70 Ind. 44; *Indiana, etc., Co. v. Routledge*, 7 Ind. 25.

³ *Hill v. Roach*, 72 Ind. 57; *Barbon v. Searle*, 1 Vern. 416; *United States v. Knight*, 1 Black. 484, 489; *Bentley v. Coyne*, 4 Wall. 509; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 805; *Davis v. Speiden*, 104 U. S. 83, 87.

⁴ *Kimberly v. Arms*, 40 Fed. Rep. 548; *Whiting v. Bank*, 13 Pet. 6; *Buffington v. Harvey*, 95 U. S. 99; *Shelton v. Van Kleeck*, 106 U. S. 532; *Ricker v. Powell*, 100 U. S. 104. These cases show that where a matter, whether of fact or of law, has been fully considered and decided on appeal, it can not be again brought into litigation.

only be urged by parties to the appeal.¹ If a joint motion to dismiss is made by several parties it will be unavailing, unless it is well taken as to all who unite in it.²

§ 532. **Requisites of the Motion**—The motion to dismiss the appeal should be in writing. We are aware that in a case decided some years ago it was held that such a motion need not be in writing,³ but we regard that decision as erroneous even under the rules of practice as they then existed, for a motion is a pleading and pleadings should be in writing; it is, however, quite clear that under the rules now in force the motion must be a written one.⁴ The motion should specify with reasonable certainty the grounds upon which it is based.⁵ The motion is heard, as motions generally are, upon the papers, affidavits and briefs of the parties, for so the rules of court provide.

§ 533. **Notice of the Motion to Dismiss**—Even in the absence of an express rule of court upon the subject, it is clear, on principle and authority, that the appellant is entitled to notice of the motion to dismiss.⁶ It would be unjust to require parties to be constantly on the watch for movements by their adversaries in a court whose jurisdiction extends over the whole State. But the rule of court settles, and rightly settles, the question; notice must be given.⁷ Notice may be served upon the adverse party or his attorney of record.⁸ Where a special motion, such as a motion to dismiss, is made and notice given, the party is fully

¹ *Watertown National Bank v. Holabird* (S. Dak.), 49 N. W. Rep. 98.

² *State v. Cunningham*, 101 Ind. 461. An appeal may be dismissed as to one party without affecting the rights of other parties. *Miller v. Arnold*, 65 Ind. 488.

³ *Scotten v. Divilbiss*, 60 Ind. 37. It is evident that the case cited did not receive very careful consideration and that there are other errors and inconsistencies in the opinion than the one mentioned in the text.

⁴ The rules of court require that such

motions shall be in writing. Rule XII. *Newman v. Kiser*, 128 Ind. 258.

⁵ *Bilyeu v. Smith*, 18 Oregon, 335, 22 Pac. Rep. 1073.

⁶ *Dyer v. Brady* (Cal.), 26 Pac. Rep. 511; *Town of Enterprise v. State*, 24 Fla. 152; *Loucheine v. Strouse*, 46 Wis. 487.

⁷ *Dick v. Mullins*, 128 Ind. 365, 27 N. E. Rep. 741; *Hargrove v. Washington*, 32 So. Car. 584, 10 S. E. Rep. 616.

⁸ *Ashe v. Glenn*, 33 So. Car. 606, 12 S. E. Rep. 423.

in court to answer the motion and is bound to take notice of the disposition made of it.¹

§ 534. **Dismissal by the Appellant**—An appellant may, of course, dismiss his appeal if it will not prejudice the rights of the appellee. But broad as is the right of the appellant to dismiss, he will not be permitted to exercise it to the manifest injury of the appellee.² It is difficult to conceive a case where a dismissal would so materially prejudice the appellee as to preclude the appellant from dismissing, except a case where there is an assignment of cross-errors, although it may be possible that there are other cases where a right to dismiss can not be exercised, because its effect would be unjustly prejudicial to the appellee. Where there is an assignment of cross-errors the appellant can not dismiss the appeal so effectively as to carry the appellee's case out of court.³ The appellee may, of course, consent to such a dismissal, but it can not be rightfully ordered over his objection.

§ 535. **Effect of a Dismissal**—The effect of the dismissal of an appeal is, as a general rule, to leave the case as if there had been no appeal.⁴ An order of dismissal does not preclude a second appeal. But a dismissal will not authorize a second appeal after the time limited for appealing. This is so for the reason that a party can not successfully plead his own laches as an excuse for not perfecting the appeal within the time prescribed by law.⁵ The dismissal of the appeal takes the case and the parties out of court, and the refile of the transcript is the filing of a new appeal.⁶ But where notice is given of a

¹ This is the doctrine declared in *Heaton v. Knowlton*, 65 Ind. 255.

² *State v. Moriarity*, 20 Iowa, 595.

³ *Feder v. Field*, 117 Ind. 386.

⁴ *Wallace v. Carter*, 32 So. Car. 314, 11 S. E. Rep. 97; *Fagan v. McTier*, 81 Ga. 73, 6 S. E. Rep. 177.

⁵ *State v. Ferguson*, 42 La. Ann. 643, 7 So. Rep. 670; *Bunting v. Saltz*, 84 Cal. 168, 22 Pac. Rep. 1132, S. C. 24 Pac. Rep. 167; *Stenzel v. Sims*, 25 Ill.

App. 538; *Lawrence v. Wood*, 122 Ind. 452, 24 N. E. Rep. 159; *Corinne, etc., Co. v. Johnston*, 5 Utah, 147; *Wiseman v. Mitchell Co.*, 104 N. C. 330, 10 S. E. Rep. 481; *Leary v. Territory*, 3 Wash. Ty. 13, 13 Pac. Rep. 665; *Varn v. Williams*, 30 So. Car. 608, 10 S. E. Rep. 390.

⁶ In the case of *Board v. Brown*, 14 Ind. 191, the court said: "Upon the dismissal of an appeal, the parties are no longer in court, and the refile of

motion to reinstate and upon that notice reinstatement is ordered there is nothing more than the continuation of the original appeal.

§ 536. **Withdrawing the Transcript**—It has long been the practice to permit an appellant, upon leave asked, to withdraw the transcript. The right to withdraw a transcript is not an absolute one, but the leave to withdraw is granted as a matter of favor. It is, therefore, discretionary with the court to grant or refuse leave to withdraw the transcript after the dismissal of the appeal. It is, indeed, held by the Supreme Court of the United States that the transcript becomes a record of the higher court and can not be withdrawn.¹

§ 537. **Reinstatement—The Power to Order**—An appellate tribunal by virtue of the inherent power which resides in courts of such a high rank may undoubtedly reinstate an appeal wherever justice requires it. The statute assumes to confer upon the court this power, but it needs no statute to invest the court with power over its own judgments and records, for that power exists as an inherent attribute in the court as one of the organs of sovereignty. The power is in the main a discretionary one,² so that it is not hedged in by fixed rules, although there are rules to which the courts usually yield obedience.

§ 538. **Cause must be Shown**—The reinstatement of an appeal, no matter for what reason the order of dismissal is granted, is not a matter of course. Courts ordinarily require that satisfactory cause be appropriately shown. One who has negligently and purposely violated the rules of the court, or has failed to do what the law requires, can not ask a reinstatement as a matter of right.³

the record is the institution of a new suit, at least so far as to require that notice shall be given to the defendant."

¹ *Cheney v. Hughes*, 138 U. S. 403, 11 Sup. Ct. Rep. 303.

² *Panton v. Manley*, 89 Ill. 458; *State v. Foster*, 44 N. J. L. 378.

³ *Taylor v. State*, 82 Ga. 578, 9 S. E.

Rep. 783; *Gulf, etc., Co. v. Edwards*, 72 Texas, 303, 10 S.W. Rep. 525; *Thomas v. Kelley*, 27 Ill. App. 491; *Bullock v. Cook*, 28 Mo. App. 222; *Horton v. Green*, 104 N. C. 400, 10 S. E. Rep. 470; *Whitehurst v. Pettipher*, 105 N. C. 39, 10 S. E. Rep. 857; *Stephens v. Koonce*, 106 N. C. 255, 10 S. E. Rep. 996; *Griffin*

§ 539. **Notice of the Motion to Reinstate**—A motion to reinstate can not be heard unless proper notice has been given. The motion is a special one, and falls within the rule that all special or collateral motions require notice. But there is an especially strong reason for requiring notice of an application to reinstate, and that is this: The effect of a dismissal is to carry the case and the parties out of court,¹ and they can only be brought into court upon notice. Where notice is duly given, the parties are in court as to the matters presented by the motion with all their incidents, and they must take notice of the action of the court respecting the motion. If the application can not be heard at the time designated in the motion, it will be heard, without any new or additional notice, at a subsequent time.²

§ 540. **Practice on Motion to Reinstate**—A motion to reinstate is heard upon the papers, affidavits and written briefs. The papers are to be filed with the clerk who will transmit them to the court. The notice may be served upon the adverse party or some one of his attorneys of record. The motion should be placed on file with the necessary affidavits and briefs at the time of giving the notice. The adverse party is entitled to a reasonable time,—ten days,—in which to respond to the motion, so that all the papers should be on file for that length of time before the date appointed for the hearing.

v. Nelson, 106 N. C. 235, 11 S. E. Rep. 414. The cases which follow indicate what causes are not sufficient to secure the reinstatement of an appeal. *Jones v. State*, 80 Ga. 640, 6 S. E. Rep. 172; *Evans v. Kilby*, 81 Ga. 278, 7 S. E. Rep. 226; *Rumsey, etc., Co. v. Baker*, 33 Mo. App. 239; *Williams v. Jacksonville, etc., Co.*, 25 Fla. 359, 5 So. Rep. 847; *Harmon v. Lexington*, 32 So. Car. 583, 10 S. E. Rep. 552. The cases which follow supply illustrations of what has been regarded as sufficient cause. *Tribble v. Poore*, 28 So. Car. 565, 6 S. E. Rep. 577; *State v. Gaslin*, 25 Neb. 71, 40 N. W. Rep. 601; *Hunt v. Blackburn*, 127 U. S. 774, 8 Sup. Ct. Rep. 1395; *Moore v. Brown*, 81 Ga. 10, 6 S. E. Rep. 833; *Stoddard v. Roland*, 31 So. Car. 342, 600, 9 S. E. Rep. 741; *Smith v. Summerfield*, 107 N. C. 580, 12 S. E. Rep. 465. As to the effect of negligence, see *Le Guen v. Gouverur*, 1 Johns. Cases, 436, 502; *Duncan v. Lyon*, 3 Johns. Ch. 351; *M'Vickar v. Wolcott*, 4 Johns. 510; *Ward v. Town of Southfield*, 102 N. Y. 287. See, generally, *Peyton v. Kruger*, 77 Ind. 486; *Johnson v. Herr*, 88 Ind. 280; *Sharp v. Moffitt*, 94 Ind. 240.

¹ *Board v. Brown*, 14 Ind. 191.

² *Heaton v. Knowlton*, 65 Ind. 255.

CHAPTER XXVII.

THE EFFECT OF AN APPEAL.

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| <p>§ 541. An appeal removes the case from the jurisdiction of the trial court.</p> <p>542. Appeal from an interlocutory order does not completely oust jurisdiction.</p> <p>543. Illustrative cases.</p> <p>544. What the appeal covers.</p> | <p>§ 545. Collateral or supplemental matters not covered by the appeal.</p> <p>546. The judgment effective notwithstanding the appeal.</p> <p>547. Action upon the judgment not barred by the appeal.</p> <p>548. Supplying omissions and correcting the record after appeal.</p> <p>549. A new record can not be made.</p> |
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§ 541. An Appeal removes the Case from the Jurisdiction of the Trial Court—The overwhelming weight of authority is that an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal.¹

¹ *Allen v. Allen*, 80 Ala. 154; *Boyn-ton v. Foster*, 7 Metc. 415; *Bryan v. Bery*, 8 Cal. 130; *Baggs v. Smith*, 53 Cal. 88; *Livermore v. Cambell*, 52 Cal. 76; *Burgess v. Donoghue* (Mo.), 2 S. W. Rep. 303; *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250; *State v. Duffel*, 41 La. Ann. 958; *Stephens v. Koonce*, 106 N. C. 222, 10 S. E. Rep. 996; *Kimberly v. Arms*, 40 Fed. Rep. 548; *Ensminger v. Powers*, 108 U. S. 292; *Pierson v. McCahill*, 23 Cal. 249, 253; *McGarrahan v. New Idra Co.*, 49 Cal. 331, 345; *Mitchell v. United States*, 9 Pet. 711; *Saltmarsh v. Tuthill*, 12 How. (U. S.) 387; *Bronson v. La Crosse, etc., Co.*, 1 Wall. 405; *Stewart v. Stringer*, 41 Mo. 400, S. C. 97 Am. Dec. 278; *Helm v. Boone*, 6 J. J. Marsh. 351, S. C. 22 Am. Dec. 75; *Planter's Bank v. Neely*, 7 How. (Miss.) 80, S. C. 40 Am. Dec. 51; *M'Laughlin v. Janney*, 6 Gratt. (Va.) 609; *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Ladd v. Couzins*, 35 Mo. 513; *State v. Kolsen* (Ind.), Dec. 19, 1891. The only case which opposes the doctrine of the cases cited that we have been able to find is that of *Indiana, etc., Co. v. McBroom*, 103 Ind. 310. The decision in that case, we venture to say, is not sound. It is antagonistic to the general principle declared by the cases referred to above, and to the doctrine of the text writers. 1 Black on Judgments, § 243. It is opposed to the established doctrine that a party can not pursue two remedies at the same time. *Kimberly v. Arms*, *supra*; *Ensminger v. Powers*, 108 U. S. 292, 302; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Harvey v. Fink*, 111 Ind. 249; *Klebar v. Town of Corydon*, 80 Ind. 95, and cases cited. If a party can obtain a new trial while an appeal is pending

[It is difficult to conceive how it could be otherwise, since it is not possible that two courts can have authority over a single case at the same time. The case must, of invincible necessity, be in the higher court or in the lower court, for it can not be in both courts. As the authority of the inferior yields to the superior, the case is, for all purposes connected with the consideration and decision of the questions involved in it, completely within the jurisdiction of the appellate tribunal. The right to order process to enforce the judgment remains in the trial court where there is no supersedeas or order staying proceedings, but all jurisdiction over questions involved in the litigation and embraced by the judgment terminates with the removal of the case to the appellate tribunal. The loss of jurisdiction is so complete as to require a party who seeks relief from any error, except an error in making the record or in omitting something from the record, to apply to the higher court. After the cause leaves the lower court it can not act upon any question involved in the appeal. Where the appeal is made to operate as a supersedeas, as we have elsewhere shown, it operates not only to divest the jurisdiction of the trial court but also to preclude the trial court, or the parties, from taking steps to enforce the judgment.¹

§ 542. **Appeal from an Interlocutory Order does not completely oust Jurisdiction**—Where the law permits an appeal from an interlocutory judgment or an intermediate order, and the appeal is from such an order or judgment, only part of the case is removed by appeal from the trial court to the appellate tribunal.² But the part of the case appealed goes completely to the higher court. If, for instance, an appeal is duly taken from an order appointing a receiver, only so much of the case as af-

the effect is to terminate the case in the higher court, since nothing is left for decision. There is no longer any controverted question. The effect of such a doctrine is to practically make the superior tribunal yield to the inferior.

¹ Coates v. Wilkes, 94 N. C. 174; Keyser v. Farr, 105 U. S. 265; Stone v. Spellman, 16 Texas, 432; Levi v.

Karrich, 15 Iowa, 444; Skinner v. Bland, 87 N. C. 168; Penrice v. Wallis, 37 Miss. 172. See Stay of Proceedings, Supersedeas, Appeal Bond.

² Jewett v. Albany City Bank, 1 Clark (N. Y.), 59; Atlantic Ins. Co. v. Lemar, 10 Paige, 505; Deas v. Thorne, 3 John. 543.

facts that order is carried out of the jurisdiction of the trial court, and, as it retains jurisdiction of the principal issues, it may proceed to hear and determine them, but it certainly could not hear or decide the branch of the case removed by the appeal to the higher court. If, to again illustrate, suit should be brought to foreclose a mortgage and for the appointment of a receiver, and the court should enter an interlocutory order appointing a receiver, a proper appeal would carry up the case so far as it involved the order, but it would leave the part of the case involved in the issue made upon the mortgage in the trial court. It is quite clear, upon principle and authority, that what is effectively appealed leaves the jurisdiction of the one court and completely enters that of the other.

§ 543. *Illustrative Cases*—The scope and effect of the general rule that the appeal divests the jurisdiction of the trial court, are, of course, illustrated in the cases already referred to, but it may serve to exhibit the rule in a clearer light to refer to particular instances of its application. After an appeal has been taken the trial court can not make a supplemental decree.¹ It has been held that a motion to retax costs can not be made after the appeal,² but it may be doubted whether this is not carrying the doctrine too far, although there is reason supporting it. Where the amount or the right to costs is the question involved in the appeal, and requires the judgment of the appellate tribunal, then the trial court has no power to adjudicate upon it; but where the question comes up as a distinct, supplemental or collateral matter, we can see no reason why it may not be decided, pending the appeal, by the trial court. It has been held that an appeal from an order refusing to set aside a settlement of an administrator so completely carries the case into the appellate tribunal that no trial court can assume jurisdiction of the same subject.³ Where a decree is entered in a suit for divorce, and an appeal is perfected, alimony can not, as it has

¹ *Beal v. Chase*, 31 Mich. 490.

First National Bank, 30 Ia. 191; *Car-michael v. Vandebur*, 51 Ia. 525.

² *Levi v. Karrick*, 15 Iowa, 444; *Mc-Glaughlin v. O'Rourke*, 12 Ia. 459. For discussions and illustrations of the general rule see the cases of *Turner v.*

³ *Townsend v. Townsend*, 60 Mo. 246. See, generally, *State v. Musick*, 71 Mo. 401.

been held, be allowed during the pendency of the appeal by the trial court.¹ After an appeal in attachment proceedings the trial court has no jurisdiction to order the attachment discharged. In a case where an injunction is finally denied, the trial court's jurisdiction is taken away by the appeal, and it can not award an injunction² in the same proceeding, unless the injunction is asked as to some distinctly independent or supplemental matter. Without further discussion of particular instances, we pass from the immediate topic with the general statement that in whatever phase the question has been presented the ruling has been that where there is a general appeal the authority over the questions involved in and covered by the appeal is transferred to the higher court.³

§ 544. What the Appeal Covers—The appeal when prosecuted generally brings up the whole case,⁴ although not all the questions may be so presented as to entitle the appellant to a review of the rulings upon them. There is a clear and important distinction between bringing up questions and presenting questions for review. A party may not properly present questions, but if they are within the issues they are covered by a general appeal. This is evident. If the judgment had not been appealed from it would, upon a familiar elementary principle, have so completely terminated and adjudicated all the questions embraced within the issues as to conclude the parties. The appeal does not take from the judgment its chief and most valuable characteristic,—that of terminating litigation by a final and

¹ *Lewis v. Lewis*, 20 Mo. App. 546. Said the court in the case cited: "After the appeal, the circuit court had no such jurisdiction." *Cralle v. Cralle*, 81 Va. 773; *Pasour v. Lineberger*, 90 N. C. 159.

² *Spears v. Matthews*, 66 N. Y. 127. We have qualified the rule stated for the reason that, as will be presently shown, the trial court may make orders relating to distinctly independent supplemental or collateral matters, although it can make no orders nor declare any decisions upon the questions

involved in the case carried up by the appeal.

³ *Western, etc., Co. v. State*, 69 Ga. 524; *Skinner v. Blair*, 87 N. C. 168; *Keyser v. Farr*, 105 U. S. 265; *Stewart v. Taylor*, 68 Cal. 5; *Whaley v. Charleston*, 8 So. Car. 344; *Harrison v. Trader*, 29 Ark. 85.

⁴ *Palmer v. Rogers*, 70 Ia. 381; *Clair v. Terhune*, 35 N. J. Eq. 336; *Bledsoe v. Nixon*, 69 N. C. 81; *Smith v. Cooper*, 21 Ga. 359; *Woodrum v. Kirkpatrick*, 2 Swan (Tenn.), 217.

conclusive adjudication ; on the contrary, the judgment retains that characteristic and possesses that effect until reversed. A general¹ appeal, therefore, necessarily removes from the jurisdiction of the trial court all questions concluded by its judgment.

§ 545. **Collateral or Supplemental matters not covered by the Appeal**—Matters independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court. Such matters as the appeal does not cover are purely collateral or supplemental, lying outside of the issues framed in the case, or arising subsequent to the delivery of the judgment from which the appeal is prosecuted. The general rule that a case leaves the jurisdiction of the trial court when an appeal is perfected is not impinged by holding that purely collateral or supplemental matters are left under the control of the trial court, notwithstanding the loss of jurisdiction over the case taken to the higher court. A reference to some of the instances where power over collateral or supplemental matters was held to remain in the trial court will give a clearer conception of the law upon the subject than general words can do. Where property is sold pursuant to a decree of the court, the pendency of an appeal will not preclude the trial court from taking steps to coerce payment from the purchaser.² A pending appeal does not take from the trial court authority to compel a ministerial officer to perform a duty, although the duty may be collaterally connected with matters embraced in the appeal.³ Where the duties of a receiver have fully terminated, or where he is guilty of a breach of duty, the trial court may, as we suppose, make the necessary order in a case where the receivership is merely ancillary, but where the very question involved in the appeal is the conduct of the receiver, the trial court can not rule upon his conduct, except where the conduct relates to matters subsequent to the appeal.⁴ The trial

¹ We employ the term, "general appeal," for want of a better, to designate cases where the appeal is not from part only of a case. Ordinarily an appeal brings up the whole controversy;

this is the rule, but it is not entirely without exceptions.

² *State v. Houston*, 35 La. Ann. 236.

³ *State v. Clark*, 33 La. Ann. 422.

⁴ In *Baughman v. Calveras*, 72 Cal.

court may entertain a motion to set aside a sale of land made under its order, where the sale is purely collateral and incidental.¹ If a fund is left in the hands of the trial court, or in the hands of one of its officers or agents, it may make orders for its investment or other orders of a like general nature.² An appeal does not cover matters not fairly embraced within the issues, although such matters may grow out of or be connected with the same general subject.³ But care is required in the application of the subsidiary rule just stated to prevent a violation of the wide reaching and salutary principle that what might rightfully have been litigated in the case is regarded as having been litigated and determined. If the general principle that a judgment is final and conclusive as to the particular controversy is not adhered to, great evil and confusion of a perplexing and serious effect would inevitably result, inasmuch as the repose of society would be disturbed by vexatious and prolonged litigation and different decisions might be made in the same case. The true rule is that whatever the judgment below legitimately covers the appeal embraces.

§ 546. **The Judgment effective notwithstanding the Appeal**—The decisions in this State have steadily asserted the doctrine that a judgment is not affected by the appeal further than that proceedings are stayed in cases where the proper bond is filed. In one case it was held that a party who had appealed from a judgment refusing to permit the probate of a will could prosecute an action notwithstanding the appeal, although it proceeded on the theory that the will involved in the appeal was invalid.⁴ In another case a judgment of eviction was rendered, and it was held that the action upon the covenants of the deed

the court went much further than
ext. As to matters occurring after
appeal is perfected, *State v. Ham-*
6 La. Ann. 257.

Moore v. Jordan, 65 Texas, 395.
Hoddard v. Ordway, 94 U. S. 672;
Don v. Adrain, 91 N. C. 372; *Spring*
South Carolina Ins. Co., 6 Wheat.

¹ *State v. Davey*, 39 La. Ann. 507, 2
So. Rep. 44.

⁴ *Burton v. Burton*, 28 Ind. 342. In
this case the court said: "The only
effect of the appeal is to stay execution
upon the judgment from which the ap-
peal was taken. In all other respects
the judgment, until annulled or re-
versed, is binding upon the parties as
to every question directly presented."

was maintainable inasmuch as the judgment, although appealed from, was an ouster.¹ Still stronger doctrine was asserted in a case in which it was held that a party to whom land was set off in a partition proceeding might maintain an action to recover possession of the land although an appeal from the judgment in the partition proceedings was pending.² It has been held in many cases that an appeal does not suspend or destroy the effect of an injunction decreed in the suit from which the appeal is prosecuted.³ The general conclusion to which the authorities with substantial unanimity lead is, that the appeal, even where a supersedeas is granted, suspends the enforcement of the judgment and leaves the case where the judgment from which the appeal is prosecuted placed it.⁴

§ 547. Action upon the Judgment not barred by an Appeal—It has long been the doctrine of our court that an appeal does not bar an action upon the judgment.⁵ This question is one upon

¹ *Burton v. Reeds*, 20 Ind. 87. See *Bryan v. Scholl*, 109 Ind. 367; *Anderson, etc., v. Thompson*, 87 Ind. 278.

² *Randles v. Randles*, 67 Ind. 434.

³ *United States v. Knox County*, 39 Fed. Rep. 757; *State v. Dillon*, 96 Mo. 56, 8 S.W. Rep. 781; *Central Union Tel. Co. v. State*, 110 Ind. 203; *Hawkins v. State*, 126 Ind. 294; *State v. Chase*, 41 Ind. 356; *Heinlen v. Cross*, 63 Cal. 44; *Sixth Avenue, etc., Co. v. Gilbert, etc., Co.*, 71 N.Y. 430; *Robertson v. Davidson*, 14 Minn. 554; *Graves v. Maguire*, 6 Paige Ch. 379; *Clark v. Clark*, 7 Paige Ch. 607; *Burr v. Burr*, 10 Paige Ch. 166; *First National Bank v. Rogers*, 13 Minn. 407; *Cook v. Dickerson*, 1 Duer. 679; *Burrall v. Vanderbilt*, 1 Bosw. 637, 643; *Hicks v. Michel*, 15 Cal. 107; *Ortman v. Dixon*, 9 Cal. 23; *Scheible v. Slagle*, 89 Ind. 323, 328. In *Padgett v. State*, 93 Ind. 396, the general doctrine was thus stated: "A judgment is not changed or impaired by an appeal, it remains in full force." The cases of *Mull v. McKnight*, 67 Ind. 525, *Walls*

v. Palmer, 64 Ind. 493, and some of the cases cited in the preceding notes, were referred to. *Exley v. Berryhill*, 37 Minn. 182, 33 N.W. Rep. 567; *Hey v. School-ey*, 7 Ohio, p. II, 48.

⁴ Judge Thompson said, speaking for the court, in *Burgess v. Hitt*, 21 Mo. App. 313: "The judgment or order appealed from stands, though the execution thereon is suspended during the pendency of the appeal if a supersedeas bond is granted." In the chapter on Stay of Proceedings the rule is stated and authorities are cited. The supersedeas it is held in *State v. Emmerson*, 74 Mo. 607, as it was in one of our own cases referred to in the chapter just designated, does not operate upon the fees of the clerk.

⁵ The doctrine seems to have been first directly asserted by our court in *Nill v. Comparet*, 16 Ind. 107, and the cases there relied on were *Cole v. Connolly*, 16 Ala. 271, and *Syndam v. Hoyt*, 1 Dutch (N. J.), 230. The case of *Nill v. Comparet* has been very often cited

which there is much conflict among the authorities, but in this State it is not an open question. This doctrine has been vigorously opposed by some of the courts. The opponents to the doctrine asserted by our court sustain their position by weighty arguments,¹ but there is, however, much to be said in favor of the rule established by our cases, and they are well supported by authority.

§ 548. **Supplying Omissions and Correcting the Record after Appeal**—There is some diversity of opinion upon the question whether the trial court can correct or amend its record after the appeal has been perfected, some of the courts holding that the divestiture of jurisdiction is so complete as to take from the lower court the authority to direct corrections or amendments of the record. It seems clear to us that it is unduly stretching the general rule to deny that authority, and that it is a violation of the principle that a court may cause its record to speak the truth. The court in directing amendments and corrections makes no decision upon the questions involved in the appeal, nor does it, indeed, decide any original question or review any questions previously decided. It simply causes the record to truly and correctly present the questions that it decided and to properly exhibit the facts or pleadings upon which its decisions were grounded. It does no more than correct the evidence of its decisions and of the grounds upon which its decisions proceeded, for in strict accuracy the record is only evidence of what took place, although it is evidence of such high character as to import absolute verity. The authorities support our statement that the trial court may correct its record after appeal.² It is obvious

and approved. *State v. Krug*, 94 Ind. 366, 371; *Central Union Tel. Co. v. State*, 110 Ind. 203, and the Indiana cases cited in the notes which follow. An action can not be prosecuted upon the same cause of action as that involved in the appealed case. *Buchanan v. Logansport, etc., Co.*, 71 Ind. 265.

¹ *Byrne v. Prather*, 14 La. Ann. 653; *Atkins v. Wyman*, 45 Me. 399; *Campbell v. Howard*, 5 Mass. 376; *Paine v. Cowdin*, 17 Pick. 142; *Woodward v. Car-*

son, 86 Pa. St. 176. Some of the cases make the right to sue on the judgment dependent upon the question whether a stay of proceedings has been secured. *Faber v. Hovey*, 117 Mass. 107, S. C. 19 Am. Rep. 398; *Taylor v. Shew*, 39 Cal. 536.

² *Reynolds v. Sutliff*, 71 Iowa, 549; *State v. Delafield*, 69 Wis. 264; *Kelly v. Chicago, etc., Co.*, 70 Wis. 335; *Colbert v. Rankin*, 72 Cal. 197; *National City Bank v. New York, etc., Exchange*,

that any other rule would practically prevent a true statement and presentation of the case from being made, for bills of exceptions, record entries, and the like, could not be corrected if a different rule should be enforced. The appellate tribunal has power over its own records, but it can not make records for the trial courts. Those records are made, in contemplation of law, before the power of the appellate tribunal comes into existence.

§ 549. **A new Record can not be made**—The theory upon which amendments to records are made by the trial court, after an appeal has been perfected, is that a new record is not made, but that an existing record is so corrected as to bear true evidence of what actually occurred. A trial court can not, after the case is removed from its jurisdiction by appeal, make a record of facts, evidence, or decisions, that did not exist prior to the appeal. The record it corrects is one made before the appeal, but not correctly or properly made. No new element can be added by the trial court to the case carried up by appeal, but it may cause the record to accurately exhibit the elements and incidents of the case as it was actually presented and actually decided.¹ It is evident, therefore, that where a record is changed after the appeal is perfected, the change is unauthorized and ineffective unless there was something actually existing in the past which made a change necessary in order to a full or accurate expression of the truth.

97 N. Y. 645; *Chestnutt v. Pollard*, 77 Texas, 86, 13 S. W. Rep. 352.

¹ *Lamburth v. Dalton*, 9 Nev. 64.

CHAPTER XXVIII.

REHEARING.

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| § 550. Statutory provisions. | § 556. Rehearing not granted to enable parties to secure a correction of the transcript. |
| 551. Effect of filing a petition for rehearing. | 557. Original questions can not be presented by a petition for rehearing. |
| 552. Time—Computation of. | 558. A second petition for rehearing will not be entertained. |
| 553. All acts must be done within the time fixed by law. | 559. Submitting the application. |
| 554. Who may petition for a rehearing. | 560. Ruling on the petition. |
| 555. Office of the petition. | 561. Effect of granting the petition. |

§ 550. **Statutory Provisions**—The statute provides that either party may file a petition for rehearing at any time within sixty days after the determination of the cause.¹ We suppose that the provision declaring that a party may petition for rehearing is simply declaratory of a general rule of law, inasmuch as an appellate tribunal of high rank may, without an express grant of power, entertain an application, during the term, to correct errors into which it may have fallen. The limitation as to time is, however, effective, and the uniform practice has been to decline to entertain petitions not filed within the time prescribed.² As the legislature has power to regulate matters of procedure there can be no doubt as to the effectiveness of the limitation upon parties. It is probably true that the legislature can not preclude a judicial tribunal from correcting errors when they are exhibited to it,³ but the limitation as to the time within which a petition for rehearing must be filed does not profess or

¹ R. S. 1881, § 662.

31 Ill. 385. The decision in the case

² Board of Commissioners *v.* Brown, 14 Ind. 191; *Hutts v. Bowers*, 77 Ind. 141. The decision in the case last cited is in harmony with the general rule that time is jurisdictional.

211, 213. Parties can not waive the time by agreement. *Bernhard v. Brown*, 22 Pac. Rep. 1028.

³ *In re Jessup's Estate*, 81 Cal. 408,

attempt to abridge the inherent power of the court in that regard. The statutory provision designating the time within which a petition for a rehearing may be filed grants a right to keep a case open beyond the term at which the judgment challenged was pronounced,¹ and changes the general rule that a judgment can not be altered after the expiration of the term at which it was entered. It is evident from the provisions with which that respecting the filing of a petition for a rehearing is associated, that, in cases where a petition is duly filed within the time prescribed, the case remains open until action is taken upon the petition.

§ 551. **Effect of filing a Petition for Rehearing**—Where a petition for rehearing is filed within the sixty days prescribed by the statute it operates to prevent a certification of the judgment to the trial court until it is disposed of by the higher court. This conclusion rests upon the familiar principle that where a motion or petition is filed which keeps the case open the judgment is not a final one. The statute does not, in terms, declare what shall be the effect of filing a petition, but, upon the principle stated, it is clear that until an order or judgment is entered disposing of the petition the case is not finally disposed of and hence remains in the appellate tribunal. But independently of the rule stated the fair implication from the language of the statute is that where there is a petition the clerk shall not certify the case to the trial court until a decision overruling the petition is pronounced,² so that when the language of the

¹ *Trustees v. Love*, 29 Ill. App. 615; *Gallagher v. Kilkeary*, 29 Ill. App. 600.

² It is made the duty of the clerk of the Supreme Court to give notice of the judgment of the court immediately after it is pronounced to the clerk of the trial court, but where there is a petition he can not certify the opinion down until the case is finally disposed of by the appellate tribunal. R. S. 1881, § 662. It may be added that where there is no petition, as well as where the pe-

tition is overruled, the opinion of the appellate tribunal must be transmitted to the trial court. The statute says, the "decisions and instructions shall be certified to the court below," and the long continued and uniform practice has given this language a construction that can not now be disregarded. The meaning thus assigned the statutory provision is that the opinion in full shall be certified to the clerk of the trial court.

statute is considered, as it must be, in connection with the general rule, all doubt is dissipated.

§ 552. Time—Computation of—The sixty days prescribed is ascertained by excluding the day on which the judgment assailed by the decision was rendered, and including the day on which the petition was filed. The statute prescribing a rule for the computation of time is general in its character, and, as the decisions show, has been applied to many questions of procedure.¹ The uniform practice has been to apply it to petitions for rehearing. As shown elsewhere, time is jurisdictional, and a party who fails or neglects to file his petition within the time limited will not be heard.² Doubtless, this general rule would not apply if the party was wholly without fault, and his failure to file his petition within the time described was owing to an unavoidable accident, but to break the force of the general rule a very strong and clear case must be made.³

§ 553. All acts must be done within the Time fixed by Law—In accordance with the general rule elsewhere discussed,⁴ all acts essential to prepare the case for consideration upon the application for a rehearing must be performed within the time limited by law. The law, in fixing the time, means that all, and not merely part, of the essential steps shall be taken within the prescribed time, inasmuch as there is no authority for performing any of the required acts at a time other than that designated by the statute.⁵ The rule requiring full performance within the time limited is indispensably necessary to the orderly adminis-

¹ *Hall's Safe and Lock Co. v. Rigby*, 79 Ind. 150; *Rodenwald v. Edwards*, 77 Ind. 221; *Faure v. United States Express Co.*, 23 Ind. 48; *Noble v. Murphy*, 27 Ind. 502; *State v. Thorn*, 28 Ind. 306; *Towell v. Hollweg*, 81 Ind. 154; *Womack v. McAhren*, 9 Ind. 6. If the last day falls on Sunday it may be excluded. *Hogue v. McClintock*, 76 Ind. 205.

² The party applying for a rehearing is bound to exercise diligence and to take steps to insure the filing of his pe-

tition in due time. *Durgin v. Neal*, 82 Cal. 595, 599, 23 Pac. Rep. 375. But, under our practice, it is sufficient to file the petition within the time prescribed.

³ *Gough v. Root*, 73 Wis. 32, 40 N. W. Rep. 647, 41 N. W. Rep. 622. See, generally, *Williams v. Conger*, 131 U. S. 390; *Ogilvie v. Richardson*, 14 Wis. 157; *Strickland v. Draughan*, 91 N. C. 103; *Brant v. Gallup*, 117 Ill. 640.

⁴ *Ante*, § 128.

⁵ *Hawley v. Simmons*, 101 Ill. 654; *Lacroix v. Camors*, 34 La. Ann. 639.

tration of justice and to the harmony of appellate procedure.¹ The principle we have stated requires that the petitioner should file his brief within sixty days, and that he can not, as of right, file a brief after the expiration of that period. The rules, as well as the practice of the court, require that the briefs shall be filed within the time designated,² although it is within the discretion of the court, upon due application, to extend the time for filing briefs, but not to extend the time for filing the petition except where cause is shown sufficient to call into exercise the general equity powers of the court.

§ 554. Who may Petition for a Rehearing—The fundamental principle that only parties who are injured by a ruling can successfully complain, requires that the party who petitions for a rehearing should be one who is injured by the decision. It will not avail him to show injury to some other person. It is, therefore, correctly held that an appellee who is himself not injured by a decision can not petition for a rehearing, although some of the other appellees may be injured.³

§ 555. Office of the Petition—The office of a petition for a rehearing is to specifically present points for the consideration of the court. A general statement that the court erred in the conclusions asserted in its opinion is insufficient.⁴ The petition should state what conclusions counsel suppose to be erroneous, and, where no briefs are filed, the petition should contain reasons and authorities, if any exist, proving that erroneous con-

¹ It may be further observed that time is essential inasmuch as after the lapse of the designated period the case should go to the trial court and when it reaches that court the jurisdiction of the appellate tribunal is at an end. *Peck v. Sanderson*, 18 How. (U. S.) 42; *Caldwell v. Bruggerman*, 8 Minn. 286; *Browder v. McArthur*, 7 Wheat. 58. See *post*, "Judgment on Appeal," Chapter XXIX.

² Rule XXXVII. The rule of court, so far as the point here immediately involved is concerned, is really nothing more than the declaration of a general

principle of law, and one that good practice requires should be strictly enforced.

³ *Jamison v. Barelli*, 20 La. Ann. 452.

⁴ In *Goodwin v. Goodwin*, 48 Ind. 584, the court said: "The office of a petition for a rehearing is not to request the court generally to re-examine all the questions in the record or all the questions decided against the party filing it, but it is to point out particularly the errors the court is supposed to have committed in the decision which it has made."

clusions were asserted, but, under our practice, the reasons and authorities may be presented by briefs filed within the time the law prescribes, although the particular points must be stated in the petition.¹ General statements will be unavailing, and assertions can not supply the place of arguments and authorities.²

§ 556. **Rehearing not granted to enable Parties to secure a Correction of the Transcript**—It is the duty of parties to see that the record is complete and correct before the case is taken up for consideration by the court. If parties permit a decision to be made upon a defective or incorrect record, the fault is their own, and, as a general rule, a rehearing will not be granted to enable them to secure an amendment or correction of the record.³ Any other rule would, it is evident, tend to encourage negligence and result in wrong to the community, as well as to the courts, since it would delay causes and impose a double duty upon the judicial tribunals, inasmuch as it would require them to decide the cause, once upon a defective record and again upon a corrected record. Parties are bound to do all that reasonable care and diligence require to secure a proper record and properly present the questions involved before the case is suffered to go to the court for final consideration.

¹ *Fertich v. Michener*, 111 Ind. 472, 486; *Western Union Telegraph Co. v. Hamilton*, 50 Ind. 181. Some of the courts hold, and with reason, that only the points should be stated in the petition. *Enright v. Grant*, 5 Utah, 400, 16 Pac. Rep. 595; *First Nat. Bank v. Ashmead*, 23 Fla. 379, 2 So. Rep. 657.

² *Colvin v. Warford*, 18 Md. 273; *Wilson v. Broder*, 24 Cal. 190; *Arizona, etc., Co. v. Copper Queen Co. (Ariz.)*, 11 Pac. Rep. 396. Merely technical points will not be considered on a petition for a rehearing. *People v. Northey*, 77 Cal. 618, 634, 20 Pac. Rep. 129. It is obvious that the petition must show a material error affecting the ultimate result, or it can not be granted. Nor will it be granted where all the material

questions are decided, although there may be no express statement of them. *Fry v. Currie*, 103 N. C. 203, 9 S. E. Rep. 393; *Fisher v. Cid Copper Mining Co.*, 97 N. C. 95, 4 S. E. Rep. 703; *Sauls v. Freeman (Fla.)*, 4 So. Rep. 577; *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. Rep. 13.

³ *Warner v. Campbell*, 39 Ind. 409; *Pittsburgh, etc., Co. v. Van Houten*, 48 Ind. 90; *Cole v. Allen*, 51 Ind. 122; *Merrifield v. Weston*, 68 Ind. 70; *Porter v. Choen*, 60 Ind. 338; *State v. Terre Haute, etc., Co.*, 64 Ind. 297, 303; *Board v. Center Township*, 105 Ind. 422; *Bitting v. Ten Eyck*, 82 Ind. 421; *Schrichte v. Stites, etc.*, 127 Ind. 472; *Ross v. McGowen*, 58 Texas, 603.

§ 557. **Original questions can not be presented by a Petition for a Rehearing**—It is the policy of the law to require parties to present all questions in the briefs originally filed, and not to permit new points to be made in the petition for a rehearing. The rule adopted pursuant to this policy is a salutary one, and one dictated by considerations of justice as well as by expediency. If parties were permitted to submit cases without presenting all the material points a loose and slovenly practice would be encouraged, and the administration of justice would be delayed and embarrassed. To tolerate such a practice would impose the duty upon the courts of examining and deciding cases in detached parts, and thus delay decisions, produce confusion and encourage conduct not consistent with fair dealing and good morals. The rule requiring parties to make all important points in their original briefs imposes no hardship upon them and requires no extraordinary thing. Parties are bound, in good faith and by just principles, to give full and careful study to the cases they present to the highest courts of the State, and such study, if properly made by capable counsel, ought to bring to light every point of importance. The general rule we have stated is founded on solid principle and is well supported by authority.¹ But it would be an unreasonable perversion of the general rule to hold that a party may not adduce additional arguments, authorities, or illustrations in support of the points properly stated and presented in the original briefs. If the party adheres to points well presented by the original briefs he does not violate the rule by exhibiting the points in a new light and strengthening them by additional arguments or authorities. If, however, he has not specifically stated the points in his original brief he can not, without a violation of the rule, be al-

¹ *Yater v. Mullen*, 24 Ind. 277; *Heavenridge v. Mondy*, 34 Ind. 28; *Brooks v. Harris*, 42 Ind. 177; *Pittsburgh, etc., Co. v. Ruby*, 38 Ind. 294; *Hood v. Pearson*, 67 Ind. 368; *Graeter v. Williams*, 55 Ind. 461; *Rikoff v. Brown, etc., Co.*, 68 Ind. 388; *Board v. Hall*, 70 Ind. 469; *Underwood v. Sample*, 70 Ind. 446; *Wasson v. First National bank*, 107 Ind. 206; *Union School Tp.*

v. First National Bank, 102 Ind. 464; *Succession of Broom*, 14 La. Ann. 67; *Mateer v. Brown*, 1 Cal. 221; *Kellogg v. Cochran*, 87 Cal. 192, 12 Law. Rep. Anno. 104; *State v. Coulter*, 40 Kan. 87, 673, 20 Pac. Rep. 525; *Coleman v. Kells*, 31 So. Car. 601, 9 S. E. Rep. 735; *Wachendorf v. Lancaster*, 61 Iowa, 509; *Farrell v. Pingree*, 5 Utah, 530, 17 Pac. Rep. 453.

lowed to make them in the petition for a rehearing. A party can not, however, be regarded as having stated a point where he does no more than assert, in general terms, that a ruling was erroneous. He must state specifically the point which shows the ruling to be wrong, for a mere general assertion that a ruling is wrong is not "the making of a point." We are, it may not be out of place to add, here speaking of "making points" on a petition for rehearing as a matter of right and with reference to what parties may do, as of strict right, not as to what the court may, in the exercise of its general powers, permit them to do.

§ 558. A second Petition for Rehearing will not be Entertained— A decision upon a petition for rehearing against the petitioner is a final disposition of the cause, and a second petition from the same party will not be considered.¹ This doctrine is in harmony with the general rule that where the appellate tribunal finally disposes of a motion or petition the matter is *res adjudicata*. The doctrine is important and sound, inasmuch as it enables the court to terminate litigation by summarily disposing of a second petition for rehearing. Some of the courts have, indeed, characterized the conduct of counsel in filing a second petition in cases where the first has been denied as "reprehensible and deserving of punishment."

§ 559. Submitting the Application—Applications for a rehearing are submitted upon written or printed briefs, and oral arguments are not heard. The record, petition and brief must be returned to the files within sixty days from the time the decision is filed with the clerk. It is made the duty of the clerk to enter an order overruling the petition unless the petitioner returns the papers within the time designated. After the papers are returned they can not be taken from the files by the petitioner, except on leave granted upon a special written application.²

¹ *Garrick v. Chamberlain*, 100 Ill. 476; *Smith v. Dennison*, 101 Ill. 657; *Coates v. Cunningham*, 100 Ill. 463; *Blatchford v. Newberry*, 100 Ill. 484. The general principle is declared and enforced by decisions declaring that a second motion to dismiss will not be entertained as well as by decisions in other cases. *Blair v. Lanning*, 61 Ind. 499.

² Rule XXXVII.

The rule has been enforced with considerable strictness, and so it should be, since the practice it establishes is required in order to prevent delays and to compel parties to act with promptness.

§ 560. **Ruling on the Petition**—The court is not bound to grant a rehearing as to the entire case, or to reopen it upon all questions, but it may, in its discretion, open the case as to specific questions.¹ Nor is the court bound to adhere to the opinion originally delivered, or to the mandate issued. It may modify its opinions or judgments as justice requires, without granting the prayer of the petition generally.²

§ 561. **Effect of granting the Petition**—Where a petition for a rehearing is granted generally the entire case is open for argument, but it is otherwise where the rehearing is granted as to particular points.³ The granting of a petition as to the entire case authorizes parties to make new points, assume original positions, and file additional briefs.⁴ So far does the rule go that where a petition is granted admissions made in the original briefs may be withdrawn.⁵ It was formerly the rule that an order granting a rehearing operated to set aside the submission, but this doctrine is of doubtful soundness. It is, however, unnecessary to consider the soundness of that doctrine for the rules of the court expressly provide that the order granting a rehearing shall not have the effect to set aside the submission and that the case may at once be taken up and decided.⁶

¹ *Gatling v. Newell*, 12 Ind. 118; *City of Crawfordsville v. Johnson*, 51 Ind. 397.

² *Luthe v. Luthe*, 12 Col. 429; *Mahony v. Mahony*, 41 La. Ann. 135, 5 So. Rep. 645; *Winter v. Fulstone* (Nev.), 21 Pac. Rep. 687. See *Hasted v. Dodge*, 75 Iowa, 402, 39 N. W. Rep. 668.

³ *Gatling v. Newell*, 12 Ind. 118; *City*

of Crawfordsville v. Johnson, 51 Ind. 397.

⁴ *Gilbert v. Southern, etc., Co.*, 62 Ind. 522; *First National Bank v. First National Bank*, 76 Ind. 561. But, as decided in the case last cited, the briefs originally filed are not withdrawn by the order granting the petition.

⁵ *Booker v. Goldsborough*, 44 Ind. 490.

⁶ Rule XXVIII.

CHAPTER XXIX.

THE JUDGMENT ON APPEAL.

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| § 562. Authority of the decisions of appellate tribunals. | § 574. Affirming as to some of the parties and reversing as to others. |
| 563. Effect and characteristics of the judgment on appeal. | 575. Dependent rights—Judgments. |
| 564. Remanding the case to the trial court. | 576. Trial court's duty to obey mandate of the appellate tribunal. |
| 565. Limits of the power to direct specific judgments. | 577. Scope of the mandate of the appellate tribunal. |
| 566. Original questions of fact. | 578. The law of the case. |
| 567. Directing a specific judgment. | 579. Form and effect of the judgment of affirmance. |
| 568. Directing a new trial. | 580. Judgment of reversal. |
| 569. Remanding with instructions to the trial court. | 581. Costs on reversal—Apportionment of. |
| 570. Remittitur. | 582. Effect of reversal upon the rights of <i>bona fide</i> purchasers. |
| 571. Directing the specific damages that shall be awarded. | 583. Restitution. |
| 572. Directing the amount of recovery in cases where the facts appear in special findings or special verdicts. | 584. Restitution—Practice. |
| 573. Costs in cases where a remittitur is entered. | 585. Finality of the judgment on appeal. |
| | 586. Effect of a petition for rehearing upon the rule stated in the preceding paragraph. |

§ 562. **Authority of the Decisions of Appellate Tribunals**—The courts invested with the paramount judicial power of the State must necessarily possess very comprehensive authority over the judgments, decrees and acts of the *nisi prius* courts, since the judgments of the appellate tribunals are the authoritative expressions of the highest officers of one of the great departments of government. It is essential that such judgments should be respected and obeyed by all courts of intermediate and inferior jurisdiction, for, if it were otherwise, the rules of property and the rules governing the rights of persons would remain forever unsettled. The decisions of the tribunals of last resort are as binding and effective as any other authoritative declarations

of the law can be. It is, therefore, justly held that the decisions of the appellate tribunals are binding upon all courts of original jurisdiction.¹

§ 563. **Effect and Characteristics of the Judgment on Appeal**—The authority of the appellate tribunal to expound and declare the law is not confined to particular instances, as appears from the statements and the authorities made and referred to in the preceding paragraph, for its declaration of a general rule extends to all cases belonging to the class fully within the rule, but as to particular instances—those in which the judgments are pronounced—the decisions on appeal have the greater force, inasmuch as such decisions are, as we shall presently show, conclusive upon all points fully involved in the appeal and necessarily decided.² As the authority of the appellate tribunal is so comprehensive and plenary in cases submitted to it for judgment, it must necessarily have authority to determine—and conclusively determine—all matters of law involved in the appeal, although it may not have a right, as will be subsequently shown, to usurp the province of the jury, and decide original questions of fact.³ The power to conclusively determine all questions of law includes, as of necessity, the authority to so direct the trial court that its decrees or judgments shall fully conform to the law as declared by the appellate tribunal on appeal. This authority would be unreal and unsubstantial, if the appellate tribunal could not so mold its decrees or judgments as to compel the trial court to conform to its decisions. It is also necessary that the authority to so mold its judgments as to compel the entry below of a decree or final judgment award-

¹ *Leard v. Leard*, 30 Ind. 171; *Julian v. Beal*, 34 Ind. 371.

² The decisions of a court, no matter how high its rank may be, are not, in the strict sense, the law; they are, however, evidences of the law, and proceeding, as they do, from the tribunals invested with power to authoritatively declare the law, they are to be accepted by inferior courts as the law until overruled by the supreme judicial depart-

ment of the state. 1 Kent's Com. 477; *Bright v. Hutton*, 12 Eng. L. & E., 15; *Hutton v. Uphill*, 2 H. L. Cases. 674; *Yates v. Lansing*, 9 Johns. 415; *Hart v. Burnett*, 15 Cal. 530, 607; *Hibbits v. Jack*, 97 Ind. 570; *Hines v. Driver*, 89 Ind. 339; *Paul v. Davis*, 100 Ind. 422, 426.

³ By original questions of fact, we here mean questions requiring decision in the *nisi prius* courts.

ing the parties what the law gives them, should reside in the appellate tribunal, in order to entitle it to direct such a judgment as shall finally end a controversy in all cases where that is required by the law. The duty of appellate tribunals is to enter a judgment that will forever close the controversy wherever it can be done, without unjustly trenching upon, or prejudicing, the rights of the parties to the appeal.¹ It is in accordance with the principles we have stated that it is held that an appellate tribunal is not bound to direct a judgment on the facts stated in a special finding, or in a special verdict, but may, if upon an examination of the whole record it appears that justice will be better and more surely done by awarding a new trial, specifically direct the trial court to grant a new trial to the parties.² It seems clear that this is the correct rule under such a system as ours, where equitable and legal jurisdiction are united in the same appellate tribunal. It is evident that any other rule would often work injustice, for there are many cases where the whole record shows that judgment ought not to be rendered on a special verdict or upon a special finding. It would be in many cases a sacrifice of substantial justice to a bald technicality to

¹ In *Luthe v. Luthe*, 12 Col. 421, 21 Pac. Rep. 467, the court said: "As a rule, we do not undertake to direct the entry of judgments in matters of form, but in this case, to the end that there may be a speedy end of this litigation, we will direct the entry of a modified decree by the county court." The authorities hereafter referred to make it clear that it is the right, and, indeed, the duty of the appellate tribunal to prevent litigation from being prolonged wherever it can justly and lawfully be done. In *McAfee v. Reynolds*, 28 N. E. Rep. 423, it was said: "The power, as the authorities declare, is one that should be freely exercised where its exercise will put an end to litigation and yield justice. To accomplish this it is always proper to so mold the form of the mandate as that the trial court may carry

into effect, by the appropriate entries, the judgment of the appellate tribunal."

² *Bell v. Golding*, 27 Ind. 173; *Buchanan v. Milligan*, 108 Ind. 433; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Sinker v. Green*, 113 Ind. 264; *Bartholomew v. Pierson*, 112 Ind. 430, 14 N. E. Rep. 249; *Brown v. Jones*, 113 Ind. 46, 13 N. E. Rep. 857; *Murdoch v. Cox*, 118 Ind. 266, 20 N. E. Rep. 786; *Security Co. v. Arbuckle*, 119 Ind. 69; *Louisville, etc., Co. v. Etzler*, 119 Ind. 39, 44, 21 N. E. Rep. 466; *Roberts v. Lindley*, 121 Ind. 56, 22 N. E. Rep. 967; *Thomason v. Wood*, 42 Cal. 416; *Cooper v. Shepardson*, 51 Cal. 298, 300; *Schroeder v. Schweizer*, 60 Cal. 467, 471; *Lapham v. Dreisvogt*, 36 Mo. App. 275; *Duck v. Peeler*, 74 Texas, 268; 11 S.W. Rep. 1111; *Athens, etc., Works v. Bain*, 77 Ga. 72; *McKenzie v. Peck* (Wis.), 42 N. W. Rep. 247.

pronounce judgment upon a special finding, and it would be a reproach to the law to hold that the highest courts of the commonwealth, possessing both law and equity powers, are so fettered by technical rules as to be incapable of giving effect to their conceptions of right and justice. It may be added that the successful party in a case where there is a special finding or a special verdict can not with propriety move for a new trial or repudiate a favorable decision, and, yet, if there is no authority to direct a new trial or new hearing in cases where the finding or verdict is defective or is not in accordance with the evidence, such a party may lose the benefit of a good cause of action or a valid defense, simply because he does not do what he can not do with propriety, or what it would be unreasonable to expect him to do. Considerations of expediency join with principle in requiring that the appellate tribunal should do what the whole record indicates is necessary to give to the parties a fair opportunity to establish their rights. The appellate tribunal is not, however, bound to remand the case for a new trial, where the facts fully appear in a special finding or verdict, but may, if it deems proper, remand the case with instructions to render the proper judgment on the facts.¹

§ 564. **Remanding the Case to the Trial Court**—The power of the appellate tribunal to frame judgments is very comprehensive, and extends over all classes of cases where the facts are admitted of record or there appear in such a form as to leave nothing to do but to apply the law to them by an appropriate judgment. The appellate tribunal may pronounce the ultimate judgment without remanding the case where the facts are not in dispute,² unless the statute requires that the case should be remanded to the trial court. Our statute evidently contemplates that the case shall go back to the trial court for final judgment

¹ *McAfee v. Reynolds* (Ind.), 28 N. E. Rep. 423; *Parker v. Hubble*, 75 Ind. 580. The matter is necessarily one largely resting in the discretion of the appellate tribunal.

² *Wickliffe v. Owings*, 17 How. (U. S.) 47; *Graham v. Bayne*, 18 How. (U. S.) 60; *Semmes v. United States*, 91 U. S. 21. It is the practice in many jurisdictions for the appellate tribunal to itself pronounce the proper judgment or decree. But even in those jurisdictions the appellate tribunal is not bound to enter the ultimate judgment, for it may, at its election, remand the case to the trial court.

where a reversal is adjudged, and although the provisions are somewhat conflicting, there can be little doubt that the purpose of the legislature was that the appellate tribunals should not render an entirely new and original judgment in any case brought before them by appeal. They do, of course, render a judgment affirming, reversing, or revising the decree or judgment below, but they do not directly render the specific decree or judgment as the court of original jurisdiction does, for the mandate remands the case. This is so whether there is an express statement in the mandate to that effect or not, since the law gives the judgment on appeal the force and operation we have ascribed to it. But the effect of a mandate directing the specific decree or judgment that the trial court shall render is almost the same as a direct judgment by the appellate tribunal: it is, indeed, essentially so in legal effect. This is clearly so for the reason that where the trial court renders a decree or judgment in obedience to the mandate that judgment or decree is, in legal effect, that of the appellate tribunal. The appellate tribunal decides the law and directs the trial court both as to the law and its application, so that the latter is little more than the passive instrument of the former.¹

§ 565. *Limits of the power to direct a Specific Judgment*—While the power of an appellate tribunal to modify, correct or amend the judgment of the trial court is very comprehensive it is, nevertheless, not without limit. It is held that the appellate tribunal can not direct the trial court to render a judgment for a sum beyond its jurisdiction.² This must necessarily be true

¹ In *Burnett v. Curry*, 42 Ind. 272, the court, speaking of specific directions given the trial court, said: "This we did in effect by fixing the basis on which the judgment should be rendered and instructing the circuit court to render the judgment accordingly. That court had but one duty to perform, which was to render judgment as directed. It was, in effect, the rendition of judgment by this court." In so far as the court, in the case from which we have quoted, seems to recognize the right of parties

to agree what the court shall do, and thereby bind the court, it is clearly wrong, since parties can not by agreement, control the court in such a matter. It is, however, to be said that the case does not authoritatively decide that the court can, be controlled by the agreement of the parties, for the question was not directly presented for decision.

² *Glover v. Collins*, 18 N. J. L. 232. See, also, *Porter v. Foley*, 21 How. (U. S.) 393; *Bingham v. Cabot*, 3 Dallas,

even in the States where it is the law that the appellate tribunal may itself render the proper judgment without remanding the case to the trial court. Our reason for saying so is this: The appellate tribunal being essentially one of review and having jurisdiction only in cases where the trial court has jurisdiction, it can not render a valid judgment in a case where none could have been rendered by the trial court from which the appeal is prosecuted. The provisions of the Federal and the State constitutions guaranteeing and preserving the great right of trial by jury impose a limit upon the power of all courts.¹ Where there is a disputed question of fact, arising as an original question for decision, in a case where there is a right to a trial by jury, no court, no matter what its rank may be, can disregard the provisions of the organic law and decide the question. Although it is implied in our statement, it may, nevertheless, be well enough to add, for the sake of clearness, that the right to a trial by jury does not extend to questions which originate on appeal and are incidental to the exercise of purely appellate jurisdiction. As constitutions are to be construed with reference to existing institutions and well known principles, it can hardly be possible that the provisions of our national and State constitutions were intended to apply to questions of fact originating on appeal, since, at common law juries were never called to determine questions originally arising on appeal.²

§ 566. **Original questions of Fact**—It is a necessary sequence of the doctrine stated in the preceding paragraph that the appellate tribunal can not adjudicate upon original disputed questions of fact in cases where there is a constitutional right to a trial by jury, but where there is no such right,—as, for instance, in equity cases, or cases arising under the exercise of the right of eminent domain,—it would seem that the weight of authority

19; *Mordecai v. Lindsay*, 19 How. (U. S.) 199. Where the defect as to a jurisdictional fact is one that may be cured by amendment the judgment will be reversed generally, but where the defect is one not curable by amendment positive directions to dismiss will be

given. *Robertson v. Cease*, 97 U. S. 646; *Mordecai v. Lindsey*, *supra*.

¹ *Jones v. Fortune*, 128 Ill. 518, 21 N. E. Rep. 523.

² See, *ante*, "Supreme Court," Chapter III.

is that, in the absence of a statute forbidding it, such questions may be determined by the appellate tribunal. It has long been the practice of many courts to decide questions of fact in suits of purely equitable cognizance, but under our code such questions are not for the appellate tribunals to decide. We believe that on principle appellate tribunals should not finally decide such questions under any system. Our practice has been to remand all cases where there is a disputed question of fact and that question is not one arising as an original question on appeal, so that a practical exposition has been given to the statute which can not be departed from without violating a fundamental principle.¹ Our decisions in analogous cases clearly indicate that the rule is the same in equity cases as in other cases, for they affirm that although the evidence is in writing,²

¹ *Bruce v. Schuyler*, 4 Gilm. 221; *Pike v. Megoun*, 44 Mo. 491; *Hovey v. State*, 119 Ind. 386; *Board v. Bunting*, 111 Ind. 143; *Weaver v. Templin*, 113 Ind. 298, 301; *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat, 304; *Konor v. Happersett*, 21 Wall. 162; *State v. Parkinson*, 5 Nev. 15; *People v. Board*, 100 Ill. 495; *Rogers v. Gooding*, 2 Mass. 475. The reporter's note to the case of the *City of Jeffersonville v. Steam Ferryboat, etc.*, 35 Ind. 19, conveys an erroneous impression, and has misled the authors of some of our digests. That case does not decide, directly or indirectly, that the Supreme Court will render a judgment directly, but, on the contrary, the case was remanded, in accordance with the uniform practice, with instructions to the trial court to enter the proper judgment. The mandate in that case is this: "The judgment is reversed with costs, and the case is remanded to the circuit court with instructions to render judgment for the plaintiff for the amount claimed." An important and influential reason supports the general doctrine of the text and that is this: The appellate jurisdiction is intrinsically and essen-

tially one of review, and the court invested with that jurisdiction can not, in any way, whether it be a suit in equity or an action at law, determine original questions of fact without departing from sound principle. As said by the Supreme Court of California, in refusing to decide such a question: "To do so would be to exercise original rather than appellate jurisdiction." *Ellis v. Jeans*, 26 Cal. 272, 278. The earlier cases in that court seem to have taken a different view, but they have been completely overthrown. *Carpenter v. Gardiner*, 29 Cal. 160; *Hayes v. Martin*, 45 Cal. 559; *Poorman v. Mills*, 43 Cal. 323. The doctrine of that court seems to be fairly outlined in *Lick v. Diaz*, 37 Cal. 437, where it was said: "But the result must depend on controverted facts, which it is not our province to determine, and it is therefore impracticable for us to render a final judgment." See *Wise v. Williams*, 88 Cal. 30, 25 Pac. Rep. 1064; *Gay v. Davey*, 47 Ohio St. 396, 25 N. E. Rep. 425.

² *Carr v. Haskett*, 110 Ind. 152; *McConnell v. Harrington*, 108 Ind. 405; *Lake Erie, etc., Co. v. Griffin*, 107 Ind.

still, the appellate tribunal will not weigh it, but will accept that which the trial court deemed trustworthy. It is, of course, implied in what we have said, that the facts must be in dispute, for where there is no disputed question of fact, nothing remains but to apply the law to the facts, and, as the court must always determine what the law is and how it shall be applied, it must determine the whole cases where the facts are undisputed. This principle is declared and enforced in the cases which hold that the court may direct what the verdict shall be in cases where there is no conflict in the evidence,¹ and it is asserted in other cases.²

464. 473; *Miller v. Evansville National Bank*, 99 Ind. 272; *State v. Wasson*, 99 Ind. 261; *Pence v. Garrison*, 93 Ind. 345. The earlier cases held that in suits in equity the court would weigh the evidence on appeal. *Egbert v. Rush*, 7 Ind. 706. In the case of *Nichols v. Glover*, 41 Ind. 24, 34, it was said that: "The evidence being all written, we can judge of it as well as the court below," but the case cited can not be regarded as authority upon the question here under immediate discussion, for, in view of the decision upon other points, and of the peculiar form in which the question was presented, the statement quoted can not be regarded as anything more than mere *dicta*. The decisions which declare that the court will not weigh evidence mean that it will not weigh the testimony of witnesses in cases where there is conflict, for it can not be legally possible that, where all of the evidence consists of written instruments, as deeds, agreements, promissory notes and the like, the appellate tribunal will not determine the meaning, weight, and effect of such evidence. *American Insurance Co. v. Butler*, 70 Ind. 1.

¹ *Crookshank v. Kellogg*, 8 Blackf. 256; *Vance v. Vance*, 74 Ind. 370; *Dodge v. Gaylord*, 53 Ind. 365; *Hall v. Durham*, 109 Ind. 434; *Wabash*, etc.,

Co. v. Williamson, 104 Ind. 154; *Carver v. Carver*, 97 Ind. 497; *Weis v. City of Madison*, 75 Ind. 241, 254; *Parks v. Ross*, 11 How. (U. S.) 362; *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasant v. Fant*, 22 Wall. 116; *Dryden v. Britton*, 19 Wis. 22; *Lane v. Old Colony, etc., Co.*, 14 Gray, 143. But where there is competent evidence sufficient in probative effect to make a fair question of fact, the case must go to the jury. *Huff v. Cole*, 45 Ind. 300; *Haynes v. Thomas*, 7 Ind. 38.

² *Taylor v. Lohman*, 74 Ind. 418; *Stringer v. Northwestern, etc., Co.*, 82 Ind. 100; *Robertson v. Huffman*, 101 Ind. 474; *Smith v. Kruger*, 33 Ind. 86. The principle stated is illustrated by the cases which hold that where there is no evidence upon a material point the judgment will be reversed. *Begein v. Brehm*, 123 Ind. 160; *Kiser v. Beam*, 117 Ind. 31; *Hutchinson v. Trauerman*, 112 Ind. 21; *Roby v. Pipher*, 109 Ind. 345; *Ray v. Dunn*, 38 Ind. 230; *Vaughan v. Godman*, 103 Ind. 499; *Bevan v. Tomlinson*, 25 Ind. 253. It is obvious that the doctrine of the cases to which we have referred is not opposed to the rule, asserted in a vast number of cases, that the court will not disturb a finding or verdict in a case where there is some evidence fairly supporting the finding or verdict upon all material points.

§ 567. **Directing a Specific Judgment**—Where the facts are not in controversy and are fully exhibited by the record, the appellate tribunal may direct the specific judgment that shall be rendered.¹ It is not, of course, bound to give specific directions as to what judgment shall be entered, but it may rightfully do so when justice requires. As the object of the law is to put an end to litigation the power to direct what specific judgment shall be entered is one to be liberally exercised in furtherance of justice. It has often been exercised.²

§ 568. **Directing a New Trial**—Whether a new trial shall be ordered or a specific judgment shall be directed is a matter so largely within the discretion of the appellate tribunal³ that it can hardly be said that there is any established general rule upon the subject, except that which forbids the trial of original questions of fact in cases where a trial by jury is demandable

Where there is no evidence, the question is one of law and not of fact, and whether there is or is not evidence, is, in all appeals, to be determined from an examination of the record.

¹ *City of Jeffersonville v. Steam Ferryboat, etc.*, 35 Ind. 19. In the case cited the court below was directed to render a judgment upon the agreed statement of facts. The authority to direct the specific judgment has often been exercised in cases where the facts appeared in a special finding or in a special verdict. *McAfee v. Reynolds* (Ind.), 28 N. E. Rep. 423. See, generally, *Lemke v. Dageling*, 52 Wis. 498; *Everit v. Walworth County Bank*, 13 Wis. 419; *Schunck v. Gegenseitiger, etc.*, 44 Wis. 369; *Baldenberg v. Warden*, 14 W. Va. 397; *Carroll v. Campbell*, 25 Mo. App. 630; *Rosenfield v. Goldsmith* (Ky.), 12 S.W. Rep. 928. We have collected the cases not so much for the purpose of sustaining the general proposition stated as for the purpose of showing the application of the doctrine to particular instances.

² *Smith v. Hubbard*, 85 Tenn. 306, 2 S. W. Rep. 569; *Oakland Paving Co. v. Bagge*, 79 Cal. 439, 21 Pac. Rep. 855; *Loveland v. Gardner*, 79 Cal. 317, 21 Pac. Rep. 766; *Baltimore, etc., Co. v. State*, 69 Md. 551, 16 Atl. Rep. 212; *Willey v. Morrow*, 1 Wash. Ty. 474; *Grundy v. Pine Hill Coal Co. (Ky.)*, 9 S.W. Rep. 414; *Baltimore, etc., Co. v. State*, 69 Md. 551, 16 Atl. Rep. 212. See, generally, *Wood v. State*, 27 Tex. App. 538, 11 S.W. Rep. 525; *Underwood v. Riley*, 19 Wis. 412; *Pryce v. Security Ins. Co.*, 29 Wis. 270; *Schmidt v. Gilson*, 14 Wis. 514. Where a defect in a pleading appears to be amendable the court may, if it deems it proper in the furtherance of justice, remand with instructions to permit an amendment. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. Rep. 81; *Love v. Tinsley*, 32 W. Va. 25, 9 S.E. Rep. 44. Ordinarily, however, the appellate tribunal gives judgment upon the pleadings as they appear in the record where the only errors alleged are based upon rulings on the pleadings.

³ *Ante*, § 563.

as a matter of right under the provisions of the constitution guaranteeing the great common law right of trial by jury. But, although there is no fixed rule, beyond that stated, it is the uniform practice to remand for a new trial or hearing when it appears that such a course will best secure justice. It is the practice where facts have been kept from the jury by the erroneous exclusion of evidence to remand the case for a new trial.¹ So, where incompetent evidence is erroneously allowed to go to the jury the case will, as a general rule, be remanded with instructions to award a new trial of the whole case.² This is clearly the correct doctrine. The jury are the judges of the facts, and if the trial court improperly excludes evidence³ they are not allowed to be fully invested with knowledge of the facts, and, presumptively at least, can not correctly decide the questions at issue between the parties; on the other hand, if incompetent evidence is admitted, the jury are authoritatively put in possession of matters which they ought not to be permitted to consider. In legal contemplation a jury can not justly decide a case where material facts are kept from them, nor can they justly decide a case where the court admits incompetent evidence. In the one case the court impliedly affirms that the facts kept from them must not be considered; in the other, it impliedly directs them to consider what they have no right to regard.

§ 569. **Remanding with Instructions to the Trial Court**—Where the facts are not in dispute or where it is evident that no recovery can be had in the particular instance the appellate tribunal may remand the case with instructions to dismiss the action or to enter a final judgment in favor of the party entitled to it under the law.⁴ So, on the other hand, it is proper for the

¹ *Bordentown, etc., v. Flannagan*, 41 N. J. L. 115; *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. Rep. 49.

² The case of *St. Croix, etc., Co. v. Richie*, 73 Wis. 409, 415, 41 N. W. Rep. 1064, asserts a general principle sustaining the doctrine of the text.

³ It is implied, of course, that the evidence must be material and influential,

for if the evidence is immaterial or without influence, the ruling upon it, although it may be wrong, is harmless.

⁴ *Somerville v. Reid*, 35 Ga. 47; *Cranford v. Wingfield*, 25 Texas, 414; *Binnely v. Chesapeake, etc., Co.*, 8 Pet. 214; *Brackett v. Griswold* (N. Y.), 28 N. E. Rep. 365.

court where justice requires it, to direct that the affirmance shall not preclude another action.¹ So, too, amendments may be suggested or directed in furtherance of justice, and direction may be given to admit parties.² It is safe to affirm that the result of all the particular instances, as a valid inductive process will show, is that the judgment on appeal may so direct the trial court as to require it to vary, amend or modify its decree or judgment as to make it effectively yield justice to the parties whose interests are involved.³

§ 570. *Remittitur*—It is a common practice, and one fully defensible on principle, to direct that a *remittitur* shall be entered, and if none be entered that the judgment be wholly reversed.⁴ This course leaves the party an election to remit part of the damages assessed in his favor or to suffer a reversal and take the chances of another trial. It seems just to allow this election, since the party may be able to supply needed evidence or omissions on a second trial. Nor is there any injustice to the appellant since he receives, under such a practice, all that he

¹ *White v. Poorman*, 24 Iowa, 108; *Shafer v. Newlan*, 29 Ill. 44.

² *McCalop v. Fluker*, 12 La. Ann. 551; *Mabey v. Atkins*, 10 Wall. 419; *De Wolf v. Haydn*, 24 Ill. 525. See, generally, *Sankey v. Sankey*, 8 Ala. 601; *Crosby v. McDermitt*, 7 Cal. 146; *Moore v. McConnell*, 17 La. Ann. 84; *Sanborn v. Webster*, 2 Minn. 323; *Lewis v. Darling*, 16 How. (U. S.) 1.

³ *Wortham v. Harrison*, 8 Texas, 141; *Stanard v. Brownlow*, 3 Munf. (Va.) 229; *Myers v. Kendrick*, 13 Iowa, 599; *Chittenden v. Brewster*, 2 Wall. 191; *Burleson v. Burleson*, 15 Texas, 423; *Woodward v. Howard*, 13 Wis. 557; *Waring v. Gilbert*, 25 Ala. 295; *McClure v. Lay*, 30 Ala. 208; *Bradley v. Root*, 5 Paige, 632; *Shollenberger v. Brinton*, 52 Pa. St. 9; *McCaw v. Blewitt*, 1 Bailey (So. Car.), Ch. 98.

⁴ *Giles v. Law*, 14 Ind. 16; *Simpson v. Shafer*, 20 Ind. 306; *Schafer v. Smith*, 68 Ind. 226; *Frazer v. Boss*, 66 Ind. 1;

Pate v. Roberts, 55 Ind. 277; *Cravens v. Duncan*, 55 Ind. 347; *Boyle v. Carter*, 24 Ill. 49; *Doll v. Feller*, 16 Cal. 432; *Hitchings v. Van Brunt*, 38 N. Y. 335; *Porter v. Grimsley*, 98 N. C. 550, 4 S. E. Rep. 529; *Kavanaugh v. Janesville*, 24 Wis. 618; *Smith v. Schulenberg*, 34 Wis. 41; *Bigelow v. Doolittle*, 36 Wis. 115; *Single v. Schneider*, 30 Wis. 570; *McHugh v. Chicago, etc., Co.*, 41 Wis. 75; *Tyson v. Milwaukee, etc., Co.*, 50 Wis. 78. A party may, of course, voluntarily enter a *remittitur*. *Buse v. Russell*, 86 Mo. 209; *Kimes v. St. Louis, etc., Co.*, 85 Mo. 611; *Murray v. Phillips*, 59 Ind. 56. It has been held that where the judgment awards the party more land than he was entitled to he may obviate a reversal by a *remittitur*. *Gibson v. Choteau*, 50 Mo. 85. But compare *Allen v. Claybrook*, 58 Mo. 124; *Keen v. Schnedler*, 15 Mo. App. 590.

can justly claim, namely, a general reversal. But broad as is the right of a party to enter a *remittitur*, it is not allowed to destroy the right of appeal after jurisdiction attaches.¹

§ 571. **Directing the specific Damages that shall be Awarded—** Some of the courts carry the doctrine upon which rests the rule that a party may be directed to enter a *remittitur* or be compelled to submit to a new trial to great lengths, for they assert that the court may fix the amount of the recovery even where there are no *data* upon which a definite calculation can be made and no fixed rule for measuring the amount of the recovery.² We suppose it to be clear that where a mere calculation exposes the error and the calculation rests upon written instruments, or upon evidence, definitely fixing the amount of recovery, the appellate tribunal may direct what damages shall be awarded, but where there are no such *data* and no fixed rule we doubt the power of the court to absolutely direct what damages shall be assessed.³ To illustrate the meaning we desire to convey we say that we believe such a direction would be proper where the action is on a bill of exchange, promissory note, or the like, but not in an action for personal injuries caused by culpable negligence or intentional wrong. It seems to us that in actions of the class last named the court, in directing what damages shall be awarded, invades the province of the jury and violates the rule that a judgment can not be directed for a specific sum where there is no definite rule which separates the elements of damages. It is, we suppose, quite clear that a trial court could not direct what damages a jury should allow in an action for personal injuries, although it might grant a new trial, and it is difficult to conceive any solid principle upon which the claim of an appellate tribunal to fix the damages in such cases can be rested, for it has no more right to assume the functions of a jury than has the court of original jurisdiction. Nor is it possible in such an action to separate and dis-

¹ *Ante*, § 62.

² *Barbour v. McKee*, 7 Mo. App. 587; *Kimes v. St. Louis, etc., Co.*, 85 Mo. 611.

³ *North America Ins. Co. v. For-*

heimer, 86 Ala. 541, 5 So. Rep. 870; *State v. Baougham*, 20 Iowa, 497; *Cady v. Milwaukee, etc., Co.*, 5 Dak. 97, 37 N. W. Rep. 221.

tinguish the excessive and illegal damages from the legal and legitimate, and where this can not be done there can, as has been held by able courts, be no specific and positive direction as to the amount that shall be assessed as damages.¹

§ 572. **Directing the amount of Recovery in cases where the facts appear in Special Findings or Special Verdicts**—Where the facts appear in a special finding or in a special verdict, it is proper for the appellate tribunal to rectify an error in the assessment of damages by directing the specific amount for which judgment shall be entered in cases where the damages are severable and the verdict or finding supplies the *data* for determining what part is justly assessed and what part is wrongly awarded. But even in cases where the facts appear in special verdicts or findings, the specific amount can not, as we think, be directly fixed by the appellate tribunal unless the items included in the sum named as damages are susceptible of severance. We suppose that if a gross sum should be designated in an action for personal injuries the appellate tribunal could not absolutely designate the amount for which judgment should be rendered, unless it appeared that improper elements entered into the computation, and that such elements could be separated from the other elements which entered into the assessment of damages made by the court or jury that tried the case. We do not assert that the appellate tribunal may not require the successful party to elect to enter a *remittitur* or suffer a reversal, for that we believe may be done in any case, but we do assert that the appellate tribunal can not in ordinary cases of recoveries for personal injuries, or the like, where an assessment of damages is made in gross, deny an election and absolutely direct what the recovery shall be. This must follow from the well settled and well known rule that there is no fixed standard for the exact measurement of damages, although there are certain general

¹ *Potter v. Chicago, etc., Co.*, 22 Wis. 615; *Page v. Sumpter*, 53 Wis. 652; *Pendergast v. Hodge*, 21 Mo. App. 138; *Cook v. Hannibal, etc., Co.*, 63 Mo. 397. It seems to us that where the damages are assessed in gross, as they are in ac-

tions for personal injuries, the court can not absolutely direct what part shall be remitted, and that the only course is to remand the case for a new trial.

rules to be observed in ascertaining and assessing the damages.¹ The cases generally affirm that in actions for personal injuries the amount of the recovery is to be fixed by the jury, although it is the duty of the court to so instruct them as to prevent them from taking improper elements into consideration.²

§ 573. **Costs in cases where a Remittitur is entered**—Where a party enters the proper *remittitur* on appeal the general rule is that the judgment will be affirmed, but the affirmance will be at the costs of the party who enters the *remittitur*. This is the ordinary rule, whether the *remittitur* is voluntarily entered by the party, or is entered by direction of the court.³ While the general rule is as we have stated it, there are, as we suppose, some exceptions to it, although the exceptions can not be very important or very numerous. The comprehensive powers of an appellate tribunal are such that it may apportion costs as the justice of the particular case may require.

§ 574. **Affirming as to some of the Parties and Reversing as to Others**—Where the interests of the parties to an appeal can be rightfully severed, the trial court may affirm as to some of the parties and reverse as to others.⁴ It is, indeed, the rule that

¹ Damages are, of course, to be compensatory, but what shall be a just compensation is to a great extent, although not entirely, a matter for the jury. *Taber v. Huston*, 5 Ind. 322; *Carthage, etc., Co. v. Andrews*, 102 Ind. 138; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Louisville, etc., Co. v. Falvey*, 104 Ind. 409; *Board v. Legg*, 110 Ind. 479.

² *City of Delphi v. Lowrey*, 74 Ind. 520.

³ *Johnston v. Morrow*, 60 Mo. 339; *Miller v. Hardin*, 64 Mo. 545; *Clark v. Bullock*, 65 Mo. 535; *Peck v. Childers*, 73 Mo. 484; *Higgs v. Hunt*, 75 Mo. 106. Particular cases must, of necessity, be governed by special rules. No general rule can be formulated that will fitly or justly apply to all cases. In no small degree the matter of apportioning costs

must, in cases where a *remittitur* is entered, be within the discretion of the court. But the general rule stated in the text applies in the very great majority of cases. And the rule justly applies in most cases. This is so for the reason that where a *remittitur* is directed it is implied or declared that something was awarded the appellee to which he was not entitled, and where this is true, there is a meritorious right of appeal. If there is a meritorious right of appeal the party who successfully asserts it can not be justly burdened with costs.

⁴ *Cairns v. O'Bleness*, 40 Wis. 469; *Sutton v. McConnell*, 46 Wis. 269; *Rogers v. Well*, 12 Wis. 664; *Blum v. Strong*, 71 Texas, 321, 6 S. W. Rep. 167; *Hamilton v. Prescott*, 73 Tex. 565, 11 S.

where the errors do not affect the parties jointly, they must sever in their assignment of errors, for it has often been adjudged that an assignment of errors not good as to all the parties who join in it is not good as to any of them. It must result, as a necessary conclusion from this firmly established doctrine, that separate judgments not only may be rendered, but often must be rendered on appeal. But there may, of course, be cases where the reversal must be of the entire decree or judgment, although the interest of the parties may not, in strictness, be joint. The rule seems to be that where justice can not be fully done, or the rights of the parties fully adjudicated without a new trial of the case or a new hearing of the suit, the entire judgment or decree will be reversed and a new trial or new hearing ordered.¹ Where the rights of one party are dependent upon those of another or others, as often happens, it is necessary that the judgment be reversed with such instructions as will require a new trial or new hearing.²

W. Rep. 548; *Boone v. Hulsey*, 71 Tex. 176, 9 S.W. Rep. 531; *Steeple v. Downing*, 60 Ind. 478; *Fields v. Moul*, 15 Abb. Pr. Rep. 6; *Mannsfeld v. Allen*, 85 Mo. 502. Where there is a joint judgment in which the interests are blended it can not be reversed as to one of the joint parties only. This is the general rule. *McGillis v. Bishop*, 27 Ill. App. 53. But under the statutory provisions respecting co-parties, it is probable that there are exceptions to the rule. See, "Parties," *ante*, Chapter VII.

¹ *Gaar v. Millikan*, 68 Ind. 208. The court said in the case cited: "The Kennards, therefore, are not entitled to a reversal of the judgment on their own account, but as the affirmance of the judgment as to them might possibly embarrass the appellee in the further prosecution of his alleged cause of action against the appellant, Abram Gaar, it has seemed to us that the ends of justice would probably be subserved by the reversal of the entire judgment."

² *Hamilton v. Prescott* 73 Tex. 565, 11 S. W. Rep. 548. In the case cited the

court referred to *Bayless v. Daniels*, 8 Texas, 140; *Houston v. Ward*, 8 Texas, 124; *Hopson v. Murphy*, 4 Texas, 248; *Burke v. Cruger*, 8 Texas, 66, and other cases. These cases were reviewed by the court and it was said: "We think the conclusion to be deduced from the apparently conflicting cases is that this court, when it finds error in the proceedings of the lower court as to any party to the judgment, and not as to another, and that a proper decision of the case as to one is not dependent upon the other, will reverse in part and affirm in part, but, where the rights of one party are dependent in any manner upon those of another, it will treat the judgment as an entirety, and, where a reversal is required as to one it will reverse the judgment as a whole." The doctrine of the case from which we have quoted is a sound one, and supplies, perhaps, as good a test as can be given for determining when a judgment should be treated as an entirety and as such reversed.

§ 575. **Dependent Rights—Judgment**—According to the test suggested in the case cited in the note to the preceding paragraph,¹ a judgment on appeal necessarily reverses a judgment and sends back the entire case for a new trial or new hearing where the rights of the parties are blended, although there may not, in strictness, be a joint interest. This rule must prevail in many cases where the interests of different lien-holders are involved, since, while there may not be an absolute unity, there is, nevertheless, such a dependency of interests as makes it necessary to treat the decree appealed from as an entirety.² It is evident that where there are blended interests involved, such as lien-holders generally possess, the decree must, in most instances, be treated as an entirety, for if it be not so treated justice can seldom be done. Where there is an ordinary personal judgment for damages against two or more parties the general rule under our statute probably is that the judgment of the trial court is severable, but it is otherwise where there are blended or commingled interests in property although such interests may not, in strictness, be joint. The object of the code is to settle one controversy in a single suit and not to permit it to be divided into parts and litigated in parcels or divisions, so that it is often important to reverse an entire decree in order that upon a second hearing the whole controversy may be finally adjudicated.³ The policy of settling an entire controversy in one suit

¹ *Ante*, § 574.

² *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. Rep. 551, S. C. 8 Railway & Corp. L. J. 124; *Jones v. Matthews* (Miss.), 4 So. Rep. 547; *Bassett v. Warner*, 23 Wis. 673; *Bond v. Wabash, etc., Co.*, 67 Iowa, 712; *Whipperman v. Dunn*, 124 Ind. 349, 357. Citing *Bisel v. Tucker*, 121 Ind. 249, and *State v. Templin*, 122 Ind. 235. In *Whipperman v. Dunn*, *supra*, the court said: "It is perfectly clear that justice can not be done between the parties without a new trial as to the whole case. In such cases the court will order a new trial of all the issues in the cause to the end that justice may be done."

³ *Greenup v. Crooks*, 50 Ind. 410; *Minor v. Hill*, 58 Ind. 176; *McCaffrey v. Corrigan*, 49 Ind. 175; *Harrison v. Phenix, etc., Ins. Co.*, 83 Ind. 575; *Ætna, etc., Co. v. Finch*, 84 Ind. 301; *Ulrich v. Drischell*, 88 Ind. 354; *Gaylord v. City of La Fayette*, 115 Ind. 423, 433; *Adair v. Morgenthau*, 114 Ind. 303; *Masters v. Templeton*, 92 Ind. 447; *Woodworth v. Zimmerman*, 92 Ind. 349; *Ballew v. Roller*, 124 Ind. 557, 558; *Horn v. Indianapolis National Bank*, 125 Ind. 381, 396; *Stockwell v. State*, 101 Ind. 1; *Bundy v. Cunningham*, 107 Ind. 360; *Otis v. De Boer*, 116 Ind. 531, 534, 535; *Lawrence v. Beecher*, 116 Ind. 312, 314; *Manigault v. Holmes*, 1 Bailey

is so clearly right and its effect so salutary, that it overbears all merely formal and technical rules. The appellate tribunal possesses such broad and comprehensive power to mold and frame its judgments so as to do substantial and complete justice between the parties, that it can always make such orders respecting costs and their apportionment as may seem just and equitable.

§ 576. Trial Court's duty to obey the Mandate of the Appellate Tribunal—The mandate of the appellate tribunal is law to the trial court and must be strictly obeyed.¹ Where the mandate directs that a particular judgment be entered, that a specified ruling be made, or that a designated course be pursued, the inferior tribunal must yield obedience to the directions given it. Thus, where a new trial is directed it must be granted; no other action can be rightfully taken by the trial court.² So, where a case is remanded upon a single point with specific directions the trial court can not open the case generally.³ No modification of the judgment or decree directed by the appellate tribunal

(So. Car.), Eq. 278; *Benjamin v. Elmira, etc., Co.*, 49 Barb. 441, S. C. 54 N. Y. 675; *Murrell v. Smith*, 51 Ala. 301; *McComb v. Spangler*, 71 Cal. 418; *Hefner v. Northwestern, etc., Co.*, 123 U. S. 747.

¹ *Burnett v. Curry*, 42 Ind. 272; *Chapin v. Board*, 21 Ind. 12; *Cutsinger v. Nebeker*, 58 Ind. 401; *Center Tp. v. Board*, 110 Ind. 579; *Cunningham v. Ashley*, 13 Ark. 653; *Gunter v. Laffan*, 7 Cal. 588; *Watson v. Avery*, 3 Bush. 635; *Caldwell v. Bruggerman*, 8 Minn. 286; *Henderson v. Winchester*, 31 Miss. 290; *Henshaw v. Robertson*, 1 Bailey Ch. (So. Car.), 311; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12.

² *Argenti v. San Francisco*, 30 Cal. 458; *McMillan v. Baker*, 92 N. C. 110; *Myers v. McDonald*, 68 Cal. 162.

³ *McConnell v. Wall*, 67 Texas. 352; *Conner v. Pope*, 23 Mo. App. 344; *Mc-*

Intyre v. McIntyre, 24 Mo. App. 166; *Mix v. People*, 122 Ill. 641. See, generally, *Washburn, etc., Co. v. Chicago, etc., Co.*, 119 Ill. 30, *Gage v. Bailey*, 119 Ill. 539; *Davis v. Curtis*, 70 Iowa, 398; *Allen v. United States*, 22 Ct. of Cl. 300. See, generally, *Titusville Iron Works v. Keystone Oil Co.*, 130 Pa. St. 211, 18 Atl. Rep. 739; *Tipping v. Robbins*, 71 Wis. 507, 37 N. W. Rep. 427; *Cox v. Louisville, etc., Co. (Ky.)*, 11 S. W. Rep. 808; *Kneeland v. American, etc., Co.*, 140 U. S. 592, 11 Sup. Ct. Rep. 426; *City of New Orleans v. Whitney*, 138 U. S. 595, 11 Sup. Ct. Rep. 428. In the case of *McKinney v. State*, 117 Ind. 26, it was held that where there is a specific order in the mandate directing a reassessment of damages the parties can not amend their pleadings after the case reaches the trial court under the judgment remanding it.

can be made by the trial court; no provision can be engrafted upon it nor can any be taken from it.¹

§ 577. **Scope of the Mandate of Appellate Tribunal**—It is not possible to lay down a specific rule for measuring the scope and effect of a mandate from an appellate tribunal, since its scope and effect must generally be determined from the language in which it is expressed, or from the record and facts in the particular instance.² It may be said, in a general way, that when it expressly directs that a controversy shall be terminated by a specific decree or judgment, its effect is conclusive and covers the entire case, but where it does not either expressly or impliedly so direct the lower court as to prohibit amendments or the introduction of new parties, that court may permit proper amendments and the introduction of new parties.³ Nor does the mandate always operate upon the trial court so as to exclude the consideration of matters occurring subsequent to those involved in the appeal.⁴ Where a new trial is directed and no specific instructions are given or rules declared, the trial court is not bound to adhere to the evidence adduced on the former trial.⁵

¹ Hughes' Appeal, 90 Pa. St. 60; Sherman v. Windsor, etc., Co., 57 Vt. 57; Herstein v. Walker, 90 Ala. 477, 7 So. Rep. 821; Murrill v. Murrill, 90 N. C. 120; Kershman v. Swehla, 62 Ia. 654. Where the appellate tribunal orders a dismissal, the trial court can not do anything more than enter the appropriate judgment dismissing the action. Wall v. Dodge, 3 Utah, 168. See, generally, Blacklock v. Small, 127 U. S. 96.

² It is, as has been often decided, proper to consider the judgments of courts with reference to the record and facts before them. In the absence of the record and the facts of a particular case, the judgment of a court would sometimes be unintelligible, at all events, its full scope and true meaning could not be ascertained.

³ Perry v. Burton, 126 Ill. 599, 18 N. E. Rep. 653; Green v. Springfield, 130 Ill. 515, 22 N. E. Rep. 602; Cartagnino

v. Belletta (Cal.), 11 Pac. Rep. 1097; Smith v. Shaffer, 29 Neb. 656, 45 N. W. Rep. 936; McCurdy v. Middleton, 90 Ala. 99, 7 So. Rep. 655.

⁴ Davidson v. City of New Orleans, 32 La. Ann. 1245; Sanders v. Peck, 39 Ill. App. 238, but see same case on appeal, 131 Ill. 407; Blandin v. Silsby, 62 Vt. 69, 19 Atl. Rep. 639; Busby v. Mitchell, 29 So. Car. 447, 7 S. E. Rep. 618. See Crib v. Morse, 79 Wis. 193, 18 N. W. Rep. 489. See, also, cases first cited in the following note.

⁵ McLennan v. Prentice, 79 Wis. 488, 48 N. W. Rep. 487. In the case of Moore v. American, etc., Co., 60 Hun. 582, 15 N. Y. Supp. 382, the general doctrine was carried to a great length. Bonny v. Bonny (Ky.), 9 S. W. Rep. 404; Fort Madison, etc., Co. v. Batavian Bank, 77 Ia. 393, 42 N. W. Rep. 331; Adams v. Smith, 6 Dak. 94.

but where specific instructions are given or rules declared, it is, of course, the imperative duty of the trial court to rigidly obey them, for what the appellate tribunal adjudges it is not at liberty to disregard directly or indirectly.¹ Where the reversal opens the whole case, the only effect of the judgment on appeal is to bind the trial court to follow the law as declared by the higher court.² It does not always follow that because specific instructions are embodied in the mandate, no steps can be taken by the trial court, for, while it is unquestionably true that no steps can be taken that directly or indirectly contravene the express or implied provisions of the mandate, there, nevertheless, may be cases where steps may be taken in respect to matters touched on by the mandate of the appellate tribunal.³

§ 578. **The Law of the Case**—It is a firmly settled principle that the decisions of the appellate tribunal constitute the law of the case upon all the points in judgment, no matter at what stage of the proceedings they arise, or in what mode they are presented. This rule is not one springing from the doctrine of *stare decisis*, but it is one founded upon the same principle on which rests the doctrine of *res adjudicata*. Questions before the court for decision, and by the court decided as essential to a final judgment, are conclusively and finally adjudicated. The law as declared can not be changed upon a second or subsequent appeal. This general doctrine is affirmed by many cases, and, so far as we can discover, denied by none.⁴ It is

¹ *Scroggs v. Stevenson* (N. C.), 12 S. E. Rep. 1031.

² *Needless v. Burk*, 98 Mo. 474, 11 S. W. Rep. 1008; *White v. Butcher*, 97 N. C. 7, 2 S. E. Rep. 59; *Ford v. Ford*, 72 Wis. 621, 40 N. W. Rep. 502. See *Mason v. Burke*, 120 Ind. 404, 22 N. E. Rep. 119; *O'Connell v. O'Leary*, 151 Mass. 83, 23 N. E. Rep. 826.

³ *McCoy v. McCoy*, 33 W. Va. 60, 10 S. E. Rep. 19. See, generally, *O'Brien v. Gaslin*, 24 Neb. 559, 39 N. W. Rep. 449; *District of Columbia v. McBlair*, 124 U. S. 320, 8 Sup. Ct. 547.

⁴ *Dodge v. Gaylord*, 53 Ind. 365;

Kress v. State, 65 Ind. 106; *Braden v. Graves*, 85 Ind. 92; *Test v. Larsh*, 76 Ind. 452; *Hawley v. Smith*, 45 Ind. 183; *Union, etc., Tp. v. First National Bank*, 102 Ind. 464; *City of Logansport v. Humphrey*, 106 Ind. 146; *Pittsburgh, etc., Co. v. Hixon*, 110 Ind. 225; *Hibbits v. Jack*, 97 Ind. 570; *Forgerson v. Smith*, 104 Ind. 246; *Board v. Pritchett*, 85 Ind. 68; *Richmond Street Ry. Co. v. Reed*, 83 Ind. 9; *Continental Life Ins. Co. v. Houser*, 111 Ind. 266; *Nickless v. Pearson*, 126 Ind. 477; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. Rep. 431; *Thompson v. Hawley*, 16 Oregon, 251,

plainly evident that the rule is a sound and salutary one, since, without such a rule, litigation might be endless and a controversy remain unsettled. But this is not the only reason supporting the rule, for it is supported by the principle that the judgment of the court upon the questions before it is final and can not be vacated after the close of the term. It is, however, to be borne in mind that the rule does not go to the extent of foreclosing a review of all the questions discussed, for it does not, by any means, go to that length. It is only such questions as were before the court for decision and such as were expressly or impliedly decided, that are conclusively adjudicated. The reasoning or illustrations of the court do not constitute decisions and hence the reasoning and the illustrations, although they may be important as aids in determining what was actually decided, do not constitute the binding adjudication.¹

§ 579. Form and Effect of a Judgment of Affirmance—Where no specific directions are deemed necessary and the conclusion of

19 Pac. Rep. 84; *Chicago, etc., Co. v. Hull*, 24 Neb. 740, 40 N. W. Rep. 280; *Alexandria, etc., v. McVeigh*, 84 Va. 41, 3 S. E. Rep. 885; *McWilliams v. Walthall*, 77 Ga. 7; *Lee v. Stahl*, 13 Col. 174, 22 Pac. Rep. 436; *Steele v. Thompson*, 38 Mo. App. 312; *Green v. Springfield*, 130 Ill. 515, 22 N. E. Rep. 602; *Roberts v. Cooper*, 20 How. (U. S.) 467; *Sizer v. Many*, 16 How. (U. S.) 98; *Cumberland Coal, etc., Co. v. Sherman*, 20 Md. 117; *Du Pont v. Davis*, 35 Wis. 631; *Booth v. Commonwealth*, 7 Metc. (Mass.) 285. In *Hibbits v. Jack*, *supra*, it was said: "What was decided by a case afterwards overruled continues to be the law of the case as between the parties and those claiming under them. *Hardigree v. Mitchum*, 51 Ala. 151; *Well's Res Adjudicata and Stare Decisis*, § 628."

¹ In the case of *Union School Tp. v. First National Bank*, 102 Ind. 464, 472, the court said: "In our opinion a decision rendered on appeal does not con-

clusively determine merely incidental or collateral questions, but determines only such questions as are presented for decision and are decided as essential to a just disposition of the pending appeal." The Supreme Court of California, in speaking of the law of the case, said: "It has never, that we are aware, been held to apply to expressions in an opinion which are merely *obiter*, and we venture to say that beyond something of that sort there is nothing in the former opinion of this court affecting the questions presented on this appeal." *Wixson v. Devine*, 80 Cal. 385, 388. A doctrine similar to that stated in the text is declared in other cases. *Hughes v. Detroit, etc., Co.*, 78 Mich. 399, 44 N. W. Rep. 396; *Clark v. Hershey*, 52 Ark. 473, 12 S. W. Rep. 1077; *Norton v. Moshier* (Ill.), 28 N. E. Rep. 463; *Lucas v. Board*, 44 Ind. 524, and authorities cited.

the appellate tribunal is that the judgment of the lower court should be affirmed, a simple declaration of affirmance is all that is essential, as the law annexes the necessary and appropriate incidents. The appellate tribunal, in rendering a judgment which simply affirms that of the court of original jurisdiction, does not render a new judgment upon the demand acted upon by the former court, it simply confirms the judgment of that tribunal.¹ Where there is a simple affirmance, the judgment remains in force as of the date of its entry in the records of the trial court. Even where a supersedeas is obtained, the appeal does not, as is well settled, disturb the judgment below further than to suspend its enforcement. A judgment affirming that rendered by the trial court is sometimes said to "effect a merger," but this statement requires qualification, for it is not, in strictness, true that the judgment of the trial court "is drowned in that of the superior court." The trial court judgment remains undisturbed, saving only that it is conclusively confirmed by the judgment on appeal. This confirmation operates to a limited extent as a merger, inasmuch as it concludes the trial court and the parties, and absolutely precludes them from modifying or abrogating the judgment affirmed. The authority of the trial court as to all matters involved in the appeal and adjudicated by the judgment there rendered is at an end.² Its authority, indeed, ends when the case is removed to the higher tribunal by the appeal, and revives only when, if ever, it returns under an order remanding the case.³

§ 580. **Judgment of Reversal**—A judgment reversing the judgment or decree of the trial court, expressed in general terms and

¹ *Eno v. Crooke*, 6 How. Pr. Rep. 463; *Halsey v. Flint*, 15 Abb. Pr. Rep. 367. An appellate tribunal may add to a judgment of affirmance such explanations as may be necessary to make the judgment below fully understood. *Mayo v. Purcell*, 3 Munf. (Va.) 243.

² *Herstein v. Walker*, 90 Ala. 477, 7 So. Rep. 821; *Dobson v. Simonton*, 100 N. C. 56; *Werborn v. Pinney*, 76 Ala. 291. *In re Cassidy*, 95 N. C. 225;

Abrams v. Lee, 14 Ill. 167; *Chickering v. Failes*, 29 Ill. 294; *Lyon v. Merritt*, 6 Paige, 473. The conclusiveness of the judgment is not affected by the fact that the cause was submitted, on appeal, upon a defective record. *Gregory v. Slaughter*, 19 Ind. 342; *Devoss v. Jay*, 14 Ind. 400; *State v. Daugherty*, 59 Mo. 104.

³ See, "Effect of the Appeal," Chapter XXVII.

without specific directions or instructions, operates to completely annul the judgment or decree of the lower court and to restore the parties to the position they occupied when the original decree or judgment was rendered.¹ Its effect is substantially the same as that of a judgment awarding a new trial, for, in general, it opens up the whole case.² We have stated the general rule in guarded terms, for we suppose that it is not correct to affirm that a judgment of reversal always opens up the judgment below, as is sometimes said, for we suppose it incontrovertibly true that the judgment on appeal does not always or necessarily open up the entire case. It surely would not do so in a case where the error is in refusing to modify a decree or judgment, or where there is some error affecting the judgment or decree only in part. The judgment of reversal does, however, usually reach back to the first error, and from that point generally opens up the whole case.

§ 581. **Costs on Reversal—Apportionment of—**As a general rule the reversal carries the costs from the first error.³ But the

¹ *Mulin v. Atherton*, 61 N. H. 20; *Ervin v. Collier*, 3 Mont. 189; *Lipp v. Hunt*, 30 Neb. 469, 45 N. W. Rep. 685; *Rose v. Garrett*, 91 Mo. 65; *Phelan v. San Francisco*, 9 Cal. 15; *Lewis v. St. Louis, etc., Co.*, 59 Mo. 495; *Crispen v. Hannovan*, 86 Mo. 160; *Musser v. Harwood*, 23 Mo. App. 495.

² *State v. Templin*, 122 Ind. 235, 238; *Edwards v. Edwards*, 22 Ill. 121; *Hidden v. Jordan*, 28 Cal. 301. In the case of *Cox v. Pruitt*, 25 Ind. 90, it was said: "The reversal by this court, *ex vi termini*, vacates the judgment of the court below without any action of that court. On the filing of the certified opinion of this court in the clerk's office of the circuit court, it was the duty of that court to proceed with the case from the point reached by the judgment of reversal. That court having done its duty, although in an informal manner, committed no error in taking jurisdiction of the cause." The reversal completely destroys the effect of the judg-

ment reversed except as a muniment of title in favor of *bona fide* purchasers. *Post*, §§ 582, 583. After reversal the judgment can not be effectively pleaded in bar nor effectively employed as an estoppel. *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Taylor v. Smith*, 4 Ga. 133; *Oregonian Ry. Co. v. Oregon, etc., Co.*, 27 Fed. Rep. 277; *Smith v. Frankfield*, 77 N. Y. 414.

³ *Doyle v. Kiser*, 8 Ind. 396; *Conner v. Winton*, 10 Ind. 25; *Excelsior, etc., Co. v. Brown*, 47 Ind. 19; *Winton v. Conner*, 24 Ind. 107; *Eigenmann v. Kerstein*, 72 Ind. 81; *Shoemaker v. Smith*, 100 Ind. 40; *Thomas v. Simmons*, 103 Ind. 538. Fees of stenographer are part of the costs. *Wright v. Willson*, 98 Ind. 112. Where appellee enters satisfaction of judgment appellant is entitled to recover the cost of the transcript. *Monnett v. Hemphill*, 110 Ind. 299. The cost of the transcript is part of the costs of the appeal. *R. S.* 1881, § 665.

plenary power of the court to so mold its judgments as to do equity enables it to apportion the costs equitably, and it does not invariably adjudge costs according to the general rule stated. In the absence, however, of elements constituting the particular case an exception to the general rule, the costs will be apportioned as it requires. Where no specific directions are given the uniform practice is to tax the costs under the rule.

§ 582. Effect of Judgment of Reversal upon the rights of Bona fide Purchasers—The provisions of our code protect parties who, in good faith, purchase land sold under a judgment which is subsequently reversed.¹ It excludes parties and attorneys so that they can not successfully assert rights as good faith purchasers.² It is clear that the provisions of the statute referred to in the note must be considered in connection with the provisions respecting the effect of a supersedeas, for we think that where a supersedeas is rightfully issued and duly served, a sale upon the judgment will not convey title. We incline to the opinion that where a supersedeas is issued there can be no good faith purchaser, although a sale may be made in disobedience of its

¹ R. S. 1881, § 169. The broad terms of the statute can not, as it seems to us, in view of other provisions of the statute and of the established rules of law, be given literal effect, for there must be some cases where the reversal destroys title. We suppose it clear that where the judgment of the trial court is void there can be no *bona fide* purchaser. *Underwood v. Pack*, 23 W. Va. 704. It is, however, probably true that the statute can be given effect by somewhat restricting the terms employed.

² The statute is merely declarative of the common law; its policy was to establish confidence in judicial sales. *Twogood v. Franklin*, 27 Iowa, 239; *Hubbell v. Broadwell*, 8 Ohio, 120; *Gott v. Powell*, 41 Mo. 416; *Frakes v. Brown*, 2 Blackf. 295; *Dorsey v. Thompson*, 37 Md. 25; *Fitzgibbon v. Lake*, 29 Ill. 165,

S. C. 81 Am. Dec. 302; *Stinson v. Ross*, 51 Me. 556, S. C. 81 Am. Dec. 591; *Little v. Bunce*, 7 N. H. 485, S. C. 28 Am. Dec. 363; *Gray v. Brignardello*, 1 Wall. 627; *Shultz v. Sanders*, 38 N. J. Eq. 154; *Jesup v. City Bank*, 15 Wis. 604, 82 Am. Dec. 703; *Stout v. Gully*, 13 Col. 604, 22 Pac. Rep. 954; *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. Rep. 350; *Cheever v. Minton* (Col.), 21 Pac. Rep. 710. An assignee of the judgment who purchases is held to be a party and liable to be compelled to make restitution. *McJillton v. Dove*, 13 Ill. 486, 54 Am. Dec. 449. See, as to rights and liabilities of assignee, *Ritch v. Eichelberger*, 13 Fla. 169; *Reynolds v. Harris*, 14 Cal. 667; *Weber v. Tschetter* (Dak.), 45 N. W. Rep. 201; *Northam v. Gordon*, 23 Cal. 255; *Reynolds v. Hosmer*, 45 Cal. 616, 630.

provisions.¹ The title of one who is not a *bona fide* purchaser is defeated by a reversal.²

§ 583. **Restitution**—As the reversal of a judgment completely vacates and annuls it,³ justice requires that one who is not protected by superior equities should restore all of value that he has received or acquired by virtue of the invalid judgment. The reversal, no matter whether made upon confession of errors or after a contest, takes from the reversed judgment all effect, and the parties to the judgment can take no benefit from it.⁴ It necessarily results from these settled and sound principles that a party who acquires title under a judgment annulled by a reversal ought not to be permitted to hold it unless he is a *bona fide* purchaser in all that the term implies. The common law gave effect to this just and salutary principle by compelling a party, not a *bona fide* purchaser, to make restitution of property received by him under the invalid or ineffective judgment.⁵ The rule is that where the party has the property in *specie* he may be compelled to restore the property and the claimant can not be put off with the payment of damages, but where the

¹ *Parker v. Courtney*, 28 Neb. 605, 44 N. W. Rep. 863.

² *Mullin v. Atherton*, 61 N. H. 20.

³ *Ante*, § 580, and authorities collected in note. *Ragan v. Cuyler*, 24 Ga. 397, 400; *French v. Edwards*, 4 Saw. C. C. 125.

⁴ In *Maghee v. Collins*, 27 Ind. 83, the court said: "After a judgment has been reversed it can have no force for any purpose. It no longer binds either of the parties to it. It will not bear another suit for the same cause of action against the party who was a defendant to it, and surely no principle of justice requires that it should be deemed a bar in favor of a stranger jointly liable with him originally. If there be a rule of law to that effect it is wholly technical and arbitrary, and without any support in sound reason or good morals."

⁵ *Martin v. Woodruff*, 2 Ind. 237. In the case cited it was said: "The defendant is entitled to no benefit from a judgment which ought not to have been recovered." This is a terse expression of the principle upon which rests the doctrine of restitution. *Doe v. Crocker*, 2 Ind. 575; *Splahn v. Gillespie*, 48 Ind. 397, 408; *Gott v. Powell*, 41 Mo. 416; *Bickett v. Garner*, 31 Ohio St. 28; *Quan Wo Chung Co. v. Laumeister*, 83 Cal. 384, S. C. 17 Am. St. Rep. 261; *Lytle v. Lytle*, 94 N. C. 522; *Perry v. Tupper*, 70 N. C. 538; *Watson v. Trustees*, 2 Jones, 211; *Little v. Bunce*, 7 N. H. 485, 28 Am. Dec. 363; *Murray v. Berdell*, 98 N. Y. 480; *Hall v. Wells*, 54 Miss. 289; *Shaw v. Fleming*, 5 Houst. 155; *Runyon v. Hale*, 10 Ark. 476; *Harlan v. Scott*, 2 Scam. 65; *Kennedy v. Hanner*, 19 Cal. 374.

property can not be restored the claimant is, of course, entitled to compensation.¹

§ 584. **Restitution—Practice**—In some of the States the order of restitution is made directly by the appellate tribunal, and it is the judgment of that tribunal that effects a restoration of the specific property.² Our statute, in accordance with its general purpose to establish a system requiring cases to be remanded to the trial court for the entry of the ultimate judgment,³ provides that the party entitled to restitution “may notify the purchaser or his tenant, or other person in possession, that at the next term he will move the court which rendered the judgment to restore him to the possession of the premises.”⁴ This provision requires the judgment of restitution to be pronounced by the court of original jurisdiction, but, upon the principle stated in preceding paragraphs of this chapter, the appellate tribunal has power to direct the court below to enter a judgment of restitution upon the proper steps being taken by the party entitled to a restoration of the specific property. The remedy provided by the statute is a summary one.⁵ The statute is remedial in its nature and salutary in its effect, and should be liberally construed. One of the leading objects which the statute is designed to accomplish is that of ending litigation by directing a restoration of the property without compelling the

¹ The claimant is entitled to the property itself, not simply to the value of the property. *Gott v. Powell*, 41 Mo. 416; *Bickett v. Garner*, 31 Ohio St. 28.

² *Stockman v. Riverside, etc., Co.*, 64 Cal. 57; *Ex parte Morris*, 9 Wall. 605. See, also, *Pico v. Cuyas*, 48 Cal. 639, 643; *Kennedy v. Hamer*, 19 Cal. 374, 386; *Reynolds v. Harris*, 14 Cal. 667, 688. It is held that the statute does not make it imperative upon the court to order a restitution. *Coster v. Peters*, 7 Rob. (N. Y.), 386, S. C., 4 Abb. Pr. (N. S.) 53. It is, however, held that it may be directed, as a matter of course. *Estus v. Baldwin*, 9 How. Pr. Rep. 80; *People v. Johnson*, 38 N. Y. 63, 66. The right may be lost by inexcusable delay.

Coster v. Peters, *supra*. See, generally, *People v. Livingston*, 80 N. Y. 66; *Britton v. Phillips*, 24 How. Pr. Rep. 111; *Lott v. Swezey*, 29 Barb. 87; *Holloway v. Stephens*, 1 Hun. 308; *Scholey v. Halsey*, 72 N. Y. 378.

³ *Ante*, § 564. See, also, *Williams v. Port*, 9 Ind. 551; *Williams v. Jones*, 14 Ind. 363; *Stockton v. Coleman*, 42 Ind. 281.

⁴ R. S. 1881, § 672.

⁵ The remedy is held, and we think justly, to be a cumulative one. *Lott v. Swezey*, 29 Barb. 87; *Kidd v. Curry*, 29 Hun. 215; *Scholey v. Halsey*, 72 N. Y. 378. Our code gives express sanction to this general doctrine. R. S. 1881, § 673.

claimant to resort to a formal action, and, as the object is one favored by high considerations of public policy and supported by sound principle, the appellate tribunals ought to freely and liberally apply its provisions in cases where justice demands restitution. The provisions of the statute concerning the hearing and procedure seem to contemplate the formation of an issue, for the statute declares that: "Upon proof that the notice has been served ten days the court may proceed to hear and determine the issues made by the parties,"¹ but, broad as these words are, it is, nevertheless, evident that, when taken in connection with other provisions of the code and considered with reference to the purpose of its framers and the object they intended to accomplish, the issue must, of necessity, be a narrow and limited one. It is hardly possible that the code contemplates the opening of the entire case. We can see no reason to doubt that the only issue that can properly be formed is, whether the claimant is entitled to a judgment restoring the property taken from him under the judgment vacated by the judgment on appeal. This must be so for the judgment on appeal is conclusive as to the ineffectiveness of that rendered by the trial court, so that the only question open to controversy is the right to restitution.

§ 585. Finality of the Judgment on Appeal—In affirming, as we have done, that the judgment on appeal concludes both the trial court and the appellate tribunal, we have impliedly, at least, shown that in important particulars the judgment on appeal is final in all that the term implies. But it is final in other respects than those indicated. It is final in the sense that after the close of the term at which it was rendered the court that rendered it can not vacate it, but this statement is to be deemed limited by the doctrine stated in the paragraph which follows.²

¹ R. S. 1881, § 673.

² *Center Township v. Board*, 110 Ind. 579; *Hungerford v. Cushing*, 8 Wis. 324; *State v. Wapucca Bank*, 20 Wis. 640. In the case last cited the court referred to the following cases as sustaining its views. *Washington Bridge Co.*

v. Stewart, 3 How. (U. S.) 413; *Martin v. Hunter*, 1 Wheat. 304; *Skillern v. May*, 6 Cranch. 267. It is upon the general principle stated in the text that it was held that after the case reaches the trial court under the order remanding it the appellate court can not con-

Where there is a simple judgment of reversal, that is, one without specific instructions, the decision is not final in such a sense as to interdict further proceedings,¹ but even in such a case the judgment is final as to all questions presented for decision and decided as essential to a disposition of the pending appeal. Where there is a judgment of reversal completely putting an end to the controversy by specific directions or instructions it is, as a general rule, to be regarded as final in the strictest sense of the term.² We have stated only general rules. We do not mean to imply that the appellate tribunal may not in cases of accident or fraud relieve a party who presents a mer-

itrol the enforcement of the judgment. *Szorn v. Lamar*, 71 Ga. 85; *Wallace v. Stutsman County*, 6 Dak. 1. It seems clear that this must be the correct doctrine, for under our statute the opinion must be certified to the trial court, but it must be the true doctrine under any system, otherwise we should have the strange anomaly of one case in two courts at the same time.

¹ *Houston v. Moore*, 3 Wheat. 433; *Smith v. Adams*, 130 U. S. 167. In the case last cited it was said: "A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case."

² In speaking of such a judgment the Supreme Court of the United States said: "That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment already rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering

the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court, which has been rendered, into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motion to dismiss were all judgments or decrees of reversal with leave for further proceedings in the inferior court." See, also, *Brown v. Union Bank*, 4 How. (U. S.) 465; *Gibbons v. Ogden*, 6 Wheat. 448, and note; *Pepper v. Dunlap*, 5 How. (U. S.) 51; *Tracy v. Holcomb*, 24 How. (U. S.) 420; *Baker v. White*, 92 U. S. 176; *Davis v. Crouch*, 94 U. S. 514; *Atherton v. Fowler*, 91 U. S. 143; *Williams v. Bruffy*, 102 U. S. 248, 255; *Moore v. Robbins*, 18 Wall. 588. It is true that the decisions in the cases cited are directed to a phase of the subject somewhat different from that discussed in the text, but they assert the principle there stated, inasmuch as they clearly exhibit the difference between a general judgment of reversal and a judgment of reversal accompanied by specific instructions or directions which effectually put an end to the particular suit or action. Specific directions may end a controversy as effectually as an unconditional judgment of affirmance. *Chouteau v. Allen*, 74 Mo. 56; *Connor v. Pope*, 23 Mo. App. 344.

itorious cause, who has been free from fault, prompt and diligent; on the contrary, we are satisfied that the powers of the court are of such high and comprehensive character, for both the elements of equity and of law are blended in its powers and authority, that it may give relief in the proper case. But cases in which such relief can be granted are extraordinary ones and very seldom arise.

§ 586. **Effect of a Petition for Rehearing upon the rule stated in the preceding paragraph**—It seems quite clear that where a petition for rehearing is filed within the time limited, the case remains in the appellate tribunal until judgment is given upon the petition. As long as the petition remains undisposed of the case remains in the appellate tribunal. A petition filed at one term necessarily carries the case over to the term at which a ruling is made on the petition. It is evident, also, that a party entitled to petition for a rehearing may file his petition within the time prescribed, although the time may not expire until after a new term has begun.

PART II.

ERROR IN JUDICIAL PROCEEDINGS.

CHAPTER I.

THE NATURE OF JUDICIAL ERROR.

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| § 587. Error—Definition. | § 593. A wrong ruling not probably
prejudicial is not available
error. |
| 588. Erroneous rulings. | |
| 589. Ruling right when made does
not constitute error. | 594. Presumption of prejudice from
an erroneous ruling. |
| 590. The ultimate ruling is decisive. | 595. No error where complaining
party secures his rights by
amendment. |
| 591. Presumption that the court ad-
heres to a declared or indi-
cated theory. | 596. Pleadings upon which error is
alleged must be in the record. |
| 592. That is not error which the rec-
ord does not show to be error. | |

§ 587. **Error—Definition**—It is sufficient for our immediate purpose to define the term “error” in a rough way, and this we do by saying that it means a wrong ruling or decision. A wrong decision is one which violates some fundamental rule or principle of law, or some rule of pleading, practice, or evidence. But a mistake, although it may, in a general sense, be erroneous, is not always such an error as will be available on appeal. It is always essential to success on appeal to show a wrong ruling or decision, but a wrong ruling does not invariably constitute error. Speaking with strict accuracy, an “error” is such a wrong ruling as probably induced a wrong judgment, but the term is not ordinarily used in this strong sense, for other words are generally added to the term when error sufficient to warrant a reversal is meant. If a mistake in declaring or applying a rule of law does not probably conduce to a wrong judgment, there is, in strictness, no error, although it is not uncommon to say that the “ruling constitutes error,” or that there “was error in the ruling,” when no more is meant than that a mistake was made by the trial court but not one requiring that a judgment be reversed or annulled.¹ It is, in

¹ It will be shown at another place that there are two general classes of errors, available and unavailable.

general, true, that a mere irregularity does not constitute error, but an irregularity may be error where it directly or influentially conduces to an erroneous final decision. An error in the true and strict sense is such an irregularity or such a mistake in declaring or applying some fundamental rule, or some established rule of pleading, practice, or evidence, as conduces to a wrong judgment, or so operates as to make the final decision erroneous.

§ 588. **Erroneous Rulings**—Erroneous rulings (using the term “erroneous rulings” as meaning wrong rulings, which probably tend to produce a wrong judgment or decree) are sufficient to overthrow a judgment or decree upon a direct attack well made, but they are not available in a purely collateral attack. A judgment may be radically erroneous and not void. If there is a court and jurisdiction the judgment is not void, and if not void, no collateral attack can prevail against it.¹ A party may appeal from a void judgment but he is not bound to do so, for it may be utterly disregarded; he can not, however, disregard a judgment which is simply erroneous, for, until set aside or reversed by a judicial order or decree, it is effective. It is erroneous judgments that appellate courts have to deal with in the vast majority of cases brought to their bar. A judgment is

¹ *Ex parte* Bigelow, 113 U. S. 328; Goodell v. Starr, 127 Ind. 198; Harrod v. Dismore, 127 Ind. 338; McLaughlin v. Etchison, 127 Ind. 474; Boyer v. Berryman, 123 Ind. 451; Cicero Tp. v. Picken, 122 Ind. 260; Essig v. Lower, 120 Ind. 239, and cases cited. A void judgment, as a general rule, carries its own condemnation. Kingman v. Paulson, 126 Ind. 507; Bailey v. Martin, 119 Ind. 103; Earle v. Earle, 91 Ind. 27. It is really an absolute nullity; that is no judgment save in form, and not always in that, at all events it is utterly destitute of force. Smith v. Hess, 91 Ind. 424. A voidable judgment is one which may be avoided or annulled. Smith v. Hess, *supra*. On appeal the record must supply the means of overthrowing it,

but it may be attacked in the lower courts for matters not apparent of record. State v. Morrison, 103 Ind. 161; Indiana, etc., Co. v. Allen, 113 Ind. 581; Robertson v. Huffman, 92 Ind. 247; McAlpine v. Sweetser, 76 Ind. 78; Weiss v. Guerineau, 109 Ind. 438; Wilhite v. Wilhite, 124 Ind. 226. In Wolfe v. Davis, 74 N. C. 597, 599, it was said: “An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law, as where it is for one party, when it ought to be for the other, or for too little or too much.” See, also, Koonce v. Butler, 84 N. C. 221. “Erroneous” means, as usually employed, deviating from the law. Thompson v. Doty, 72 Ind. 336, 338.

erroneous wherever a wrong ruling denies a party a substantial legal right, although the ruling may be made early in the progress of the case. The wrong may, of course, be subsequently rectified,¹ but if it is not it may be sufficient cause for reversal, no matter at how early a stage of the case it was committed.

§ 589. Ruling Right when Made does not constitute Error— Whether a ruling does or does not constitute error is to be determined, as a general rule, by the condition existing at the time it was made. If at the time the ruling was made it was not erroneous, it can not be made erroneous by the subsequent acts of the parties. Thus, the withdrawal of the general denial in an answer after a ruling upon demurrer can not make the ruling wrong, although if the general denial had been withdrawn before the ruling was made, the ruling would have been erroneous in the strictest sense.² The court may change the condition of affairs and impress error upon a ruling, but a change wrought by the subsequent acts of the parties can not have that effect. If the party desires to secure an available ruling, that is a ruling upon which error may be properly alleged, in cases such as those cited in the note, he must, after withdrawing the denial, refile the affirmative paragraph and secure a ruling upon it as refiled. If that ruling is adverse, then error may be prop-

¹ *Moyer v. Brand*, 102 Ind. 301.

² *Reeder v. Maranda*, 66 Ind. 485, 486. In the case cited the court said: "To be sure, the general denial was afterwards withdrawn, but its withdrawal could not make a ruling erroneous which was not so at the time it was made." A similar ruling was made in *Cincinnati, etc., Co. v. Smith*, 127 Ind. 461, where it was said: "As it was not available error to sustain a demurrer to the reply at the time of the ruling, we do not think the appellant could make it available by withdrawing the general denial on a subsequent day." In harmony with the decisions in the cases cited is the decision in *Kidwell v. Kidwell*, 84 Ind. 224, 228, where it was said: "Appellant's withdrawing of the

first paragraph could not change the force of the ruling upon the record." *Indianapolis, etc., Co. v. City of Lawrenceburgh*, 37 Ind. 489, is to substantially the same effect. An erroneous ruling made after the judgment has been pronounced and entered can not, it has been held, overthrow the judgment. *Bowrell v. Zigler*, 19 Ohio, 362. We suppose, however, that much depends upon the character of the ruling, for if it should so operate as to affect the judgment materially and directly it might be error. We suppose, also, that a wrong ruling depriving a party of a right may be such an error as can be made available on appeal.

erly alleged. But, although error may be properly alleged, it does not necessarily follow that the judgment will be reversed, since the paragraph may be good, or the question may not be properly saved. It is one thing to properly allege error and quite another thing to make it appear that there is available error.¹

§ 590. The ultimate Ruling is Decisive—If the ultimate ruling in a case is clearly right, intermediate mistakes are not of controlling importance. If that ruling is right there is no error. A mere mistake or irregularity can not be regarded as error where it is substantially rectified by subsequent and controlling rulings.² But if the mistake or irregularity is carried forward and so warps the course or rulings of the court as to operate to the substantial injury of the party complaining, there is error

¹ "Errors in judicial proceedings," says Mr. Powell, "are such mistakes or deviations from those principles of law deemed necessary in the due administration of justice, which, when found in the record affecting the judgment to the injury of the party, will be corrected by being reversed or modified. Such error must be substantially wrong, operating to the injury of the party, and which he has not waived by his act or consent, or which has not been otherwise cured, or it will not be considered by the appellate as an object of reversal." Powell's Appellate Proceedings, 115. It is evident from this that where a ruling is right when made there can be no error, and that regard must be had to the facts and pleadings before the court at the time it made its decision, for any other conclusion would place it in the power of parties to transform a right ruling into a wrong one. In short, no ruling can be wrong, or erroneous, where there is no deviation or departure from the rules of law, and there is no departure or deviation where the court acts upon the facts or pleadings as

they appear, by the record, at the time of making the decision.

² This principle is illustrated by *Fell v. Muller*, 78 Ind. 507, where it was held that if a motion to suppress deposition is sustained, but the deposition is subsequently permitted to go in evidence, there is no error. The principle is applied in the cases which hold that errors in stating conclusions of law are not regarded where the ultimate judgment is correct. *Krug v. Davis*, 101 Ind. 75, 77; *Whitworth v. Ballard*, 56 Ind. 279; *Chicago, etc., Co. v. Barnes*, 116 Ind. 126; *Hill v. Hazen*, 93 Ind. 109; *Slauter v. Favorite*, 107 Ind. 291; *White v. Chicago, etc., Co.*, 122 Ind. 317, 330. Where an instruction works no prejudice there is no available error. *Wallace v. Cravens*, 34 Ind. 534. For other decisions declaring that if the ultimate conclusion is right, intermediate errors will be disregarded, see *Whitworth v. Ballard*, 56 Ind. 279; *Pennington v. Nave*, 15 Ind. 323; *Check v. Glass*, 3 Ind. 286; *State v. Michaels*, 8 Blackf. 436; *Butt v. Butt*, 118 Ind. 31, 33; *Bothwell v. Millikan*, 104 Ind. 162; *Mason v. Mason*, 102 Ind. 38.

within the meaning of the law. If the wrong ruling asserts a definite and clearly marked theory, the presumption is that the court adhered to that theory, unless the record shows the contrary, and if that theory is wrong and probably works injury there is error.

§ 591. **Presumption that the Court Adheres to a Declared or Indicated Theory**—It is the right of parties to assume, in the absence of countervailing rulings or indications, that a court will adhere to a theory clearly indicated by a ruling. Where the theory thus indicated is wrong and is such as will probably lead to an erroneous decision, it will be presumed on appeal, nothing to the contrary appearing, that the case was tried on the theory indicated by the ruling.¹ Thus, if the trial court erroneously overrules a demurrer to a bad paragraph of answer, the presumption is that it tried the case upon the theory asserted by the ruling on the answer. Any other rule would be unjust and subversive of principle, since the rulings of courts are theoretically always, and actually in most cases, made after solemn deliberation for the purpose of indicating the lines upon which the case must be conducted.² It is no comfort to a plaintiff in a case where a bad answer is held good, to be told that there are other paragraphs of the answer under which the same facts are admissible in evidence; for the declaration of the ruling is that if the defendant proves the facts stated in the answer he will succeed, although he proves no other. A ruling directly made in such a case settles the law, as far as the trial court can settle it, for the particular controversy, and if the ruling injures the

¹ *Abdill v. Abdill*, 33 Ind. 460; *Kernodle v. Caldwell*, 46 Ind. 153, 158; *Over v. Shannon*, 75 Ind. 352; *Sims v. City of Frankfort*, 79 Ind. 446, 449; *Eve v. Louisville*, 91 Ind. 457, 463; *Board v. Armstrong*, 91 Ind. 528, 532; *McComas v. Haas*, 93 Ind. 276, 280; *Epperson v. Hostetter*, 95 Ind. 583, 587; *Weir v. State*, 96 Ind. 311, 315; *Thompson v. Lowe*, 111 Ind. 272, 279, 12 N. E. Rep. 476; *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. Rep. 419; *Scott v. Stet-*

ler, 128 Ind. 385, 37 N. E. Rep. 721; *Par-ker v. Medsker*, 80 Ind. 155; *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402. In the case last cited it was said: "It must be held, nothing appearing to the contrary, that the court below tried the case on the theory of the law as ruled on the demurrers in making up the issues."

² A case tried on a wrong theory generally results in a wrong judgment. *Board v. Johnson*, 127 Ind. 238.

plaintiff he has just reason to complain. The trial court may, to be sure, change its ruling, but there is no presumption that it will do so, nor any presumption that it has done so where there are no facts or recitals upon which such a presumption can be built.¹

§ 592. That is not Error which the Record does not show to be Error—Error appears by the record whenever it exists. Where no error appears of record there is none in contemplation of law. A ruling must appear by the record and from the record it must be shown to be erroneous in the strict sense, that is, it must appear that the ruling was wrong and that it probably so operated as to bring about a wrong final result.²

§ 593. A wrong Ruling not probably Prejudicial is not Available Error—A ruling may be wrong and yet not constitute error in

¹ A special finding may show that the ruling was not prejudicial. *Walling v. Burgess*, 122 Ind. 299, 308, citing *Tracewell v. Farnsley*, 104 Ind. 497; *Nixon v. Campbell*, 106 Ind. 47; *Krug v. Davis*, 101 Ind. 75.

² We have elsewhere shown that errors must be manifest on the face of the record. To the proposition that the errors must appear to be probably prejudicial we cite *Harter v. Elzroth*, 111 Ind. 159, where it was said: "It has long been the settled rule that this court will not reverse a judgment of the trial court, unless the record affirmatively shows the existence of the errors urged by the complaining party, and, also, that the errors were, or probably were, prejudicial to the party against whom they were committed." The court cited *Binns v. State*, 66 Ind. 428; *Cline v. Lindsey*, 110 Ind. 337; *McKinsey v. McKee*, 109 Ind. 209. We also cite *Peden v. Mail*, 118 Ind. 556, 559; *Perkins v. Hayward*, 124 Ind. 445; *Lett v. Horner*, 5 Blackf. 296; *Indianapolis, etc., Co. v. Herkimer*, 46 Ind. 142; *Nixon v. Campbell*, 106 Ind. 47; *Kernodle v.*

Gibson, 114 Ind. 451. In the case last cited the court said that "although errors appeared there could be no reversal," because the record fails to show that any of such matters, even if erroneous, could or did harm the plaintiffs. *Passmore v. Passmore*, 113 Ind. 237. See, also, *Morningstar v. Musser* (Ind.), 28 N. E. Rep. 1119; *Devereux v. Champion, etc., Co.*, 17 So. Car. 66, 72; *Livingston v. Dunlap*, 99 N. C. 268; *McGowan v. Wilmington, etc., Co.*, 95 N. C. 417; *Boutelle v. Westchester, etc., Co.*, 51 Vt. 4. The rule was thus stated by the Supreme Court of Ohio: "To justify the reversal of a judgment, the record must affirmatively show not only that error intervened, but that it was to the prejudice of the party seeking to take advantage of it." *Scovern v. State*, 6 Ohio St. 288. See, also, *Reynolds v. Rogers*, 5 Ohio, 171, 172; *May v. State*, 14 Ohio, 461, 467; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. Rep. 673; *McBride v. Lathrop*, 24 Neb. 93; *Snyder v. Snyder*, 75 Iowa, 255, 39 N. W. Rep. 297; *State v. Parker*, 106 N. C. 711.

the true and strict sense of the term. If the record does not show that it was probably prejudicial, that is, that it probably conduced to a wrong final decision, it is not really error. It is not necessary that the record should show that the wrong ruling certainly brought about a wrong result, for it is sufficient if it appears that it probably influenced the court to a wrong conclusion. This doctrine is illustrated by the cases which hold that rejecting competent evidence that could not have influenced the decision, or admitting incompetent evidence where it could not have conduced to a wrong decision, is not error.¹ There is some difficulty in giving practical effect to the general rule inasmuch as it is sometimes difficult to determine what cases fall under it and what cases constitute exceptions.

§ 594. **Presumption of Prejudice from Erroneous Ruling**—There are cases which seem to form exceptions to the general rule that the record must make it appear that the wrong ruling probably prejudiced the complaining party, but upon a close analysis it will be found that these cases are apparent rather than real exceptions. The principle upon which they proceed is that the ruling is in and of itself of such a nature and of such force as to create the presumption that it conduced to bring about a wrong result. If the evidence is in the record and is conflicting the rejection of material and competent evidence may be presumed error inasmuch as the party offering it had a right to put forward all the material or competent evidence he could secure, and the denial of the right in such a case as that supposed is presumptively prejudicial.² So it may be in many

¹ *Turner v. Fendall*, 1 Cranch. 117; *v. State*, 47 Ind. 251; *Dickinson v. Very v. Watkins*, 23 How. (U. S.) 469; *Colter*, 45 Ind. 445; *Indianapolis, etc., Co. v. Anthony*, 43 Ind. 183; *Carter v. Pratt*, 99 U. S. 619; *Hornbuckle v. Pomeroy*, 30 Ind. 438; *Aylesworth v. Stafford*, 111 U. S. 389; *Lucas v. Brown*, 31 Ind. 270; *McDermitt v. Brooks*, 18 Wall. 436; *Wilson v. Hoss*, 24 U. S. Sup. Ct. Rep. (Lawyer's ed.) 270; *Hubank*, 25 Ind. 232; *Wayne Co., etc., Clark v. Fredericks*, 105 U. S. 4; *Cava- Co. v. Berry*, 5 Ind. 286; *Scott v. Indian- zos v. Trevino*, 6 Wall. 773; *Chicago Smith v. Smith*, 3 Ind. 303; *Pettis v. Taylor*, 9 Wall. 726; *Mining Co. v. Johnson*, 56 Ind. 139.
² So the admission of incompetent evidence in such a case as that stated
Taylor, 100 U. S. 37; *Cooper v. Coates*, 21 Wall. 105. See, generally, *Broyles*

other cases, as, for instance, where the jurymen bind themselves in advance to abide by a verdict directed by a majority vote.¹ Upon the theory that a wrong ruling on its face is so material and so influential as to prejudice the party against whom it is directed, what, at first blush, seems to be a conflict among the authorities may be easily and readily dissipated. Where the ruling discloses its own materiality and influence and, *prima facie*, appears to be prejudicial, it is assumed that it was so in the absence of countervailing facts, clearly showing that it was uninfluential. It does not, as a general rule, require any express recital or statement to show the character of a wrong ruling, for in most cases its vicious character appears upon its face. But there are cases, and not a few, where the record was held not to contain enough to affirmatively show error. One case is where the evidence is not in the record and the instructions are assailed, for in such a case the court, as will be elsewhere shown, will presume that the instructions were correct as applied to the evidence. Another case is where all the instructions are not in the record. There are, of course, other cases, but those to which we have referred are sufficient for our present purpose.

§ 595. No Error where complaining Party secures his Rights by Amendment—It requires no discussion to prove that if a party

in the text is presumptively erroneous. *Peterson v. Hutchinson*, 30 Ind. 38; *Morgan v. State*, 31 Ind. 193; *Bellefontaine, etc., Co. v. Hunter*, 33 Ind. 335; *Thompson v. Wilson*, 34 Ind. 94; *King v. Enterprise Ins. Co.*, 45 Ind. 43. See, also, *Colglazier v. Colglazier*, 124 Ind. 196. It would, of course, be otherwise if the record showed that the incompetent evidence did no harm, or justified an inference that no harm resulted. *Weik v. Pugh*, 92 Ind. 382; *Taylor v. Williams*, 120 Ind. 414; *Morningstar v. Musser* (Ind.), 28 N. E. Rep. 1119. See "Verdict right on the evidence, erroneous instructions harmless," *post*, § 643.

¹ *Hawk v. Allen*, 126 Ind. 568. The

conclusion upon the point under discussion—and we consider no other—is probably correct, but some of the broad statements in the opinion are hardly correct. It is not, as the cases well agree, necessary that the record should always show that a wrong ruling did not do harm; on the contrary, the general rule is that the record must show that the erroneous ruling was prejudicial or was probably prejudicial. See cases cited, *ante*, § 591. It may be true that there are exceptional cases, as indicated in the text, from which the erroneous effect of the ruling will be presumed. The conclusion reached in *Medsker v. Pogue*, 1 Ind. App. 197, is correct.

amends his pleadings in the trial court he can not successfully allege error on the rulings made upon the pleadings supplanted by the amendment.¹ If a party desires to appeal from rulings declaring his pleadings bad he must stand upon his original pleading. If he amends his pleading it goes out of the record.²

§ 596. **Pleadings upon which Error is Alleged must be in the Record**—The bare suggestion that pleadings upon which error is alleged must be in the record is sufficient, since the proposition is self-proving. If pleadings essential to a full understanding of the questions sought to be presented by the assignment of errors are absent from the record, the appeal will be unavailing.³ If pleadings are lost they must be substituted below, and to accomplish that object the proper proceedings must be there prosecuted. After substitution pursuant to the order of the trial court, they may be brought into the record on appeal by *certiorari*.⁴

¹ *Earp v. Board of Commissioners of Putnam County*, 36 Ind. 470; *Scotten v. Longfellow*, 40 Ind. 23; *Wingate v. Wilson*, 53 Ind. 78; *Short v. Stotts*, 58 Ind. 29. But where one paragraph of an answer only is amended the amendment does not necessarily waive exception to a ruling sustaining a demurrer to another and different paragraph. *Washburn v. Roberts*, 72 Ind. 213.

² *Berghoff v. McDonald*, 87 Ind. 549; *State v. Hay*, 88 Ind. 274; *Kennedy v. Anderson*, 98 Ind. 151; *Conley v. Diber*, 91 Ind. 413; *Eshelman v. Snyder*, 82 Ind. 498; *Miles v. Buchanan*, 36 Ind. 490.

³ *Chisham v. Way*, 73 Ind. 362; *Sumner v. Goings*, 74 Ind. 293; *Seager v. Aughe*, 97 Ind. 285; *Shackman v. Little*, 87 Ind. 181; *Louisville, etc., Co. v. Henly*, 88 Ind. 535; *Harrison School Tp. v. McGregor*, 96 Ind. 185; *Clark v. Shaw*, 101 Ind. 563; *McGinnis v. Gabe*, 78 Ind. 457; *Keesling v. Ryan*, 84 Ind. 89; *State v. Fitch*, 113 Ind. 478; *Kissell v. Anderson*, 73 Ind. 485. Pleadings struck out on motion must be brought back into record by bill of exceptions. See Bill of Exceptions.

⁴ *Montgomery v. Gorrell*, 49 Ind. 230; *Burkam v. McElfresh*, 88 Ind. 223; *Mitchell v. Stinson*, 80 Ind. 324.

CHAPTER II.

EXERCISE OF DISCRETIONARY POWER.

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| § 597. Judicial discretion—Definition. | § 609. Denying negligent parties leave to amend. |
| 598. Discretionary power. | 610. Amendments after verdict. |
| 599. Scope of the discretionary power. | 611. Failure of proof. |
| 600. A question of pure discretion is not a question of law. | 612. Calling a jury. |
| 601. Absolute and limited discretion. | 613. Impaneling the jury. |
| 602. Review of rulings professedly made in the exercise of discretionary power. | 614. Decisions upon the qualifications of jurors. |
| 603. Abuse of discretion. | 615. Mode of trial. |
| 604. Showing an abuse of discretion. | 616. Conduct of the trial. |
| 605. Refusal to exercise a discretionary power. | 617. Control of the delivery of evidence. |
| 606. Time to plead. | 618. Examination of witnesses. |
| 607. Allowing amendments to pleadings. | 619. Ordering a view. |
| 608. Abuse of discretion in denying amendments. | 620. Compulsory examination of the person. |
| | 621. Discharge of the jury before verdict. |
| | 622. Time for filing bills of exceptions. |

§ 597. **Judicial Discretion—Definition**—In every superior court of general jurisdiction there resides authority which is not strictly defined or limited by fixed rules of law, but which must be exercised in order to justly vindicate substantive rights, properly frame issues, and duly conduct trials. This authority may be said, in a general way, to be the power of the judge to rule and decide as his best judgment and sound discretion dictate.¹ The term “judicial discretion” is usually employed

¹ The definition given in *Rex v. Young*, 1 Burr. 556, 560, by Chief Justice Mansfield, has been often quoted, and is probably as satisfactory as any general definition can be. This great judge said: “But though discretion does mean (and can mean nothing else but) the exercising of the best of their judgment upon the occasion that calls for it, yet if this discretion be willfully abused, it is criminal, and ought to be under the control of this court.” *Rex v. Peters*, 1 Burr. 568, 570; *Rex v. Wilkes*, 4 Burr. 2527, 2539; *Dooley v. Barker*, 2 Mo. App. Ct. 325, 328; *Dorman v. State*, 34 Ala. 216, 235; *Rooke's Case*, 3 Coke's Rep.

as designating the power mentioned. The judicial discretion is not an arbitrary right to do whatever an individual judge's whim, caprice or passion may suggest, for what is not reasonable or not in accordance with common justice no judge has a right to do.¹ When a ruling or decision clearly and certainly passes the limits of reason, justice and right, it is not the product of judicial discretion and can not be regarded as the exercise of sound judgment, but must be attributed to passion, whim, caprice, or willful wrong. Judicial discretion is not without limits or conditions, although these limits or conditions are not defined or established by fixed rules or principles of law. As will be subsequently shown, where the law declares and fixes definite and certain principles and rules there is, in strictness, no right as of discretion, since such rules or principles constitute the measure of the authority of the tribunal. It is the object of the law to make courts instruments of justice, and what thwarts this great object can not be regarded as judicial discretion. The law does not vest arbitrary power in any judge to be exercised at his pleasure regardless of the rights of parties, although it does vest him with some authority which he is to exercise according to his best judgment.²

§ 598. **Discretionary Power**—The exercise of purely discretionary power even by ministerial officers is not subject to review, and there is much stronger reason for the rule where such a power is exercised by a judicial tribunal than there is where it is exercised by ministerial or administrative officers.³ Courts are

100a. Coke, as is well known, censured the practice of leaving too much to the discretion of a judge, and his great enemy, Bacon, expressed a similar opinion. The former's well known saying, "in judicature discretion is a crooked cord," has been often quoted.

¹ *Faber v. Bruner*, 13 Mo. 541, 543; *State v. Cumming*, 36 Mo. 263, 279; *Mabry v. Ross*, 1 Heisk. Tenn. 769, 774.

² *Tripp v. Cook*, 26 Wend. 143, 152; *Rex v. Wilkes*, 4 Burr. 2527, 2539; *Baily v. Taafe*, 29 Cal. 424; *Stringer v. Davis*,

30 Cal. 318, 321; *Lybecker v. Murray*, 58 Cal. 186, 189; *Pinkham v. McFarland*, 5 Cal. 137; *Thompson v. Thornton*, 41 Cal. 626; *Ex parte Farmers Loan, etc., Co.*, 129 U. S. 206.

³ *Board v. Fullen*, 111 Ind. 410, 412; *Welch v. Bowen*, 103 Ind. 252; *State v. City of Newark*, 48 N. J. Law, 101; *Gozler v. Georgetown*, 6 Wheat. 593; *Weaver v. Templin*, 113 Ind. 298; *City of Richmond v. Davis*, 103 Ind. 449. The presumption, even as to ministerial officers, is that they rightfully dis-

presumed to proceed with deliberation and upon due information. They are organized to adjudicate upon the highest rights of person and property, and the judges are presumptively selected because of their moral fitness, their learning "and their devotion to justice." It is no marvel, then, that there is complete agreement upon the proposition that the exercise of purely discretionary power can not be reviewed.¹ The rule that the higher courts review and revise only where there is an abuse of discretion and never where there is no abuse is declared and enforced in almost numberless cases.

§ 599. **Scope of the Discretionary Power**—Many matters rest in the discretion of the trial court and the scope of the discretionary power is very extensive. The difficulty lies in determining in particular cases whether the ruling was made in the exercise of a discretionary power or in the exercise of an imperative duty, and whether there was or was not an abuse of discretion. It is not safe to attempt to lay down any definite general rule for determining these questions, and hence we must look to the decisions upon specific branches of the general subject and from them ascertain what the rule is as applied to particular classes of cases. Little more can be safely said than that the discretionary power covers a large field, and that it is most often exercised in permitting or refusing amendments to pleadings and in governing the introduction of evidence, but is by no means confined to such matters. This much, however, may be safely affirmed: An imperative duty rests upon all courts to obey and

charged their duties. *Wright v. Forrestall*, 65 Wis. 341; *In re Brady*, 85 N. Y. 268; *State v. Township of Union*, 37 N. J. Law, 268; *In re Ingraham*, 64 N. Y. 310; *Jackson School Tp. v. Barlow*, 75 Ind. 118. Infinitely stronger is the reason for making the like presumption concerning the action of courts.

¹ *Kemper v. Trustees*, 17 Ohio, 293; *Avery v. Ruffin*, 4 Ohio, 420; *Holt v. State*, 11 Ohio St. 114; *Gandolfo v. State*, 11 Ohio St. 114; *Dobbins v. State*, 14 Ohio St. 493; *Griffin v. Veil*, 56 Mo. 310; *Legg v. Drake*, 1 Ohio

St. 286; *Morris v. Graves*, 2 Ind. 354; *Detro v. State*, 4 Ind. 200; *Heberd v. Myers*, 5 Ind. 94; *Carlisle v. Wilkinson*, 12 Ind. 91; *Dearmond v. Dearmond*, 12 Ind. 455; *Cooper v. Johnson*, 26 Ind. 247; *Blake v. Stewart*, 29 Ind. 318; *Indianapolis, etc., Co. v. Rutherford*, 29 Ind. 82; *Tyin v. Halstead*, 74 N. Y. 604; *Tucker v. Leland*, 75 N. Y. 186; *Cole v. Gourlay*, 79 N. Y. 527, 535; *State v. Meloney*, 79 Iowa, 413, 44 N. W. Rep. 693; *Jefferson County v. Hawkins*, 23 Fla. 223; *Bullock v. Cook*, 28 Mo. App. 222.

enforce the law as it exists, for no court is above the law, nor has any court the right, or the power, to violate or depart from established rules or principles, whether such established rules and principles be declared in statutes or embodied in what is commonly called the unwritten law. If there be such an established rule or principle, there is no discretion; if there be no such rule or principle, then, as a general rule, discretion exists. It is evident, therefore, that whether a ruling is made in the exercise of a discretionary power or not is, in most cases, to be determined by ascertaining whether there is or is not an imperative rule or principle to which the court is under a duty to adhere. All the field of judicial action beyond that fenced in by imperative rules and principles is the field of discretion; all that is so fenced in is excluded from the scope, or sphere, of discretionary power.

§ 600. **A question of Pure Discretion is not a question of Law—** In a strict and just sense a question of discretion is not a law question.¹ Whether a discretionary power has been abused may, however, be a question of law. It follows from these fundamental principles that where there is a discretionary power and no abuse, there is nothing for the appellate tribunal to review or revise, but where there is an abuse of discretion there is a duty for that tribunal to perform, inasmuch as it must ascertain and decide whether the abuse prejudiced the substantial rights of the party who makes complaint. It is, of course, essential, where the point is made, for the appellate tribunal to ascertain that there was an abuse of discretion, since that question lies at the threshold. If there is found to be nothing more than an exercise of a purely discretionary power, there investigation ends, for that conclusion excludes further inquiry.

§ 601. **Absolute and Limited Discretion—**Some of the courts make a distinction between absolute discretion and discretion

¹ *Lawrence v. Farley*, 73 N. Y. 187; *B. & C.* 819; *Ex parte Strong*, 20 Pick. 484; *Carpenter v. Bristol Co.*, 21 Pick. 258. "A matter which rested in the sound discretion of the court can not be assigned for error." *Powell's App. Cranch.* 206; *Mellish v. Richardson*, 7 Proceedings, 195.

limited by fixed rules of law.¹ With deep respect and deference for the able court which asserts this distinction, we affirm that it does not and can not exist. If authority is limited by law it ceases to be discretionary. The fixed principles of law, whether prescribing rules of pleading, practice, procedure or evidence, or whether defining or establishing substantive rights of person or property, destroy discretion, so that where such fixed rules or principles exist there can be no such thing as discretionary authority.² Fixed rules no court can disregard without wrong, and fixed rules imply the non-existence of discretion. Every one has a right to a trial in a court of justice according to the law of the land, and established or fixed rules are part of that law. It is true, that a violation of a fixed rule, or a deviation from settled principles does not always constitute error. This is so, however, simply and solely because the wrong ruling does no harm, but it is never so because it is discretionary with any court to obey or to disobey settled rules or principles.

§ 602. **Review of Rulings Professedly made in the Exercise of Discretionary Power**—If a purely discretionary power is exercised in ruling upon a question the appellate tribunal will not, as we have substantially said, review the ruling,³ but a court may, in assuming to exercise a discretionary power, transcend the limits of that power or abuse it. The difficulty arises in cases where the question is whether the power exercised was exercised within or without the bounds of discretion, or in cases where the question is whether the power was or was not abused. It is not legally possible for the trial court to preclude a review by assuming to exercise a discretionary power, for if a power not discretionary is wrongfully exercised to the manifest prejudice

¹ *People v. City of Syracuse*, 78 N. Y. 56, 61; *Howell v. Mills*, 53 N. Y. 322; *Anonymous*, 59 N. Y. 313. "An absolute discretion," it is said, "is one which can not be governed by any fixed rules." *Tripp v. Cook*, 26 Wend. 143; *People v. Superior Court*, 5 Wend. 114. Discretionary matters purely are said to be such as the court acts on by a de-

nial or refusal as a matter of favor. *Matter of Eldridge*, 82 N. Y. 161, 166.

² *Piggott v. Ramey*, 1 Scam. 145.

³ The appellate court must, of course, look far enough into the question to determine whether the power exercised was purely a discretionary one; if found to be such, the court will not go further with the question.

of the party who complains, or if there is a clear and palpable abuse of the power to the substantial injury of such a party, the decision will be reviewed and revised.¹

§ 603. **Abuse of Discretion**—It has been said in express terms, or affirmed by clear implication in a great number of cases, that where there is an abuse of discretion resulting in manifest and harmful wrong the ruling of the trial court will be deemed available error.² The adjudged cases leave no room to doubt that the appellate tribunal will revise rulings involving an abuse of discretion, but it is very difficult to determine what will be regarded as an abuse of discretion, for decisions upon this precise point are scant. The cases in which the courts have reversed a judgment for an abuse of discretion have generally been those where a new trial was asked or refused, and in such cases the particular facts only are considered and no general rule laid down, so that from them we can deduce no general principle.³ The best that can be done is to say that each case

¹ The vigorous opinion in the case of *Third Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127, demonstrates the correctness of the general statements of the text. See, also, *Powell v. Jopling*, 2 Jones, L. R. 400; *Davis v. State*, 15 Ohio, 72; *Gandolfo v. State*, 11 Ohio, 114; *Dobbins v. State*, 14 Ohio St. 493, 499; *Holt v. State*, 11 Ohio St. 691. In *Gordon v. Spencer*, 2 Blackf. 286, the court in speaking of a matter regarded as one of discretion, said: "We are of opinion that the defendant's affidavit does not show conclusively that the circuit court transcended the bounds of a legal discretion." In *McLimans v. City of Lancaster*, 57 Wis. 297, it was said: "We can not say that the learned judge transcended a reasonable discretion."

² In *Morris v. Graves*, 2 Ind. 354, it was said: "It would certainly require a plain case of abuse to justify a superior court in reversing the decision of the court below on such points." The

court cited *Sanders v. Johnson*, 6 Blackf. 50. In many cases it has been said that where a court is invested with a discretion the appellate court will not attempt to control its exercise, but will interfere in case of abuse. *Ricketts v. Spraker*, 77 Ind. 371; *Daggett v. Flannagan*, 78 Ind. 253; *Langsdale v. Woolen*, 99 Ind. 575, 579; *Citizens Bank v. Adams*, 91 Ind. 280; *Nalker v. State*, 102 Ind. 502; *Stephenson v. State*, 110 Ind. 358; *App v. State*, 90 Ind. 73; *Wachstetter v. State*, 99 Ind. 290, 292; *Butler v. State*, 97 Ind. 378; *Black v. Thomson*, 107 Ind. 162; *State v. Maher*, 74 Iowa, 77, 37 N. W. Rep. 2; *Welch v. Wetzell Co.*, 29 W. Va. 63, 1 S. E. Rep. 337; *State v. Barrett*, 40 Minn. 65, 70, 41 N. W. Rep. 459.

³ In one of these cases it was said: "Whilst we would not interfere with the ruling of the district court in a case admitting of some reasonable doubt as to the proper exercise of that discretion, still, in a case like this, where the plead-

will be determined upon its merits, and if the appellate court is satisfied that the lower court transcended its discretion or grossly perverted it to the manifest injury of the complaining party it will revise the ruling. Such a ruling can not, indeed, be justly said to be one made in the exercise of a purely discretionary power, since an abuse of the power is not, in contemplation of law, an exercise of the power, and if discretion is transcended another field is necessarily invaded. While it is correct to say that the exercise of a purely discretionary power is not reviewable on appeal, it is not correct to affirm that no rulings made within the range of power not limited and defined by established rules is beyond review. We have, therefore, been careful to restrict our statement so as to confine it to rulings made in the exercise of purely discretionary power, our meaning being that there is an exercise of a purely discretionary power only where there is neither abuse nor a passing out of the bounds of judicial discretion.¹

§ 604. **Showing an Abuse of Discretion**—The rule, as stated by the courts, imposes upon a complaining party the burden of showing very clearly and very strongly that the trial court abused its discretion. Some of the courts use language as explicit and strong as our vocabulary supplies.² It is by no

ings and evidence are fully brought before us, establishing, as we think, beyond doubt, that the ruling of the court is erroneous, we feel it to be our duty to reverse the proceeding." See, generally, *Byne v. Smith*, 76 Ga. 101; *McBride v. Northern, etc., Co.*, 19 Ore. 64, 23 Pac. Rep. 814; *Grigsby v. Schwarz* (Cal.), 22 Pac. Rep. 1041; *Albion, etc., Co. v. Richmond, etc., Co.*, 19 Nev. 225. Where a new trial is granted the almost universal rule is that the appellate tribunal will not review the discretionary power exercised in granting it. *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42; *Fitzpatrick v. Papa*, 89 Ind. 17; *Waddle v. Magee*, 81 Ind. 247; *Reed v. Chicago, etc., Co.*, 71 Wis. 399, 37 N.W. Rep. 225; *Barney v. Dudley*, 40 Kan. 247, 19 Pac.

Rep. 550; *Dean v. Georgia, etc., Co.*, 79 Ga. 211, 9 S. E. Rep. 424; *Kennicutt v. Parmalee*, 109 N. Y. 650, 16 N. E. Rep. 549; *Sanders v. Wakefield*, 41 Kan. 11, 29 Pac. Rep. 518; *Halpin v. Nelson*, 76 Iowa, 427, 41 N. W. Rep. 62.

¹ The cases cited upon particular topics will show, more clearly than general statements can do, the limits of judicial discretion and what constitutes an abuse of power. We refer to the cases cited in the pages which follow, as illustrative of the general subject as well as declarative of the law upon the particular points to which they are cited.

² In *Detro v. State*, 4 Ind. 200, 202, Roache, J., speaking for the court, said, in speaking of the trial courts, that: "In so far as they are vested with dis-

means an easy task to make it satisfactorily appear that the trial court abused the discretion conferred upon it, since the presumption that the trial court did no wrong seems to be applied in such cases with peculiar stringency and force.¹

§ 605. **Refusal to Exercise a Discretionary Power**—If a court is under a duty to exercise a power, it is error for it to refuse to do so, although the power may be discretionary.² The refusal to exercise such a power, where the duty exists, if productive of substantial injury will warrant a reversal of the judgment. But although the refusal may be wrong it will not constitute available error unless it works substantial injury to the complaining party. The appellate tribunal may, it seems not inappropriate to suggest, compel the lower court to make some ruling, but it can not direct what the ruling shall be,³ and from this settled principle, even in the absence of cases directly in point, may be deduced the conclusion that the refusal to rule is a legal wrong.

cretionary powers, they will be presumed to be properly exercised until the contrary is shown. All these decisions are, it is true, subject to revision, but in all such cases the ruling of the circuit court will be presumed to have been in accordance with the justice and merits of the case, unless the complaining party shows unequivocally that the court has been guilty of an abuse of its discretionary powers, and that his rights have been injuriously affected by such abuse." So, in the case of *Ray v. Northrup*, 55 Wis. 396, it was said: "A motion of this kind is usually very much in the discretion of the court to which it is addressed, and this court will not reverse an order of the kind unless the case presents strong grounds for holding that the discretion of the court to which the motion was addressed was not justly and fairly exercised." Some of the cases say: "The abuse must be gross and plainly mani-

fest." *Seymour v. Board of Supervisors*, 40 Wis. 62; *Smith v. Smith*, 51 Wis. 665, 668; *McLaren v. Kehlor*, 22 Wis. 297, 300; *Churchill v. Welsh*, 47 Wis. 39, 54; *Tierney v. Union Lumber Co.*, 47 Wis. 248.

¹ In *Gordon v. Spencer*, 2 Blackf. 286, the court very clearly implies that no other than a conclusive showing is sufficient.

² *Tyler v. Healey*, 51 Cal. 191; *Dickey v. Davis*, 39 Cal. 565, 569; *Tilton v. Beecher*, 59 N. Y. 176; *Crump v. Morgan*, 3 Ired. Eq. 91, S. C. 40 Am. Dec. 447; *Smith v. Dragert*, 61 Wis. 222.

³ *Life and Fire Insurance Co. v. Adams*, 9 Pet. 573; *State v. Laughlin*, 75 Mo. 358; *Ex parte Henderson*, 6 Fla. 279; *Ex parte Dickson*, 64 Ala. 188; *Floral Springs Water Co. v. Rives*, 14 Nev. 431; *State v. Cape Girardeau, etc.*, 73 Mo. 560; *State v. Rising*, 15 Nev. 164; *Ex parte Cage*, 45 Cal. 248.

§ 606. **Time to Plead**—A court having a general power to control the formation of issues may, in the absence of explicit statutory provisions, designate the time within which pleadings shall be filed, and, as such matters are within the discretion of the tribunal, error can not be effectively assigned unless there is a palpable abuse of discretion. It is, of course, conceivable that the discretion may be exceeded or abused, and when this is so, error may be well assigned. But where a party seeks to make the action of the court in such cases available as error he must show, by affidavit, or otherwise, that the time designated was unreasonable and that the action of the court deprived him of some substantial right. He must, it is proper to suggest, remove the presumption which exists in favor of the rightful exercise of the discretionary power vested in the court.¹

§ 607. **Allowing Amendments to Pleadings**—The discretion of the trial court in the matter of allowing or refusing amendments to pleadings is very broad and comprehensive. It was so at common law.² It is certainly so under the liberal rules declared by the code.³ A ruling allowing or refusing an amendment

¹ "It is a familiar rule," said the court, in *Black v. Thomson*, 107 Ind. 162, 164, "that where a judicial tribunal has general power to designate a time within which an act may be done, it may extend the time in the exercise of a reasonable discretion." See, generally, *Parker v. State*, 81 Ga. 332, 6 S. E. Rep. 600; *Bridgman v. Dambly*, 41 Minn. 526, 43 N. W. Rep. 482; *Regenstein v. Pearlstein*, 30 So. Car. 192, 8 S. E. Rep. 850; *Myers v. State*, 115 Ind. 554; *Van Allen v. Spadone*, 16 Ind. 319; *Jelley v. Gaff*, 56 Ind. 331. But statutory provisions of a mandatory nature can not be disregarded. *Kimball v. Whitney*, 15 Ind. 280; *Runnion v. Crane*, 4 Blackf. 466.

² *Mellish v. Richardson*, 7 B. & C. 819; *Marine Ins. Co. v. Hodgson*, 6 Cranch. 206.

³ *Jenne v. Burt*, 121 Ind. 275; *Levy v.*

Chittenden, 120 Ind. 37; *Daggett v. Flanagan*, 78 Ind. 253; *Dewey v. State*, 91 Ind. 173; *Citizens State Bank v. Adams*, 91 Ind. 280; *Burns v. Barenfield*, 84 Ind. 43; *Grand Rapids, etc., Co. v. Ellison*, 117 Ind. 234; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Child v. Swain*, 69 Ind. 230; *Durham v. Feckheimer*, 67 Ind. 35; *Duncan v. Cravens*, 55 Ind. 525; *Gaff v. Hutchinson*, 38 Ind. 341; *Burr v. Mendenhall*, 49 Ind. 406; *Koons v. Price*, 40 Ind. 164. See, generally, *Meyer v. State*, 125 Ind. 335; *Hartford City, etc., Co. v. Love*, 125 Ind. 275; *Nysewander v. Lowman*, 124 Ind. 584; *Johnson v. Conklin*, 119 Ind. 109; *Langsdale v. Woolen*, 99 Ind. 575; *Bever v. North*, 107 Ind. 544; *Burk v. Andis*, 98 Ind. 59, 62; *Pittsburgh, etc., Co. v. Martin*, 82 Ind. 476; *Burns v. Barenfield*, 84 Ind. 43; *Hubler v. Pullen*, 9 Ind. 273.

can seldom be made available as error if made at any time before the finding or verdict, and there are, indeed, some amendments that on appeal will be regarded as having been made, although not actually made by the party.¹ There seems to be some confusion in the cases as to whether an amendment changing the issues can be permitted after the trial has begun. Affirming that there can be such an amendment are many cases,² and denying it are others.³ We think the conclusion required by the later and better considered cases is that permitting a radical amendment, even so radical as to change the issue, is not necessarily and invariably available error, although it may sometimes be so, but that if the complaining party duly shows that the amendment is such as to entitle him to further time to plead or to prepare for trial, and he duly makes application for time, it will be error to overrule his application.⁴ It is implied,

¹ *Reeder v. Sayre*, 70 N. Y. 180, 189; *Lounsbury v. Purdy*, 18 N. Y. 515; *Watt v. Pittman*, 125 Ind. 168; *Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541; *Chaney v. State*, 118 Ind. 494; *Buchanan v. State*, 106 Ind. 251. But amendments which are of controlling importance and which go to the substance can not be made on appeal. *Tooker v. Arnoux*, 76 N. Y. 397; *Scofield v. Whitelegge*, 49 N. Y. 259. An amendment on appeal will be allowed in order to sustain a judgment, but not to overthrow it. *Volkening v. DeGraaf*, 81 N. Y. 268; *Gasper v. Adams*, 24 Barb. 287; *Englis v. Furniss*, 3 Abb. Pr. 82; *Williams v. Birch*, 6 Bosw. 674; *McGinniss v. Mayor, etc.*, 6 Daly, 416; *Brown v. Colie*, 1 E. D. Smith, 265.

² *Burr v. Mendenhall*, 49 Ind. 496; *Ostrander v. Clark*, 8 Ind. 211; *Burns v. Fox*, 113 Ind. 205; *Durham v. Fehneimer*, 67 Ind. 35; *Child v. Swain*, 69 Ind. 230; *Hay v. State*, 58 Ind. 337; *Leib v. Butterick*, 68 Ind. 199; *Darrell v. Hilligoss, etc., Co.*, 90 Ind. 264, 267; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Levy v. Chittenden*, 120 Ind. 37; *Chicago, etc., Coal Co. v. Hunter*, 128

Ind. 213; *Chicago, etc., Co. v. Jones*, 103 Ind. 386; *Voltz v. Newbert*, 17 Ind. 187; *Musselman v. Musselman*, 44 Ind. 106; *Myers v. Moore* (Ind. App. Ct.), 28 N. E. Rep. 724. See, also, *Ahrens v. State Bank*, 3 So. Car. 401; *Hill v. Chipman*, 59 Wis. 211; *Brauns v. Sterns*, 1 Ore. 367.

³ *Kerstetter v. Raymond*, 10 Ind. 199; *Danville, etc., Co. v. State*, 16 Ind. 456.

⁴ A party who delays until the trial has begun is not entitled to leave to amend as a matter of course, but he must make a clear showing of right; if he does not it can not be justly held on appeal that there was an abuse of discretion. It has been said, again and again, that the trial court should require cause to be clearly shown and that it should be slow to grant leave to make material amendments after the trial has been entered upon, although in allowing formal amendments it should be liberal. As to the one class of amendments the rule is liberal, as to the other, strict. Amendments may be made, as is well known, as of course, before the adverse party has answered or replied; in all other cases leave must be obtained. The

of course, that the complaining party must affirmatively show that he demanded time and that his demand was well founded; or that he has shown that he was wrongfully misled. It seems clear that where there is such a demand well made and supported a denial is an abuse of discretion.

§ 608. **Abuse of Discretion in denying Amendments**—There may be cases, although rare ones, where the denial of leave to amend asked after the issues are closed will be adjudged such an abuse of discretion as entitles the party injured to a reversal.¹ It is obvious that in such a case there must be an appropriate and reasonable application for leave to amend, supported by a full, strong and clear showing in order to constitute the denial available error, for the case is one appealing primarily to the discretion of the court, and is, also, one forming a rare exception to a general rule unusually free from exceptions. The arbitrary refusal to allow amendments upon sufficient cause shown is available as error where a substantial right is denied for the reason, already suggested, that in so ruling the court abuses the discretion conferred upon it by law. Probably as good a general test as can be suggested for determining whether an amendment should be allowed is that found in the answer to the question, is the amendment in furtherance of justice?² If

express provision that leave must be obtained carries the necessary implication that the court must often determine whether or not leave should be granted, and it results from this that much is confided to its discretion.

¹ Chicago, etc., Co. v. Jones, 103 Ind. 386. In the case cited it was said: "Whether a party shall be allowed to amend his pleadings after the issues are closed is a matter resting very much in the discretion of the *nisi prius* court. The fact that, in such a case, leave of court is necessary, implies the right of the court to refuse permission to amend in any case except upon good cause shown, and, even when such a showing is made, the matter is still within the legal discretion of the court, the leave

to be granted or refused accordingly." The case from which we have quoted approves *Burr v. Mendenhall*, 49 Ind. 496, as does the case of *Shropshire v. Kennedy*, 84 Ind. 111. In the case last named the affidavit assuming to show cause was declared insufficient, and it was also decided, that there could be no available error if the pleading, as amended, would still be bad. See, also, *Brauns v. Stern*, 1 Oregon, 367; *Smith v. Gould*, 61 Wis. 31; *Hexter v. Schneider*, 14 Oregon, 184.

² In *House v. Duncan*, 50 Mo. 453, it was said: "Amendments are favored and should be literally made in furtherance of justice." In many other cases a similar doctrine has been declared and enforced. *Smith v. Yreka Water*

it affirmatively and clearly appears to be so, it is error to deny it to the prejudice of a party who appropriately and opportunely asks leave to amend.¹

§ 609. **Denying Negligent Parties Leave to Amend**—Where no sufficient cause authorizing an amendment is shown there is no abuse of discretion in denying leave to amend, and hence no available error.² It goes with the saying that if a party has been inexcusably dilatory or negligent he can not successfully complain if the court exercises its discretion against him by denying him leave to amend his pleadings.³ It is to be borne in mind that where leave is refused the presumption favorable to the trial court puts upon the complaining party the burden of affirmatively showing an abuse of discretion, or that the bounds of discretion were transcended, and, also, of further showing that the wrong of the trial court did him substantial injury.

Co., 14 Cal. 201; *Lestrade v. Barth*, 17 Cal. 285, 288; *Kirstein v. Madden*, 38 Cal. 158, 162; *Valencia v. Couch*, 32 Cal. 339, 346; *Hayden v. Hayden*, 46 Cal. 332; *Connelley v. Peck*, 3 Cal. 75, 82; *Pierson v. McCahill*, 22 Cal. 127, 130; *Harkins v. Edwards*, 1 Iowa, 296; *Dixon v. Dixon*, 19 Iowa, 512; *Tegeler v. Shipman*, 33 Iowa, 194; *Miller v. Perry*, 38 Iowa, 301; *Carr v. Moss*, 87 Mo. 447. It is said by the Iowa court, in substance, that the rule is to allow amendments, the exception to refuse. *Pride v. Wormwood*, 27 Iowa, 257; *Hinkle v. Davenport*, 38 Iowa, 355. See, generally, *Brickman v. South Carolina R. Co.*, 8 So. Car. 173; *Schreckengast v. Ealy*, 16 Neb. 510; *Connell v. Putnam*, 58 N. H. 335; *Jefferson Co. v. Ferguson*, 13 Ill. 33; *Tatem v. Potts*, 5 Blackf. 534.

¹ But it is to be borne in mind that one who asks leave to amend at a later stage of the proceedings is *prima facie* culpably lacking in diligence and is not always entitled to make such a request

as of right. And it is also to be remembered that the presumption is against a party denied such leave; that presumption must, of course, be overcome or the ruling will not be disturbed.

² *Holladay v. Elliott*, 3 Oregon, 340.

³ *Sayers v. First National Bank*, 89 Ind. 230. In *Weed, etc., Co. v. Philbrick*, 70 Mo. 646, 648, it was held that it was the duty of the court "to so construe the law in relation to pleadings and amendments to the same as to discourage negligence and deceit, to prevent delay and secure the parties from being misled." In that case it was held an abuse of discretion to permit an answer denying the execution of a written instrument to be filed after the trial had been entered upon. While the general rule is that stated in the text, it is probable that there may be cases where the demands of justice are so clear and strong that the element of delay would occupy a subsidiary place and yield to the stronger elements.

§ 610. **Amendments After Verdict**—We have already said that there are some amendments that may be regarded as having been made, even after the case has entered the appellate court, but amendments that can there be made, or there regarded as made, are not such as are of a material and controlling character. It is, indeed, the general rule that, after a verdict, or finding, amendments which radically change the issue are not allowable.¹ This is obviously the true rule, since cases must be tried upon the issue tendered, the evidence must be confined to the issue, and the verdict or finding must keep within the issue made by the pleadings. But, while the rule is that amendments after verdict are not allowable where they entirely change the issue, it is also true that amendments may be made to avoid a variance.²

§ 611. **Failure of Proof**—The cases cited in the note to the preceding paragraph, to which many more might easily be added, leave no doubt that a mere variance may be obviated by amendment made after verdict. Indeed, in many cases immaterial variances are disregarded on appeal, even where there is no amendment. But there is an essential difference between

¹ *Brown v. Smith*, 24 Ill. 196, 198; *Redman v. Taylor*, 3 Ind. 144; *Seivers v. McCall*, 1 Ind. 393; *Maxwell v. Day*, 45 Ind. 509; *Aiken v. Bruen*, 21 Ind. 137; *Cincinnati, etc., Co. v. Bunnell*, 61 Ind. 183. In *Levy v. Chittenden*, 120 Ind. 37, 40, it is said: "But this court has always held that it is error to allow an amendment to the pleading which changes the nature of the cause of action or defence, after the trial has been concluded." This is a correct statement of the law, but an erroneous impression is likely to arise from the citation with apparent approval of *Miles v. Vanhorn*, 17 Ind. 245; *Proctor v. Owens*, 18 Ind. 21; *Hoot v. Spade*, 20 Ind. 326. The broad doctrine asserted by those cases can not now be regarded as sound, as appears from the cases cited in *Levy v. Chittenden*

² *Smith v. Flack*, 95 Ind. 116; *Hull v. Green*, 26 Ind. 388; *Hamilton v. Winterrowd*, 43 Ind. 393; *Perdue v. Aldridge*, 19 Ind. 290; *Woodward v. Wilcox*, 27 Ind. 207; *Torr v. Torr*, 20 Ind. 118; *Warbritton v. Cameron*, 10 Ind. 302; *Hickey v. State*, 23 Ind. 21; *Lister v. McNeal*, 12 Ind. 302; *Cincinnati, etc., Co. v. Bunnell*, 61 Ind. 183; *Scheible v. Law*, 65 Ind. 332; *Randles v. Randles*, 63 Ind. 93; *Boynton v. Sisson*, 56 Wis. 401; *Forcy v. Leonard*, 63 Wis. 553. See *Rettig v. Newman*, 99 Ind. 424; *Judd v. Small*, 107 Ind. 398; *Record v. Ketcham*, 76 Ind. 482; *Boyd v. Caldwell*, 95 Ind. 392; *Burns v. Fox*, 113 Ind. 205. An immaterial variance may be disregarded, although there is no amendment. *Louisville, etc., Co. v. Overman*, 88 Ind. 115.

a mere variance and a failure of proof, and this difference leads to important results. It is, however, sufficient for our purpose to say that the general rule is that variances are obviated by the statute, but a failure of proof is not, and that after verdict an amendment can not be made to remedy an infirmity created by a failure of proof. In illustration of this general rule may be cited the cases wherein it is held that where a plaintiff declares upon a legal title the proof fails although an equitable title be shown.¹ There are many other cases which assert and enforce the doctrine we have stated.²

§ 612. **Calling a Jury**—In actions at law it is the imperative duty of the court to call a jury when the proper request is made.³ But in order to lay the foundation for available error, the party asking a jury must cause the record to show a due request, refusal and exception.⁴ If there is no request, the

¹ *Nichol v. Thomas*, 53 Ind. 42; *Rowe v. Beckett*, 30 Ind. 154; *Stehman v. Crull*, 26 Ind. 436; *Brown v. Freed*, 43 Ind. 253; *Groves v. Marks*, 32 Ind. 319; *McMannus v. Smith*, 53 Ind. 211; *Hunt v. Campbell*, 83 Ind. 48; *Stout v. McPheeters*, 84 Ind. 585; *Johnson v. Pontious*, 118 Ind. 270; *Castor v. Jones*, 107 Ind. 283, 287; *Deputy v. Mooney*, 97 Ind. 463.

² *Cincinnati, etc., Co. v. Bunnell*, 61 Ind. 183; *Farrell v. State*, 3 Ind. 573; *Ellis v. Ford*, 5 Blackf. 554; *Jeffersonville, etc., Co. v. Worland*, 50 Ind. 339; *Buckey v. Stanley*, 5 Blackf. 162; *Hatten v. Robinson*, 4 Blackf. 479; *Morgan v. Incorporated, etc., Co.*, 64 Ind. 213. The first of the cases cited decides that a failure of proof can not be obviated by amendment and in this is abstractly correct, but in assuming that the same rule applies before verdict as applies after verdict the decision is wrong. It seems to us that the case of *Burr v. Mendenhall*, 49 Ind. 496, and the many cases approving it, were overlooked, and an erroneous conclusion reached.

³ *Galway v. State*, 93 Ind. 161.

⁴ *Sheets v. Bray*, 125 Ind. 33, 36; *Griffin v. Pate*, 63 Ind. 273, 275; *Hauser v. Roth*, 37 Ind. 89; *Madison, etc., Co. v. Whiteneck*, 8 Ind. 217, 218; *Preston v. Sanford*, 21 Ind. 156; *Heacock v. Lubuke*, 107 Ill. 396; *Cushman v. Flanagan*, 50 Texas, 389; *Wanser v. Atkinson*, 43 N. J. L. 571; *Hall v. Chicago, etc., Co.*, 65 Iowa, 258; *Vitrified, etc., Co. v. Edwards*, 135 Mass. 591; *Bonham v. Mills*, 39 Ohio St. 534. The refusal to call a jury must be assigned as a cause for new trial or it will not be considered on appeal. *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515; *Mattingly v. Paul*, 88 Ind. 95. Waiver of jury trial may be made by failure to appear at calling of case. *Indianapolis, etc., Co. v. Caven*, 53 Ind. 258; *Love v. Hall*, 76 Ind. 326. "Calling a case for trial is an announcement or declaration by the court that a cause has been reached in its order and that the judicial examination of the issues of law or fact upon which the case depends are about to begin." Requests or motions which are required to be made within a given time before the case "is called for trial" will be in due

presumption is that the parties acquiesced in the action of the court, or that they voluntarily submitted the case to the court for trial, for, in the absence of countervailing facts, it must be assumed that the court did not depart from the law nor usurp the functions of the jury. In chancery cases the court exercises an unfettered discretion; it may call a jury or not at its pleasure, and its action will not be reviewed on appeal.¹ In such cases it is entirely discretionary with the court, whether it will or will not accept and act upon the finding of the jury.² Where a case is for the jury, but the party, instead of requesting a trial of the whole issue, requests that a single question of fact be submitted to the jury, a jury trial is waived.³ If the court enters upon the trial, but subsequently sets aside the submission and calls a jury, it exercises a discretionary power, and, unless there are some peculiar and unusual elements in the case, no error can be successfully assigned upon such action.⁴ Where the parties and the court assume that the case is a suit in equity and not an action at law, the theory involved

season, if made before the case is actually called, although an earlier time may have been fixed for trial by agreement of parties. *Moore v. Sargent*, 112 Ind. 484, 486.

¹ *Holmes v. Stateler*, 57 Ill. 209. But upon the principle that parties will be held to trial court theories, if parties and court assume that the case is one for a jury and proceed on that theory entirely, then the cause must be conducted according to the rules governing jury trials. *Summers v. Great-house*, 87 Ind. 205; *Platter v. Board*, 103 Ind. 360, 384; *Dawson v. Shirk*, 102 Ind. 184, 188. See generally, as to effect of assuming a given theory in the trial court. *Daniels v. Brodie*, 54 Ark. 216, 11 Law. Rep. Anno. 81, 83; *San Diego, etc., Co. v. Neale*, 80 Cal. 83, 11 Lawyers Rep. Anno. 604. See, also, "Holding Parties to Trial Court Theories," Chapter XXIV.

² *Rariden v. Rariden*, 28 N. E. Rep. 701; *Koons v. Blanton (Ind.)*, 27 N. E.

Rep. 334; *Platter v. Board*, 103 Ind. 360; *Bingham v. Stage*, 123 Ind. 281.

³ *Spencer v. Robbins*, 106 Ind. 580, 588. It was said in the case cited: "In a case which is triable by a jury, generally, it is not error to refuse to submit a particular question of fact to the jury. The request to submit a particular question to the jury, as whether a deed was executed, was a waiver of the right to a jury to try the case generally."

⁴ The reporter's note to *Mattingly v. Paul*, 88 Ind. 95, incorrectly represents the court as deciding that such action is irregular; the court simply granted for arguments sake,—but did not decide,—that such action was irregular. It certainly can not be held that such a proceeding is irregular in the absence of an affirmative showing that there was an abuse of discretion, since the presumption is that the trial court acted upon sufficient cause and had just reason to set aside the submission.

in the assumption will prevail on appeal and the appellate tribunal will not inquire whether the right mode of trial was or was not adopted.¹

§ 613. **Impaneling the Jury**—In impaneling the jury and determining what questions shall be asked the jurors upon their examination touching their competency and qualifications, the trial court necessarily exercises a wide discretion.² It may be said, as introductory to a consideration of particular rulings, that where there is a challenge for cause and the court sustains such a challenge, the presumption is that the person chal-

¹ In *Shew v. Hews*, 126 Ind. 474, 476, it was said: "But the whole theory of the case from the inception to the final determination in the trial court characterizes it as a suit in equity and not as an action at law, and it must rest upon that theory still." The court cited *Bingham v. Stage*, 123 Ind. 281; *Wagner v. Winter*, 122 Ind. 57; *Peters v. Guthrie*, 119 Ind. 44; *Cottrell v. Ætna Life Ins. Co.*, 97 Ind. 311.

² It is, perhaps, well enough to say here that objections to the qualifications of persons called as jurors, and objections to the manner of selecting or impaneling them, must be promptly made, for if not made until after the trial has fully begun they will be deemed waived. *Dolan v. State*, 122 Ind. 141, 144; *Coleman v. State*, 111 Ind. 563; *Henning v. State*, 106 Ind. 386; *Smurr v. State*, 105 Ind. 125. An acceptance of the jury terminates the right to object, as a general rule, unless it is clearly made to appear that the objection was not known to the complaining party and that he exercised reasonable diligence to discover the alleged grounds of disqualification. *Achey v. State*, 64 Ind. 56; *Indianapolis, etc., Co. v. Pitzer*, 109 Ind. 179; *Kennegar v. State*, 120 Ind. 176, 180; *Beauchamp v. State*, 6 Blackf. 299; *Munly v. State*, 7 Blackf. 593; *Morris v. State*, 7 Blackf. 607; *Wyatt*

v. Noble, 8 Blackf. 507; *Croy v. State*, 32 Ind. 384; *Alexander v. Dunn*, 5 Ind. 122; *Estep v. Waterous*, 45 Ind. 140; *Kingen v. State*, 46 Ind. 132; *Gillooley v. State*, 58 Ind. 182. A party must make diligent use of the opportunity the law affords him. *King v. Sutton*, 8 B. & C. 417; *State v. Quarrel*, 2 Bay, 150, *Queen v. Hepburn*, 7 Cranch. 290; *Jeffries v. Randall*, 14 Mass. 205; *State v. Funck*, 17 Iowa, 365; *Turner v. Hahn*, 1 Col. 23; *Taylor v. Greely*, 3 Me. 204. If a juror deceives a diligent party it is cause for a new trial. *Rice v. State*, 16 Ind. 298. *Croy v. State*, 32 Ind. 384, 387, does not overrule *Rice v. State* upon this point. In *Buck v. Hughes*, 127 Ind. 46, 49, it was said: "As a general rule, parties may rely, and have a right to rely, on the statements of a juror, and are not required to institute an investigation as to the truth of the statements of a juror before accepting him as such. But a party has the right, if he knows at the time, of facts making the juror incompetent to present them to the court, and have the question passed upon by the court, before entering upon the trial." It is evident from the decisions that a party who has knowledge must diligently and reasonably use it; not simply that he has a right to do so, but is under obligation so to do.

lenged was disqualified,¹ but, of course, this presumption may be rebutted in the proper case.² It may be further said, somewhat by way of preface, that where fixed rules, declared by statute or established by the unwritten law, declare what course shall be pursued, an abuse of discretion exists if such rules are departed from in an essential particular and to the substantial injury of the complaining party.³ The court may, as a general rule, excuse a juror, although parties object, where the juror asks it, and his excuse is demanded by illness, the public good, or, in rare cases, where urgent private interests of the juror demand that he be released. Where a juror is excused by the court, no error can be well assigned unless it appears that there was an abuse of discretion resulting in injury to the complaining party.⁴ An examination of jurors upon their *voir dire* is allow-

¹ City of Goshen v. England, 119 Ind. 368, 372; Carpenter v. Dame, 10 Ind. 125; Heaston v. Cincinnati, etc., Co., 16 Ind. 275, 279.

² It may be rebutted by a clear and full showing by the record that no cause existed. So where a juror is accepted, the presumption of knowledge and lack of diligence may be rebutted. Brown v. State, 60 Miss. 447; McClure v. State, 1 Yerg. 206; Meyer v. State, 19 Ark. 156. Many of the courts hold that unless it affirmatively appears that an unjust verdict was rendered, the fact that a disqualified person was on the jury will not authorize a reversal. King v. Hunt, 4 B. & A. 430; State v. Madoil, 12 Fla. 151; State v. Turner, 6 La. Ann. 309; McLellan v. Crofton, 6 Me. 307; Presbury v. Commonwealth, 9 Dana, 203; Curan's Case, 7 Gratt. 619; Greenup v. Stoker, 8 Ill. 202. But see Block v. State, 100 Ind. 357. It is firmly settled that applications for a new trial upon the ground that a juror was disqualified are received with great disfavor, and the evidence adduced in support of such applications is minutely scrutinized and cautiously received. Com. v. Flanagan, 7 Watts. & S. 415,

422; Moore v. Philadelphia Bank, 5 Sergt. & R. 41, 42; Miami, etc., Co. v. Wesler, 47 Ind. 65; Clem v. State, 33 Ind. 418; Harding v. Whitney, 40 Ind. 379; Holloway v. State, 53 Ind. 554; State v. Bancroft, 22 Kan. 170; Epps v. State, 19 Ga. 102; Spies v. People, 122 Ill. 1, 12 N. E. Rep. 865, 867; Hughes v. People, 116 Ill. 330, 337. Where a challenge is overruled the general rule is that the record must show the specific grounds stated, and their sufficiency. State v. Munchrath, 78 Iowa, 268, 43 N. W. Rep. 211; People v. Hopt, 4 Utah, 247, 9 Pac. Rep. 407. It is within the discretion of the court to withdraw a juror shown to be disqualified. Ochs v. People, 124 Ill. 399; People v. Barker, 60 Mich. 277, S. C. 1 Am. St. Rep. 501.

³ Bates v. Bates, 19 Texas, 122; Cross v. Moulton, 15 Johns. 469.

⁴ State v. Whitman, 14 Rich. L. (So. Car.) 113; State v. Breaux, 32 La. Ann. 222; Babcock v. People, 13 Col. 515, 22 Pac. Rep. 817; Ellis v. State, 25 Fla. 702, 6 So. Rep. 768; Hawes v. State, 88 Ala. 37, 7 So. Rep. 302; Commonwealth v. Livermore, 4 Gray, 18; Atlas Mining Co. v. Johnston, 23 Mich. 36; O'Brien v. Vulcan Iron Works, 7 Mo. App. 257;

able for two purposes, to determine whether there is cause for a challenge and whether it is expedient to peremptorily challenge,¹ and, while the court has a wide discretion as to what questions may be asked, it is an abuse of discretion to unreasonably restrict the examination.² It is not possible to lay down any general rule upon the subject, although it is safe to say, that so long as the court does not trench upon the right to ask such questions as are necessary to show grounds for challenge for cause, or to elicit information reasonably necessary to determine whether it is expedient to interpose a peremptory challenge,³ there is no abuse of discretion, nor is it going too far to say that unnecessarily tedious or prolix examinations are

Dodge v. People, 4 Neb. 220; *Maner v. State*, 8 Tex. App. 361; *Ware v. Ware*, 8 Me. 42; *Watson v. State*, 63 Ind. 548; *State v. Dickson*, 6 Kan. 209. As to the right to call a new panel. *Pierce v. State*, 67 Ind. 354; *Evarts v. State*, 48 Ind. 422; *Winsett v. State*, 57 Ind. 26; *Thornton on Juries and Instructions*, p. 69, § 83. Of the discretionary power to call special juries several cases treat. *Heyl v. State*, 109 Ind. 589, 591; *Deig v. Morehead*, 110 Ind. 451, 457; *City of Logansport v. Dykeman*, 116 Ind. 15, 22; *Keyes v. State*, 122 Ind. 527, 529. See *Sage v. State*, 127 Ind. 15, as to irregularity in selecting grand jurors, and, also, *Cooper v. State*, 120 Ind. 377; *State v. Mellor*, 13 R. I. 666; *Commonwealth v. Brown*, 147 Mass. 585.

¹ *Pearcy v. Michigan, etc., Co.*, 111 Ind. 59, S. C. 60 Am. Rep. 673. See, generally, *Melson v. Dickson*, 63 Ga. 682, S. C. 36 Am. Rep. 128; *Lamphier v. State*, 70 Ind. 317; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Ensign v. Harney*, 15 Neb. 330, 48 Am. Rep. 344; *Diveny v. City of Elmira*, 51 N. Y. 506. For definition of peremptory challenge, see *Gulf, etc., Co. v. Keith*, 74 Tex. 287, 11 S. W. Rep. 1117. In order to present a question upon a ruling denying a challenge for cause the record should

show that it contains the examination of the juror in full. *Indianapolis, etc., Co. v. Pitzer*, 109 Ind. 179; *Johnson v. Holliday*, 79 Ind. 151.

² *Watson v. Whitney*, 23 Cal. 375. It is generally held that it is not an abuse of discretion to refuse to permit questions to be put to a juror which tend to degrade him. *Hudson v. State*, 1 Blackf. 317; *State v. Mann*, 83 Mo. 589; *Mechanics Bank v. Smith*, 19 Johns. 115; *Spron v. Commonwealth*, 2 Va. Cases, 375; *Burt v. Panjaud*, 99 U. S. 180. But this general rule must be subject to exceptions. It is certainly competent to make the proper inquiry when it may bring out facts showing a connection with some society or association which may make the juror partial to the one side, or hostile to the other. *State v. Mann*, 83 Mo. 589; *Missouri, etc., Co. v. Munkers*, 11 Kan. 223; *Lann v. People*, 68 Ill. 303. But see *State v. Wilson*, 8 Iowa, 407; *Boyle v. People*, 4 Col. 176; *United States v. Borger*, 7 Fed. Rep. 193.

³ *Jones v. State*, 2 Blackf. 475, 478; *People v. Soy*, 57 Cal. 102; *People v. Honeyman*, 3 Den. 121, 124; *Freeman v. People*, 4 Den. 9; *Smith v. Floyd*, 18 Barb. 522; *State v. Hamilton*, 27 La. Ann. 400.

looked upon with disfavor, and that it is always within the discretion of the court to reasonably and fairly limit the examination on the *voir dire*.

§ 614. **Decisions upon the Qualifications of Jurors**—In determining questions affecting the competency of persons called as jurors a discretionary power is exercised by the court,¹ but it is not so comprehensive as many other discretionary powers. It is not, however, within the power of the court to accept an incompetent person as a juror where the statute or the established rules of law declare him to be disqualified,² for, where there are such statutory or common law rules, there is, in strict accuracy, no discretion. The duty of the court where such rules exist is imperative. But in determining whether the answers of the person called into the jury box bring him under these rules or exclude him from their operation,³ the court does exercise a wide discretion. The court does not, in exercising its discre-

¹ *Epps v. State*, 102 Ind. 539; *Walker v. State*, 102 Ind. 502; *Stephenson v. State*, 110 Ind. 358; *Stout v. State*, 90 Ind. 1; *Babcock v. People*, 13 Col. 515; 22 Pac. Rep. 817; *Vann v. State*, 83 Ga. 44, 9 S. E. Rep. 945; *Butler v. Glens Falls, etc., Co.*, 121 N. Y. 112, 24 N. E. Rep. 187; *State v. Wyse*, 32 So. Car. 45; *People v. Hoyt*, 4 Utah, 247, 9 Pac. Rep. 407; *State v. Claire*, 41 La. Ann. 1067; *Clarke v. State*, 87 Ala. 71, 6 So. Rep. 368; *Grace v. Dempsey*, 75 Wis. 313, 43 S. W. Rep. 1127; *Territory v. Pratt*, 6 Dak. 483, 43 N. W. Rep. 711; *Fogarty v. State*, 80 Ga. 450; *O'Brien v. Commonwealth (Ky.)*, 12 S.W. Rep. 471.

² *Trullinger v. Webb*, 3 Ind. 198; *La Fayette, etc., Co. v. New Albany, etc., R. Co.*, 13 Ind. 90; *Fleming v. State*, 11 Ind. 234; *Baker v. Hine*, 54 Ind. 542; *Stoots v. State*, 108 Ind. 415; *Block v. State*, 100 Ind. 357; *Rhodes v. State*, 128 Ind. 189, 27 N. E. Rep. 866, 33 Cent. L. J. 293; *Lamphier v. State*, 70 Ind. 317. See, generally, *Noe v. State*,

92 Ind. 92; *Shields v. State*, 95 Ind. 299; *Hearne v. City of Greensburgh*, 51 Ind. 119; *Diveny v. City of Elmira*, 51 N. Y. 506. As to disqualification by knowledge obtained from rumors or newspaper reports, see *Dugle v. State*, 100 Ind. 259; *Cluck v. State*, 40 Ind. 263; *Fahnestock v. State*, 23 Ind. 231. As to prejudice from opinions against particular business, see *Elliott v. State*, 73 Ind. 10; *Shields v. State*, 95 Ind. 299, 301. But compare, *Swigart v. State*, 67 Ind. 287; *Keiser v. Lines*, 57 Ind. 431. The competency of a person called as a juror is not to be determined from isolated or fragmentary statements; his entire examination should be considered. *Butler v. State*, 97 Ind. 378.

³ *Stoots v. State*, 108 Ind. 415; *Walker v. State*, 102 Ind. 502; *Elliott v. State*, 73 Ind. 10. See, generally, *Christie v. State*, 44 Ind. 408; *Patterson v. State*, 70 Ind. 341; *Pickens v. Hobbs*, 42 Ind. 270; *Hudson v. State*, 1 Blackf. 317; *Jones v. State*, 2 Blackf. 475.

tionary functions, decide what qualifications the juror shall possess,—for that is matter of established law,—but it does, in most instances, exercise such functions in determining whether the person called into the box possesses the qualifications required by the law. The decision of the court where an issue of fact is made as to the competency of a juror is, in general, conclusive,¹ and, it may not be out of place to add, the same effect is ordinarily assigned to the decision of the trial court where misconduct is charged against a juror and the decision of the question is made upon oral evidence or upon affidavits and counter affidavits.²

§ 615. **Mode of Trial**—It is, of course, not legally possible for a judge or chancellor to delegate the judicial powers devolved upon him by law,³ nor can he completely and absolutely abdi-

¹ *Pickens v. Hobbs*, 42 Ind. 270; *Bradford v. State*, 15 Ind. 347; *Miami Valley Furniture Co. v. Wesler*, 47 Ind. 65; *Coryell v. Stone*, 62 Ind. 307; *Holloway v. State*, 53 Ind. 554; *Whistler v. Teague*, 66 Ind. 565; *Lockhart v. State*, 92 Ind. 452. There is no right to a peremptory challenge where a struck jury is called under the statute, so that an examination should be confined to ascertaining whether there is cause for challenge. *May v. Hoover*, 112 Ind. 455. A party can not, in any instance, assume the facts of the particular case and under guise of examining as to competency of a juror obtain an opinion from him. *Woollen v. Wire*, 110 Ind. 251. There is some conflict in our decisions upon the question as to the effect of the rejection of a competent juror where, notwithstanding such rejection, an impartial jury was secured. We think that the true rule is that the error in such a ruling is not fatal for the reason that no harm was done the party. *Coryell v. Stone*, 62 Ind. 307, citing *Carpenter v. Dame*, 10 Ind. 125, and *Heaston v. Cincinnati, etc., Co.*, 16 Ind. 275. In *De Pew v. Robinson*, 95 Ind. 109, 111, the

court, in speaking of the rejection of a juror, said: "This was a matter very much in the discretion of the court. Besides it does not appear that the appellant was injured and therefore this ruling does not constitute an available error if erroneous." *Stephenson v. State*, 110 Ind. 358; *Hopt v. Utah*, 120 U. S. 430, 438; *Bibb v. Reid*, 3 Ala. 88; *People v. Arceo*, 32 Cal. 40; *Grand Rapids, etc., Co. v. Jarvis*, 30 Mich. 308; *Watson v. State*, 63 Ind. 548; *United States v. Neverson*, 1 Mackey, 152.

² *Stevens v. Stevens*, 127 Ind. 560, 568; *Dill v. Lawrence*, 109 Ind. 564; *Doles v. State*, 97 Ind. 555; *Long v. State*, 95 Ind. 481; *Weaver v. State*, 83 Ind. 542; *Luck v. State*, 96 Ind. 16; *Shields v. State*, 95 Ind. 299; *Catterlin v. City of Frankfort*, 87 Ind. 45; *Elliott v. State*, 75 Ind. 10; *Hodges v. Bales*, 102 Ind. 494; *Hamm v. Romine*, 98 Ind. 77.

³ *Vandercook v. Williams*, 106 Ind. 345; *Wilkins v. State*, 113 Ind. 514. Neither a clerk nor an attorney, not duly appointed special judge, can receive a verdict. *Britton v. Fox*, 39 Ind. 369; *McClure v. State*, 77 Ind. 287; *State v. Jefferson*, 66 N. C. 309. See,

cate or surrender his judicial functions; neither can he compel a party, who is in a position to enforce his rights, to submit to a mode of trial different from that prescribed by law. He can not, for instance, deprive a party of a jury trial where the law awards it to him,¹ but in chancery cases he may exercise a considerable discretion in designating the mode of trial. He may, for instance, refer matters to a master commissioner,² and, in some cases, may, in his discretion, submit particular questions of fact to a jury.³ Where a party demands a trial by jury and the court grants his request he can not be heard to aver that the wrong mode was adopted, although the case was one for the court and not for a jury.⁴ While it is the right of a party who duly requests it to have a suit in equity tried by the court,⁵ still, if he acquiesces in the trial by jury,⁶ or fails to request a trial by the court,⁷ he can not successfully complain on appeal. But where the right to a trial by the court is secured by law, as it is in chancery cases, the court can not, where objection is duly made, submit a cause entirely to the decision of a jury, although it is discretionary with it to accept or reject the decision of the jury upon the facts. This is so, because the court

generally, *Van Slyke v. Trempealeau*, etc., Co., 39 Wis. 390; *Hall v. Marks*, 34 Ill. 358; *Missouri River Tel. Co. v. First National Bank*, 74 Ill. 217.

¹ *Lake v. Lake*, 99 Ind. 339.

² *Fitzgerald v. Hayward*, 50 Mo. 516; *Martin v. Hall*, 26 Mo. 385; *Dooly v. Barker*, 2 Mo. App. 325; *Young v. Ledrick*, 14 Kan. 92. But in these cases there is no delegation of judicial power, since these ministers of the court do not decide the case; the power of final and effective decision remains in the court.

³ *Lake Erie, etc., Co. v. Griffin*, 92 Ind. 487; *Pence v. Garrison*, 93 Ind. 345; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Israel v. Jackson*, 93 Ind. 543.

⁴ *Dawson v. Shirk*, 102 Ind. 184. The ruling in this case is well supported by the established principle that parties will be held to trial court theories. As to what cases are triable by

the court, see *Rogers v. Union Central, etc., Co.*, 111 Ind. 343; *Brown v. Russell*, 105 Ind. 46; *Stix v. Sadler*, 109 Ind. 254.

⁵ *Lane v. Schlemmer*, 114 Ind. 296; *Carmichael v. Adams*, 91 Ind. 526; *McBride v. Stradley*, 103 Ind. 465; *Miller v. Evansville National Bank*, 99 Ind. 272; *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515; *Hendricks v. Frank*, 86 Ind. 278; *Evans v. Nealis*, 87 Ind. 262; *Taggart v. Tevanny*, 1 Ind. App. Ct. 339. See, also, authorities cited in preceding notes.

⁶ *Ikerd v. Beavers*, 106 Ind. 483; *Carr v. Hasket*, 110 Ind. 152; *Sprague v. Pritchard*, 108 Ind. 491.

⁷ *Jarboe v. Severin*, 112 Ind. 572. He must, as elsewhere said, reserve an exception and specify the ruling in the motion for a new trial. *Huffmond v. Bence*, 128 Ind. 131, 137.

must retain and exercise the power of giving the ultimate and decisive judgment.

§ 616. **Conduct of the Trial**—The time at which the cause shall be tried may, as a general rule, be fixed by the court, subject, of course, to the provisions of the law allowing time for the formation of issues.¹ Courts may, so long as they keep within the limits of discretion, establish reasonable rules of trial procedure,² but they have no power to adopt a rule which will deprive a party of a clear legal right.³ The trial court may, as a general rule, determine how long a trial shall be protracted, and unless there are some peculiar circumstances palpably showing that the hours determined upon by the court were so manifestly unreasonable as to constitute an abuse of discretion, its action will not be revised on appeal.⁴ It is affirmed in many cases that it is within the discretion of the trial court to

¹ *Indianapolis, etc., Co. v. Caven*, 53 Ind. 258; *Foster v. Hinson*, 76 Ia. 714, 39 N. W. Rep. 682; *State v. Maher*, 74 Iowa, 77, 37 N. W. Rep. 2. See, generally, *Philadelphia, etc., Co. v. Stimpson*, 14 Pet. 448; *Turner v. Yates*, 16 How. (U. S.), 114.

² In *Krutz v. Howard*, 70 Ind. 174, 176, it was said: "Courts have the power, and it is their duty, to adopt rules for conducting business therein not repugnant to the laws of the state." Rules of trial courts were upheld in *Truitt v. Truitt*, 38 Ind. 16; *Vail v. McKernan*, 21 Ind. 421; *Reitz v. State*, 33 Ind. 187; *Redman v. State*, 28 Ind. 205; *Galloway v. State*, 29 Ind. 442; *Jeffersonville, etc., Co. v. Avery*, 31 Ind. 277; *Ollam v. Shaw*, 27 Ind. 388. See, generally, *Langsdale v. Woollen*, 99 Ind. 575; *Jones v. Rittenhouse*, 87 Ind. 348; *Thompson v. Pershing*, 86 Ind. 303; *Hoke v. Applegate*, 92 Ind. 470; *Moore v. Sargeant*, 112 Ind. 484.

³ *Krutz v. Griffith*, 68 Ind. 444; *Krutz v. Howard*, 70 Ind. 174; *Laselle v. Wells*, 17 Ind. 33; *Jeffersonville, etc.,*

Co. v. Hendricks, 41 Ind. 48; *Shoemaker v. Smith*, 74 Ind. 71. The court, in speaking of a trial court rule in the case of *Crotty v. Wyatt*, 3 Bradw. (Ill. App. Ct.), 388, 399, said: "As to this rule we know nothing, as it is not found in the record. Still, the court by virtue of the power conferred to establish rules of practice to facilitate the dispatch of business, could not by such rules deprive a party of a well established legal right." Valid rules of procedure are, in a sense, the law, and parties must obey them. *Rout v. Ninde*, 111 Ind. 597. Judicial notice is not, however, taken by the appellate tribunal of the special rules adopted by trial courts. *Knarr v. Conaway*, 42 Ind. 260; *Rout v. Ninde*, 111 Ind. 597; *Sandon v. Proctor*, 7 B. & C. 800. But an excuse for not complying with a rule may be shown. *Bernhamer v. State*, 123 Ind. 577; *Moulder v. Kempff*, 115 Ind. 459, 463. A clear showing must be made. *Riggenberg v. Hartman*, 102 Ind. 387.

⁴ *Wartena v. State*, 105 Ind. 445, 447.

consolidate for trial several actions where they arise out of the same subject,¹ but to us it seems that this doctrine is one to be accepted with qualification and applied with scrupulous care. In civil cases the limitation upon the length of time to be allowed for argument is a matter resting to a great extent in discretion of the trial court.² But if the *nisi prius* court should unreasonably limit the time of argument so as to unjustly abridge the right of a party to be heard in argument by counsel, it would be regarded as an abuse of discretion.³ It has been held, and with reason, that, within the scope of a reasonable discretion, the court may limit the number of counsel that shall be heard in argument.⁴

§ 617. Control of the Delivery of Evidence—The order in which evidence shall be introduced is a matter largely within the discretion of the trial court.⁵ As a general rule courts permit par-

Speaking of the right of the trial court to control its sittings it was said in the case cited: "It is undoubtedly the province of the *nisi prius* courts, in the exercise of a sound discretion, to regulate the course of business during the progress of trials. Included in this is the right, during the term, in a proper way, to control its own sittings." In *McGowen v. Campbell*, 28 Kan. 25, 30, it was held an abuse of discretion to continue in session during an entire night. It may be said that the intercourse between the bench and the bar is a matter largely for regulation by the trial court. *Long v. State*, 12 Ga. 293, 330.

¹ *City of Springfield v. Sleeper*, 115 Mass. 587; *Kimball v. Thompson*, 4 Cush. 441; *Commonwealth v. James*, 99 Mass. 438; *Commonwealth v. Powers*, 109 Mass. 353.

² *Baldwin v. Burrows*, 95 Ind. 81; *Cory v. Silcox*, 5 Ind. 370; *Priddy v. Dodd*, 4 Ind. 84; *Rosser v. McColly*, 9 Ind. 587; *Lynch v. State*, 9 Ind. 541; *Musselman v. Pratt*, 44 Ind. 126; *Tice v. Hannibal, etc., Co.* 35 Mo. 416; *Dob-*

bins v. Oswalt, 20 Ark. 619, 624; *Benson v. Mahoney*, 6 Baxt. 304, 307; *Freligh v. Ames*, 31 Mo. 253; *Hart v. State*, 14 Neb. 572; *People v. Kelly*, 94 N. Y. 526; *Williams v. Commonwealth*, 82 Ky. 640.

³ *Brooks v. Perry*, 23 Ark. 32; *Weaver v. State*, 24 Ohio St. 584; *State v. Collins*, 70 N. C. 241; *Sullivan v. State*, 46 N. J. L. 446; *People v. Keenan*, 13 Cal. 581, 584; *White v. People*, 90 Ill. 117; *Dille v. State*, 34 Ohio St. 617; *Hunt v. State*, 49 Ga. 255. If further time than that designated by the court is desired, the appropriate request should be preferred, an exception reserved to the refusal, and an opportunity for review presented by a proper specification in the motion for a new trial. *Redman v. State*, 28 Ind. 205; *Baldwin v. Burrows*, 95 Ind. 81; *Williams v. Commonwealth*, 82 Ky. 640; *Kizer v. State*, 12 Lea. 564.

⁴ *Sodousky v. McGee*, 4 J. J. Marsh. 267; *United States v. Mingo*, 2 Curtis C. C. Rep. 1.

⁵ *Western Union Telegraph Co. v.*

ties to introduce evidence in the order they choose,¹ but this is a matter of favor and not of right.² The strict rule is that the plaintiff can not introduce evidence in reply that should properly be given in chief, and if the court holds a party to this rule he can not, except in an unusual and peculiar case, successfully complain.³ If, however, the trial court deems it proper to relax the strict rule and permit evidence in chief to be given after the adverse party has rested, there is, ordinarily, no such abuse of discretion as constitutes available error.⁴ Nor is there necessarily an abuse of discretion in refusing to permit a party to recall a witness who has been dismissed,⁵ although it is within the rightful discretion of the court to permit such a witness to be recalled and re-examined.⁶ It is not necessarily, nor, indeed, ordinarily, an abuse of discretion to admit evidence after the argument has closed.⁷

Buskirk, 107 Ind. 549; Noblesville, etc., Co. v. Gause, 76 Ind. 142; Nye v. Lowry, 82 Ind. 316; Pittsburgh, etc., Co. v. Noel, 77 Ind. 110; Case v. Grim, 77 Ind. 565; Blake v. Powell, 26 Kan. 320; Agate v. Morrison, 84 N. Y. 672; Goodman v. Kennedy, 10 Neb. 270; Walker v. Walker, 14 Ga. 242; People v. Durfee, 62 Mich. 487.

¹ Burns v. Harris, 66 Ind. 536; Fowler v. Hawkins, 17 Ind. 211; Clawson v. Lowry, 7 Blackf. 140; Webb v. State, 29 Ohio St. 351; Goss v. Turner, 21 Vt. 437.

² Ward v. Montgomery, 57 Ind. 276. The court may hold parties to the strict rules of evidence. Woollen v. Wire, 110 Ind. 251. It is not, however, so far as concerns the order of introducing evidence, bound to do so. Kusler v. Crofoot, 78 Ind. 597.

³ Fitzpatrick v. Papa, 89 Ind. 17; Nave v. Flack, 90 Ind. 205; Macullar v. Wall, 6 Gray, 507; Hathaway v. Hemingway, 20 Conn. 190, 195; Gilpin v. Consequa, 3 Wash. C. C. 184; Braydon v. Goulman, 1 T. B. Monr. (Ky.) 115; Graham v. Davis, 4 Ohio St. 362; York v. Pease, 2 Gray, 282; Ashworth v. Kittridge, 12

Cush. 193; Brown v. Marshall, 120 Ind. 323; Shea's Appeal, 121 Pa. St. 302, 15 Atl. Rep. 629; Rhodes v. Green, 36 Ind. 7; Williams v. Allen, 40 Ind. 295.

⁴ Stewart v. Smith, 111 Ind. 526; Morris v. State, 94 Ind. 565; Mayfield v. State, 110 Ind. 591; McKinney v. Jones, 55 Wis. 39; Caldwell v. New Jersey, etc., Co., 47 N. Y. 282; Johnston v. Mason, 27 Mo. 511; Larman v. Huey, 13 B. Monr. 436; Commonwealth v. Ricketson, 5 Metc. (Mass.) 412; Darland v. Rosencrans, 56 Iowa, 122; McDowell v. Crawford, 11 Gratt. 377, 408.

⁵ Morehouse v. Heath, 99 Ind. 509. The proper practice is to obtain leave to recall the witness; a party can not, as of strict right, recall a witness once examined. Nixon v. Board, 111 Ind. 137; Beaulieu v. Parsons, 2 Minn. 37; Girault v. Adams, 61 Md. 1, 9.

⁶ Hollingsworth v. State, 79 Ga. 605, 4 S. E. Rep. 560; Fowler v. Strawberry Hill, 74 Iowa, 644, 38 N. W. Rep. 521; Gulf, etc., Co. v. Pool, 70 Texas, 713; Swift v. Ratliff, 74 Ind. 426; Riley v. State, 88 Ala. 193, 7 So. Rep. 149.

⁷ Breedlove v. Bundy, 96 Ind. 319; Watt v. Alvord, 25 Ind. 533; Curm v.

§ 618. **Examination of Witnesses**—In the matter of the examination of witnesses the trial court necessarily exercises a comprehensive discretion, but broad as its discretion is, it can not, without error, deny a party the right to give competent evidence, nor can it, without a departure from the law, admit incompetent evidence which prejudices a party's cause.¹ There is, however, a broad field outside of that enclosed by fixed rules of law over which the discretionary power extends. Thus, the court may prevent the repetition of questions² and answers, yet it is not necessarily an abuse of discretion to permit a duplication or repetition of evidence,³ although, if carried to an unreasonable and unjust extent, it might constitute an abuse of the discretion lodged in the court. It is within the discretion of the court to limit the number of witnesses, and unless there is an abuse of discretion its ruling will be respected on appeal.⁴ The determination of the limits within which a cross-examination shall be confined is largely within the discretion of the trial court,⁵ but it is an abuse of discretion to so fetter and shorten the cross-examination as to deny a party a fair and reasonable opportunity to test the accuracy of

Rauh, 100 Ind. 247; Colton v. Vander-golgen, 87 Ind. 361; Stipp v. Claman, 123 Ind. 532; Testard v. State, 26 Tex. App. 260, 9 S. W. Rep. 888; State v. Powell, 40 La. Ann. 241. See, also, Fogarty v. State, 80 Ga. 450, 5 S. E. Rep. 782; Hornsby v. South Carolina R. Co., 26 So. Car. 187, 1 S. E. Rep. 594. See Beagles v. Sefton, 7 Ind. 496.

¹ Conden v. Morningstar, 94 Ind. 150; Spencer v. Robbins, 106 Ind. 580; State v. Thomas, 111 Ind. 515; Campbell v. Hunt, 104 Ind. 210; Rush v. Thompson, 112 Ind. 158.

² Lockwood v. Rose, 125 Ind. 588, 595; Clark v. Rhoads, 79 Ind. 342. See, generally, McSweeney v. McMillen, 96 Ind. 298; Metzler v. Metzler, 99 Ind. 384; Watson v. Crowsore, 93 Ind. 220; Lefever v. Johnson, 79 Ind. 554.

³ Adams v. Lee, 82 Ind. 587; Williamson v. Yingling, 93 Ind. 42; Rhodes v. Green, 36 Ind. 7.

⁴ Union, etc., R. Co. v. Moore, 80 Ind. 458; Jones v. Lindsay, 98 Ind. 218; Mergentheim v. State, 107 Ind. 567; Hilliard v. Beattie, 59 N. H. 462; Bays v. Hunt, 60 Ia. 251; Everett v. Union Pacific R. Co., 59 Ia. 243. In the case last cited the decision was by a divided court and it is doubtful whether the rule was not carried beyond its just limits. Riggs v. Sterling, 60 Mich. 643, S. C. 1 Am. St. Rep. 554. In Hubble v. Osborn, 31 Ind. 240, it was held an abuse of discretion to limit a party to one witness upon a vital point. A limitation in a criminal prosecution to two witnesses was held erroneous in Gardner v. State, 4 Ind. 632.

⁵ Rea v. Missouri, 17 Wall. 532; Mulhollin v. Ward, 7 Ind. 646; Ledford v. Ledford, 95 Ind. 283; Tomlinson v. Briles, 101 Ind. 538; Pedigo v. Grimes, 113 Ind. 148; Storm v. United States, 94 U. S. 76, 84; Harris v. Central R.

the memory of the witness or the truth of his testimony.¹ It is a necessary result of the principle that the mode of conducting the examination of witnesses is chiefly a matter of discretion; that it should be discretionary with the trial court to permit or to deny counsel the privilege of asking leading questions. Some of our cases indicate that it is error to permit leading questions to be asked, but the rule as established by the later cases is that it is discretionary with the court to permit leading questions to be asked, and that the appellate tribunal will not interfere unless it clearly appears that there was an abuse of discretion resulting in injury to the complaining party.² This rule is sustained by the overwhelming weight of authority,³ and is the only rule defensible upon principle. It is within the discretion of the court to grant or deny an order directing the

Co., 78 Ga. 525; 3 S. E. Rep. 355; *Simon v. Home Ins. Co.*, 58 Mich. 278; *Demmeritt v. Randall*, 116 Mass. 331; *City of South Bend v. Hardy*, 98 Ind. 577.

¹ *Hyland v. Milner*, 99 Ind. 308; *Louisville, etc., Co. v. Wood*, 113 Ind. 544; *Barnett v. Feary*, 101 Ind. 95; *Mitchell v. Tomlinson*, 91 Ind. 167; *Vogel v. Harris*, 112 Ind. 494; *Brown v. Owen*, 94 Ind. 31; *Blake v. Powell*, 26 Kan. 320; *Coates v. Hopkins*, 34 Mo. 135; *Ferguson v. Rutherford*, 7 Nev. 385; *Kalk v. Fielding*, 50 Wis. 339; *Bowers v. Mayo*, 32 Minn. 241; *Schuster v. Wingert*, 30 Kan. 529; *Wallace v. Taunton Street R. Co.*, 119 Mass. 91; *Wachstetter v. State*, 99 Ind. 290; *Oliver v. Pate*, 43 Ind. 132; *Kellogg v. Nelson*, 5 Wis. 125, 131. It is evident that it is safer to allow a wide latitude to cross-examining counsel than to restrict them, since it is scarcely possible to permit too extended an examination, provided of course, the cross-examination is confined to the subject of the direct examination, but it is quite easy to unduly abridge the important right of cross-examination.

² *Goudy v. Werbe*, 117 Ind. 154, 157;

Sohn v. Jarvis, 101 Ind. 578; *Blizzard v. Applegate*, 77 Ind. 516; *Weik v. Pugh*, 92 Ind. 382; *Hunsinger v. Hofer*, 110 Ind. 390; *Board of Commissioners v. Dombke*, 94 Ind. 72; *Kyle v. Miller*, 108 Ind. 90. In *Hunsinger v. Hofer*, *supra*, the court said: "It is only where there is a very clear and prejudicial abuse of discretion in permitting leading questions to be asked that a judgment will be reversed."

³ *Whiting v. Mississippi, etc., Co.* 76 Wis. 592, 45 N. W. Rep. 672; *Obernalte v. Edgar*, 28 Neb. 70, 44 N. W. Rep. 82; *Parker v. Georgia, etc., Co.*, 83 Ga. 539, 10 S. E. Rep. 233; *Smith v. Hays*, 23 Ill. App. Ct. 244; *Cade v. Hatcher*, 72 Ga. 359; *Lawson v. Glass*, 6 Col. 134; *Addison v. State*, 48 Ala. 478; *Walker v. Dunsbaugh*, 20 N. Y. 170; *Donnell v. Jones*, 13 Ala. 490; *Hopkinson v. Steel*, 12 Vt. 582; *Farmers, etc., Co. v. Groff*, 87 Pa. St. 124; *State v. Lull*, 37 Me. 246; *Moody v. Rowell*, 17 Pick. 490, 498. Some of the courts hold that there can be no abuse of discretion in allowing leading questions. *Bundy v. Hyde*, 50 N. H. 116; *Steer v. Little*, 44 N. H. 613.

separation of witnesses.¹ But parties have a right to be present during the trial, and, although they may be witnesses, it is error to exclude them from the court room.² It is held that it is proper for the court, where the presence of the agent of one of the parties is essential to advise counsel so as to enable them to properly conduct the cause, to except such agent from the order directing a separation of the witnesses.³ There is not, at all events, an abuse of discretion in excepting such an agent from the order excluding witnesses from the court room while others are testifying.

§ 619. **Ordering a View**—It is often necessary, to enable the jury to justly apply the evidence, that they should see and inspect the place where an event or transaction described by the witnesses occurred, and it is within the sound discretion of the court to grant or deny an order to view the place.⁴ Where the trial court does not abuse its discretion, its ruling in granting or denying an inspection and view will not be reviewed on appeal.⁵ A view is not, according to our decisions, strictly speak-

¹ *Detrick v. McGlone*, 46 Ind. 291; *Porter v. State*, 2 Ind. 435; *Jackson v. State*, 14 Ind. 327; *Nelson v. State*, 2 Swan. (Tenn.) 237; *Johnson v. State*, 2 Ind. 652; *Errissman v. Errissman*, 25 Ill. 119. A party is not to be deprived of the testimony of a witness who disobeys the order of a court requiring witnesses to be separated and kept out of the court room. The penalty for disobedience must be enforced against the wrong doing witness and not against a party who is without fault. *Burk v. Andis*, 98 Ind. 59; *State v. Thomas*, 111 Ind. 515; *Davis v. Byrd*, 94 Ind. 525. In the case last cited the doctrine given a *quasi* approval in *Jackson v. State*, 14 Ind. 327, is denied. If witness disobeys it may affect his credit. *Pleasant v. State*, 15 Ark. 624; *Grimes v. Martin*, 10 Ia. 347; *Betts v. State*, 66 Ga. 508.

² *Cottrell v. Cottrell*, 81 Ind. 87; *La Rue v. Russell*, 26 Ind. 386; *Shew v. Hews*, 126 Ind. 474, 476; *Chester v. Bower*, 55 Cal. 46.

³ *Ryan v. Couch*, 66 Ala. 244; *Betts v. State*, 66 Ga. 508. The rule stated applies to a counsel who is also a witness and it is proper to except him from the order. *Powell v. State*, 13 Texas App. 244; *Pomeroy v. Baddeley*, *Ryan & Moody*, 430; *Everett v. Lowdham*, 5 Car. & P. 91.

⁴ The statute provides for a view and directs how it shall be conducted. R. S. 1881, § 538. See *Inspection and View, Work of the Advocate*, 232-236. See, also, *Erwin v. Bulla*, 29 Ind. 95; *Luck v. State*, 96 Ind. 16; *City of Indianapolis v. Scott*, 72 Ind. 196.

⁵ *Com. v. Webster*, 5 Cush. 295, 298; *Williams v. Grand Rapids, etc., Co.*, 53 Mich. 271; *Coyner v. Boyd*, 55 Ind. 166; *People v. Buddensieck*, 103 N. Y. 487; *Pick v. Rubicon, etc., Co.*, 27 Wis. 433, 442, 446; *Smith v. St. Paul, etc., Co.*, 32 Minn. 1; *Clayton v. Chicago, etc., Co.*, 67 Iowa, 238; *Richmond v. Atkinson*, 58 Mich. 413; *People v. Bonney*, 19 Cal. 426. It has been held that in

ing, part of the evidence given on the trial; it simply enables the triers of the fact to apply the evidence.¹ While not strictly evidence, as the decisions declare, still, it certainly is not without some probative influence.²

§ 620. **Compulsory Examination of the Person**—Closely akin to the subject discussed in the preceding paragraph is that of compelling a plaintiff in an action for personal injuries to submit to an examination of his person by surgeons. Upon this subject there is much diversity of opinion, some of the courts holding that the demand for an examination is a matter of right, others holding that it is in the discretion of the court to grant or deny the demand for the examination.³ Our own cases are in confusion and indeed, in conflict, although it can hardly be said that there is any authoritative decision upon the subject.⁴

equity cases the chancellor should accompany the jury. *Fraedrich v. Flieth*, 64 Wis. 184. There is a stubborn conflict upon the question whether a defendant must accompany the jury, but the weight of authority seems to be that it is not indispensably necessary that he should. *State v. Adams*, 20 Kan. 311, 324; *Queen v. Martin*, L. R. 1 Cr. C. Res. 378; *State v. Ah Lee*, 8 Ore. 214; *Shular v. State*, 105 Ind. 289.

¹ *Chute v. State*, 19 Minn. 271; *Brakken v. Minneapolis, etc., Co.*, 29 Minn. 41; *Close v. Samm*, 27 Iowa, 503, 507; *Wright v. Carpenter*, 49 Cal. 607; *Heady v. Vevay, etc., Co.*, 52 Ind. 117; *Jeffersonville, etc., Co. v. Bowen*, 40 Ind. 545; *Gagg v. Vetter*, 41 Ind. 228.

² *Neff v. Reed*, 98 Ind. 341, 347. Many of the cases, indeed, assign to a view the effect of evidence. *Parks v. Boston*, 15 Pick. 198; *Washburn v. Milwaukee, etc., Co.*, 59 Wis. 364; *Neilson v. Chicago, etc., Co.*, 58 Wis. 516. Some of the courts have been influenced, to declare that an information imparted by a view is not evidence, for the reason that it can not be carried into the record. But this seems to us unsatisfactory. Appellate courts do not weigh

evidence, and hence the fact that information is conveyed by a view is not of such high importance as courts sometimes indicate. A court can, notwithstanding the fact that a view has been had, still act upon the evidence in the record, and if it appears that jurors have disregarded it and acted upon their own knowledge, the courts can annul the verdict.

³ See cases cited in "The Work of the Advocate," 234; *Schroeder v. Rock Island, etc., Co.*, 47 Iowa, 375; *Walsh v. Sayre*, 52 How. Pr. 334; *White v. Milwaukee, etc., Co.*, 61 Wis. 536; *Miami, etc., Co. v. Baily*, 37 Ohio St. 104; *Shephard v. Missouri, etc., Co.*, 85 Mo. 629; *Atchison, etc., Co. v. Thul*, 29 Kan. 466; *International, etc., Co. v. Underwood*, 64 Texas, 463; *Missouri Pacific R. Co. v. Johnson*, 72 Texas, 95; *Sibley v. Smith*, 46 Ark. 275; *Lloyd v. Hannibal, etc., Co.*, 53 Mo. 509; *Parker v. Enslow*, 102 Ill. 272, 279; *Roberts v. Ogdensburg, etc., Co.*, 29 Hun. 154; *Stuart v. Haven*, 17 Neb. 211; *Sioux City, etc., Co. v. Finlayson*, 16 Neb. 578, 588.

⁴ *Kern v. Bridewell*, 119 Ind. 226; *Hess v. Lowrey*, 122 Ind. 225, S. C. 7

It is hazardous in view of the conflict among the decisions to venture an opinion and especially one opposed to that of eminent text-writers,¹ but after a careful study of the question, we are unable to escape the conclusion that the rule, which is probably asserted by the greater number of cases, is wrong. It is true there is much to be said in favor of the rule, but, as we believe, the great weight of reason is against it. The rule is one which may so operate as to deter modest women, or even men, from asserting their just rights, inasmuch as they may not be able or willing to bear the examination of their persons by strange men, and often men who are hostile to them. They are in such cases forced to sacrifice their rights by a fear of exposure. The rule, we venture to say, assumes to sanction an illegal violation of the right of personal liberty, and takes from the person of the citizen the sacredness with which the fundamental law invests it.²

Law. Rep. Anno. 90; *Terre Haute, etc., Co. v. Brunker*, 128 Ind. 542, 26 N. E. Rep. 178. The expressions upon the subject in *Hess v. Lowrey*, *supra*, are certainly outside of the case and are not authoritative.

¹ Rogers' Expert Testimony, § 79; Seymour D. Thompson in 25 Central Law Journal, 3, 7.

² Since the text was written the question has been passed upon by the Supreme Court of the United States in the case of *Union Pacific Ry. Co. v. Botsford*, 11 Sup. Ct. Rep. 1000, S. C. 44 Albany Law Jour. 325. In the case cited the court held that a compulsory examination could not be ordered, saying, among other things, that: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be one

of complete immunity; to be let alone.' Cooley Torts, 29. For instance, not only wearing apparel, but a watch or a jewel worn on the person, is for the time being privileged from being taken under distress for rent or attachment on mesne process, or execution for debt or writ of replevin. 3 Black Com. 8; *Sunbolf v. Alford*, 3 Mees & W. 248, 253, 254; *Mack v. Parks*, 8 Gray, 517; *McQuigg v. Dailey*, 16 Ind. 324. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger without lawful authority, is an indignity, an assault and a trespass, and no order commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals except in a very small number of cases based upon special reasons, and upon ancient practice coming down from ruder ages, and now mostly obsolete in England, and never, so far as we

§ 621. **Discharge of the Jury before Verdict**—The discretion of the trial court in discharging a jury before a verdict is reached will be reviewed even in criminal cases only where it has been so unreasonably exercised as to require the inference that the discretion was abused. The earlier cases declared a somewhat different doctrine, but the later and sounder cases affirm that it is for the trial court to determine how long the deliberations shall be protracted.¹ This discretion can not, however, be unreasonably exercised without error. It is usually said that the jury in criminal cases may be discharged after the lapse of a reasonable time, but no definite rule for determining what is a reasonable time has, so far as we can ascertain, been laid down.² In civil cases the jury may be discharged, as the statute declares, when it satisfactorily appears that there is no possibility of their agreeing.³ This provision vests a very comprehensive discretion, if not an uncontrollable power, in the trial court, inasmuch as its effect is to leave the whole question to the trial court, and if that court is satisfied it seems that all other courts must abide by its decision. A final adjournment of the term discharges the panel,⁴ and the failure of one juror to appear puts it in the power of the court to discharge the jury.⁵

are aware, introduced into this country." In the case of *Pennsylvania Co. v. Newmeyer*, 28 N. E. Rep. 860, the Supreme Court of this State asserts the doctrine declared in the case from which we have quoted.

¹ *Walker v. State*, 26 Ind. 346; *State v. Nelson*, 26 Ind. 366; *Shaffer v. State*, 27 Ind. 131; *Proffatt on Jury Trials*, Chapter II. See, generally, *Miller v. State*, 8 Ind. 325; *Morgan v. State*, 13 Ind. 215; *Joy v. State*, 14 Ind. 139; *Hogg v. State*, 7 Ind. 551; *Miller v. State*, *supra*, intimates a doctrine that can not be sustained. In England the rule is that the discretion of the trial court will in no event be reviewed on appeal. *Queen v. Charlesworth*, 1 B. & S. 460; *Winsor v. Queen*, 6 B. & S. 143. As to what will authorize dis-

charge of panel and individual jurors, as for cause, see *Doles v. State*, 97 Ind. 555; *State v. Leunig*, 42 Ind. 541.

² In some of the cases cited in the preceding note a period of eighteen or nineteen hours was regarded as a reasonable time. In accordance with the general rule which prevails in criminal cases requiring the presence of the accused, the jury should not be discharged in his involuntary or enforced absence. *State v. Wilson*, 50 Ind. 487. Nor should the jury be instructed in his unwilling absence from the court. *Roberts v. State*, 111 Ind. 340.

³ R. S. 1881, § 542.

⁴ *Harris v. Doe*, 4 Blackf. 369.

⁵ *Ashbaugh v. Edgecomb*, 13 Ind. 466; *Maynard v. Block*, 41 Ind. 310.

§ 622. **Time for Filing Bills of Exceptions**—A trial court, while in session, has a discretionary power to grant time either within or beyond the term, for filing a bill of exceptions. If it makes the order in term its discretion will not be supervised on appeal, but an abuse of discretion may be so gross as to constitute error. It is seldom, however, that an order designating a time within which an act shall be done is subject to review on appeal.

CHAPTER III.

INVITED ERROR.

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| <p>§ 623. The error itself as distinguished from matters of procedure required to make it available.</p> <p>624. Making wrong rulings available as error.</p> <p>625. Conduct of the parties as affecting the right to make errors available.</p> <p>626. Procuring an erroneous ruling.</p> | <p>§ 627. Implied invitation to rule erroneously.</p> <p>628. Opening the door to the admission of incompetent evidence.</p> <p>629. Admission of incompetent evidence—Effect upon the party who introduces it.</p> <p>630. The doctrine of invited error founded on the principle of estoppel.</p> |
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§ 623. The Error itself as distinguished from matters of Procedure required to make it Available—It is necessary, at the outset, to mark the difference between the error itself and the procedure required to make the error available. That there is a material difference is perceived without effort when attention is fully directed to the subject. It may happen that there is a wrong ruling and yet no available error, for it may be true that the party is not in a position to avail himself of the error or that he has not done all that the case required of him. It is one thing to take such steps as make it necessary for the appellate tribunal to consider the wrong ruling, and quite another thing to prove that the error is sufficient to reverse the judgment of the trial court. The one object is accomplished when such steps are taken as make the error available, but the other object can not be accomplished without also showing the intrinsic nature of the wrong ruling, its improper influence upon the ultimate judgment given in the cause and that the party has not, by his conduct, precluded himself from making the error available for the reversal of the judgment.

§ 624. Making wrong Rulings Available as Error—The steps necessary to render a wrong ruling available, that is, to prop-

erly bring it before the appellate tribunal for review, are matters of procedure, while the effect of the error upon the judgment appealed from springs from the intrinsic character of the wrong ruling itself. Thus, for instance, it may be wrong to admit oral testimony of the contents of a deed over objection, and yet the wrong may not be available as error because no motion for a new trial was made. The steps begin in the trial court,¹ but continue into the appellate tribunal.² In rough outline these are the steps ordinarily required to make error available: 1. An objection to the ruling, or a request, so made and preferred as to bring before the trial court the specific questions for decision. 2. A proper exception. 3. A motion presenting the ruling to the trial court for review where a review is required.³ 4. Due reduction to record of rulings, objections, exceptions and facts. 5. A proper presentation of the case to the appellate tribunal by record, pleadings and briefs.

§ 625. Conduct of the Parties as affecting the right to make Error Available—The statement that the conduct of a party may be such as to exert an important, and, indeed, a controlling influence upon the right to make a wrong ruling available needs no support from argument or authority, for it carries its own proof. A party may, by conduct, waive a right of appeal or estop

¹ The proper foundation for making error available must be laid in the trial court by the appropriate request, motion, or objections. See Requests and Offers, Motions for Judgment and incidental matters, Objections. See, also, *Coleman v. Bell*, 4 N. M. 46, 12 Pac. Rep. 657; *Altmayer v. Metropolitan*, etc., Ry. Co., 14 N.Y. Supp. 311; *Glass v. Wiles* (Texas), 14 S. W. Rep. 225; *Eaton v. Barnhill*, 68 Miss. 305, 8 So. Rep. 849; *Wetzler v. Duffy*, 78 Wis. 170, S. C. 12 Law. Rep. Anno. 178; *McGraw v. Franklin*, 2 Wash. 17, 26 Pac. Rep. 810; *Halstead Lumber Co. v. Sutton* (Kan.), 26 Pac. Rep. 444; *Ready v. Shamokin*, 137 Pa. St. 92, 20 Atl. Rep. 424; *First Nat. Bank v. Holt*, 87 Cal. 158, 25 Pac. Rep. 272.

² A failure to assign error or to argue errors assigned are instances of the loss of a right in the appellate tribunal. Points conceded below can not be made on appeal. *Sullivan v. McMillan* (Fla.), 8 So. Rep. 450. See, generally, *National*, etc., *Bank v. McConnell* (Ala.), 9 So. Rep. 149; *Snell v. De Land* (Ill.), 27 N. E. Rep. 183.

³ It is not all rulings that must be brought before the trial court for review, but there are many rulings where this is necessary. As will be hereafter shown the general rule is that rulings in the conduct of the trial must be brought before the trial court for review in the appropriate mode.

himself from prosecuting an appeal.¹ Upon the same general and far reaching principle he may, by his conduct, place himself in such a position as to preclude him from taking advantage of an erroneous ruling, although he may take the necessary steps required to present the ruling for review and show its character and influence.²

§ 626. **Procuring an Erroneous Ruling**—A party who expressly asks that a designated ruling be made can not avail himself of that ruling on appeal, although it may be material and may be exhibited by the record. What a party expressly asks can not be made available as error without a violation of the plainest principles of the law. The rule we have stated is illustrated in a variety of cases. Where a party asks the court to consolidate cases, he can not complain of an order of consolidation made in compliance with his request.³ A party who invites incompetent testimony by his own mode of examining a witness can not be heard to aver that the testimony was erroneously admitted.⁴ An instruction given at the request of a party can not be successfully complained of by the party at whose request it was given.⁵

¹ *Ante*, §§ 150, 289; *Neel v. City of Toledo*, 5 Ohio Cir. Ct. 203. We are not, however, here directly concerned with the general doctrine of waiver and estoppel, but it is proper, as we suppose, to refer to the doctrine, inasmuch as it is the major one and necessarily includes the minor. The subject we here propose to discuss is involved in the greater doctrine, but it possesses such peculiar characteristics that a special consideration seems necessary.

² *Bowen v. Carolina, etc., Co. (So. Car.)*, 13 S. E. Rep. 421; *Ellison v. Rerick*, 125 Ind. 396, 25 N. E. Rep. 454; *Lee v. Hassett*, 39 Mo. App. 67; *Flaherty v. Miner*, 33 N. Y. St. Rep. 681, 25 N. E. Rep. 418; *Shinnabarger v. Shelton*, 41 Mo. App. 147; *Hearman v. Owen*, 42 Mo. App. 387; *Payne v. Hardesty (Ky.)*, 14 S. W. Rep. 348; *Smith v. Dittman*, 11 N. Y. Supp. 769.

The case of *Washington v. Louisville, etc.*, 34 Ill. App. 658, S. C. on appeal 26 N. E. Rep. 653, supplies a striking illustration of the doctrine that a party may by his conduct preclude himself from assailing the rulings of the trial court on appeal.

³ *Parker v. People*, 13 Col. 155.

⁴ *Musselman v. Musselman*, 44 Ind. 106; *Reynolds v. State*, 27 Neb. 90, S. C. 20 Am. St. 659.

⁵ *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Minot v. Mitchell*, 30 Ind. 228; *Scott v. Board*, 101 Ind. 42, citing *Barker v. Hobbs*, 6 Ind. 385; *Robertson v. Caldwell*, 9 Ind. 514; *Loomis v. Wabash, etc., Co.*, 17 Mo. App. 340; *Leabo v. Goode*, 67 Mo. 126; *Noble v. Blount*, 77 Mo. 235; *Holmes v. Braide-wood*, 82 Mo. 610; *Dennis v. Maxfield*, 10 Allen, 138; *Parsons v. Hedges*, 15 Iowa, 119; *Philadelphia, etc., Co. v.*

§ 627. **Implied Invitation to Rule Erroneously**—A ruling may be impliedly requested by a party and if it is so requested he can not, on appeal, take any advantage from the ruling. In cases where there is only an implied invitation to make a particular ruling, the difficulty is in determining the extent and effect of the invitation, but where there is no uncertainty as to the effect of the invitation, it is clear that no advantage can be taken of the ruling made in response to the invitation. The doctrine stated is tacitly, at least, enforced in the cases which hold that a plaintiff can not complain that his own pleadings are defective. In all such cases there is an implied invitation to treat the party's pleading as sufficient, and he is not in a situation to successfully complain.¹ The admission of a fact in a pleading is an implied invitation authorizing an assumption that evidence of the admitted fact is unnecessary.² Submitting a case for decision, without objection, implies that it is in a condition to be decided, and that the questions involved are so presented that the court may properly give judgment.³ But this doctrine can not be extended so far as to violate the fundamental rule that consent can not confer jurisdiction of the general subject. A party at whose instance a particular mode is pursued in appointing a referee can not successfully assert that the mode adopted was erroneous.⁴ If a party insists that evidence is competent, he invites the court to so treat it, and the error in admitting it is rendered unavailable by the invitation.⁵ A defendant who pre-

Harper, 29 Md. 330; *Territory v. Burgess*, 8 Mont. 57, 19 Pac. Rep. 558; *Chicago, etc., Co. v. Snyder*, 128 Ill. 655, 21 N. E. Rep. 520. In the early case of *Prather v. Rambo*, 1 Blackf. 189, the court disposed of a specification of error upon the principle stated in the text, and in doing so declared that a party "has no right to complain of an error or irregularity produced by his own act."

¹ *Henderson v. Barbee*, 6 Blackf. 26.

² *Morrill v. Richey*, 18 N. H. 295; *Cook v. Farrah*, 105 Mo. 492, 16 S. W. Rep. 692; *Holmes v. Fairbanks*, 17 Wis. 434; *Bird v. Lanjus*, 7 Ind. 615. See,

generally, *Roy v. Union Mercantile Co. (Wyo.)*, 26 Pac. Rep. 996; *Newton v. Newton*, 46 Minn. 43, 48 N. W. Rep. 450; *Wynn v. Central Park, etc., Co.*, 14 N. Y. Supp. 172; *Parker v. Richolson*, 46 Kan. 283, 26 Pac. Rep. 729.

³ *Miller v. Powers*, 18 Ind. 263; *Dodge v. District Township*, 17 Ia. 85; *Elwell v. Dodge*, 33 Barb. 336. See, generally, *Davenport v. Alpin*, 70 Mich. 192, 35 N. W. Rep. 211; *Heavner v. Saeger*, 79 Ga. 471, 4 S. E. Rep. 767.

⁴ *Totten's Appeal*, 40 Pa. St. 385.

⁵ *Mitchell v. Monette*, 37 Ala. 49. See *In re Bull*, 14 Daly, 510, 2 N. Y. Supp. 52.

vents explanations invites a ruling holding such explanations improper and he can not complain that they were not made.¹ A party who asks oral instructions can not successfully allege as error that they were not reduced to writing.² Where a party improperly requests and wrongfully obtains a change of venue his invitation to order the change precludes him from successfully assigning error upon the order.³ If one party asks instructions asserting a designated theory he can not complain that the court gave similar instructions at the request of his adversary.⁴ It has been held that if a party asks an instruction declaring that facts enumerated in it are immaterial, he will be deemed to have invited the court to act upon the theory that such facts exist.⁵ Where a party moves for judgment upon the theory that the questions presented were questions of law, he can not successfully change position and allege that the questions were questions of fact.⁶ The general doctrine that a party can secure no advantage from an invited ruling is tacitly asserted in the cases which hold that a party who tenders an immaterial issue can not successfully complain because the court tried the case upon the issue he tendered.⁷ The common law system of pleading recognized and enforced a rule, which, in effect, was the same as that which we have here regarded as the

¹ *Claffin v. Farmers' Bank, etc.*, 36 Barb. 540. See, generally, *Floyd v. Floyd*, 4 Rich (So. Car.), 23; *Kelly v. Davis*, 1 Head. (Tenn.) 71; *Wilson v. McAdams*, 10 Iowa, 590.

² *State v. DeMoss*, 98 Mo. 340, 11 S. W. Rep. 731. See, generally, *Pledger v. State*, 77 Ga. 242, 3 S. E. Rep. 320; *Chicago, etc., Co. v. Snyder*, 128 Ill. 655, 21 N. E. Rep. 520.

³ *State v. Anderson*, 96 Mo. 241, 9 S. W. Rep. 636.

⁴ *Shinnabarger v. Shelton*, 41 Mo. App. 147; *Suarez v. Manhattan Ry. Co.*, 60 Hun. 584, 15 N. Y. Supp. 222; *Barker v. Livingston County Bank*, 30 Ill. 591; *Chapman v. Barnes*, 29 Ill. App. 184. See, generally, *Whitmore v. Supreme Lodge, etc.*, 100 Mo. 36, 13 S. W. Rep. 495; *Demetz v. Benton*, 35 Mo. App.

559; *Connoble v. Clark*, 38 Mo. App. 486; *Bagley v. Grand Lodge, etc.*, 131 Ill. 498, 22 N. E. Rep. 487.

⁵ *New Era Life Association v. Weigle*, 128 Pa. St. 577, 18 Atl. Rep. 393. See, upon the general subject, *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. Rep. 340, S. C. 6 Lawyers Rep. Anno. 524; *Carpenter v. Wilmot*, 24 Mo. App. 589; *Taylor v. Penquite*, 35 Mo. App. 389; *Missouri Pacific R. Co. v. Schoennen*, 37 Mo. App. 612.

⁶ *Sire v. Rumbold*, 11 N. Y. Supp. 734. See, generally, *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. Rep. 418; *Strong v. Manufacturing Co.*, 6 Hun. 528; *Leggett v. Hyde*, 58 N. Y. 272, 275; *Kochler v. Adler*, 78 N. Y. 287.

⁷ *O'Neal v. Wade*, 3 Ind. 410.

rule interdicting parties from availing themselves of rulings produced by their own act. Although the rule of the common law was differently designated, it was in all essential particulars the rule we have been discussing, for it denied to parties benefit from erroneous rulings upon the pleadings brought about by their invitation. The rule of the common law to which we refer is that which denied the party who committed the first fault in pleading the right to complain that his adversary followed in the erroneous direction marked out by him.¹

§ 628. **Opening the door to the Admission of Incompetent Evidence**—The principle that a party who impliedly invites a ruling can not make the invited ruling available for the reversal of a judgment finds, perhaps, its strongest manifestation in the doctrine that a party who adduces evidence of a particular class or character opens the door to his adversary for the admission of evidence of like kind and character. In adducing such evidence there is an implied invitation to the court to rule that the kind or class of evidence given is competent, and the party who invites the ruling by his own conduct shuts out all objections. He affirms, in effect, the competency of the evidence and upon that affirmation secures its admission. He can not escape the force and effect of his own conduct, for what he requests, impliedly or expressly, he can not afterwards condemn. To permit a party to affirm at one time that testimony is competent and at another that it is incompetent would violate the principle prohibiting parties from occupying inconsistent positions. The rule rests on solid principle and is required by considerations of fairness and expediency. There is some diversity of opinion as to the foundation upon which the rule rests, and, indeed, some conflict as to the rule itself, but the decided weight of authority supports the rule.² It is, however,

¹ The rule under the code that a "bad answer is good enough for a bad complaint" is taken from the common law, and it is really but the application of the general doctrine of invited error. State, 103 Ind. 101; Hobbs v. Board, 116 Ind. 376; Nitcher v. Earle, 117 Ind. 270; Mosier v. Stoll, 119 Ind. 244, 261; Perkins v. Hayward, 124 Ind. 445, 449. In Perkins v. Hayward, *supra*, the court

² Lowe v. Ryan, 94 Ind. 450; Meranda v. Spurlin, 100 Ind. 380; Hinton v. Whittaker, 101 Ind. 344; Dinwiddie v. he is in no plight to complain that his

to be kept in mind that the situation of the parties may exert an important influence upon the question, for it is often true that evidence is competent when offered by one party but incompetent when offered by the other. The rule does not, of course, apply where the position of the parties changes the character of the evidence. It may not be amiss to say that the fact that incompetent evidence is admitted does not so conclude the court as to compel it to allow the incompetent evidence to be continued, without limitation or restriction; the rule, in truth, operates upon the parties rather than upon the court.

§ 629. Admission of Incompetent Evidence—Effect upon the Party who Introduces it—A party who introduces incompetent evidence does so at the peril of injury to himself, since he may, by the introduction of such evidence, cut himself off from giving other evidence to explain or confirm it.¹ A party may open the door for his adversary and preclude himself from having it shut against his adversary, but he can not insist that the door shall be kept open for his benefit because it was once opened at his instance.² His position is very different from that of his op-

adversary followed through the door thus opened." The rule was thus stated in *Lowe v. Ryan*, *supra*: "Appellant first sought and took the opinion of his witnesses as to whether or not the market value of his lands would be increased or diminished by the proposed highway. Having done so he is not in a position to ask a reversal of the judgment because his adversaries were allowed to meet his case with like opinion from their witnesses." In *Dinwiddie v. State*, *supra*, the court said: "It is settled by the adjudications of this court that a party can not make available for a reversal of a judgment the exclusion of evidence where, upon his objection, like evidence was excluded when offered by the other party." In *Gaff v. Greer*, 88 Ind. 122, 128, one of the parties read from a book and the other also read from the same book, and it was held that he was not in a position to successfully complain, the court saying:

"It would be strange if the appellants could use such work to establish the question of ecclesiastical law or church law deemed favorable to him, and could, at the same time, dispute its use by the appellees upon questions favorable to them. This he can not do." To substantially the same effect are the cases of *Ward v. Washington Ins. Co.*, 6 Bosw. 229; *Holten v. Holten*, 5 Weekly Dig. 14. See, also, *Glover v. Stephenson*, 126 Ind. 532; *Minton v. Underwood, etc., Co.*, 79 Wis. 646, 48 N. W. Rep. 857; *Little Rock, etc., Co. v. Tankersly (Ark.)*, 14 S. W. Rep. 1099; *Ingram v. Wackernagel (Iowa)*, 48 N. W. Rep. 998; *Jackson v. State*, 28 Texas App. 143, 16 S. W. Rep. 247; *McGraw v. Franklin*, 2 Wash. 17, 25 Pac. Rep. 911, 1 S. C. 26 Pac. Rep. 810.

¹ *Trenton Mutual Life & Fire Ins. Co. v. Johnson*, 24 N. J. L. 576; *Brand v. Longstreet*, 1 South (N. J.), 325.

² *Lyons v. Teal*, 28 La. Ann. 592.

ponent, and he can not successfully demand to be allowed to continue to violate the rules of evidence.¹

§ 630. **The doctrine of Invited Error is founded on the principle of Estoppel**—The rule that a party can not successfully assail a decision given upon his express or implied invitation is really nothing more than an application of the general principle that parties will be held to the theories they present and upon which they secure action by the court.² The foundation principle of the whole doctrine is the principle of estoppel. In all the various forms in which the rule confining parties to the theories asserted³ has been applied there is some element of estoppel, not, of course, precisely such an element as is present in cases concerning property rights, but one very closely resembling it. Thus, in a case where parties invite the court to treat the questions which control the case as questions of law and not of fact, there is a representation that the questions are questions of law, and it is but applying the principle of estoppel to refuse to permit the representation to be withdrawn;⁴ the same principle is asserted in the cases which hold that where a party insists that a contract is to be construed in a particular way, he can not

¹ If, however, incompetent evidence is admitted without objection and it sustains the finding or verdict, the judgment will not be reversed. *Graves v. State*, 121 Ind. 357; *Taylor v. State* (Ind.), 29 N. E. Rep. 415; *Stockwell v. State*, 101 Ind. 1; *Riehl v. Evansville Foundry Association*, 104 Ind. 70; *Yeager v. Wright*, 112 Ind. 230; *McFadden v. Fritz*, 110 Ind. 1, 5; *Indiana, etc., Co. v. Finnell*, 116 Ind. 414, 422. See *Roberts v. Graham*, 6 Wall. 578; *Doyle v. Mulren*, 7 Abb. Pr. R. (N. S.), 258; *Belknap v. Sealey*, 14 N. Y. 143; *Shall v. Lathrop*, 3 Hill. 237; *Pike v. Evans*, 15 Johns. 210.

² In the case of *Greeley v. Provident Savings Bank*, 103 Mo. 212, 221, it was said: "Besides, in this case, the receiver's counsel offered competent evidence to prove the fact in dispute, to wit, the receiver's compensation, but on

the exceptor's objection this evidence was excluded. This having occurred, and the excluded evidence thereby failing to form a part of that reserved in the record, the exceptor is plainly estopped from contending that the receiver failed to prove the facts rejected at his own instance. *Bigelow on Estoppel* (5th ed.), 720."

³ *Ante*, "Holding Parties to Trial Court Theories," Chapter XXIV.

⁴ *Dillon v. Cockcroft*, 90 N. Y. 649; *Trustees of East Hampton v. Kirk*, 68 N. Y. 459, 464; *Winchell v. Hicks*, 18 N. Y. 558; *O'Neill v. Jones*, 43 N. Y. 84; *Ormes v. Dauchy*, 82 N. Y. 443, S. C. 37 Am. Rep. 583; *Republic Life Insurance Co. v. Swigert* (Ill.), 25 N. E. Rep. 680, 12 Lawyers Rep. Anno. 328; *San Diego Land, etc., Co. v. Neabe*, 78 Cal. 80, 11 Lawyers Rep. Anno. 604; *Crabs v. Mickle*, 5 Ind. 145.

successfully complain that the court adopted the construction he requested.¹ The principle is enforced in the cases which hold parties to the construction placed by them on the pleadings.² It is also enforced in the cases which hold that where a party asserts that a definite theory of the law is applicable to the evidence, he will not be permitted to withdraw his assertion and assume a different position.³ Where a party objects to the introduction of primary evidence, and his objection has the effect of procuring the introduction of secondary evidence, he will not be heard to allege on appeal that the trial court erred in admitting the secondary evidence.⁴ In one of the reported cases the doctrine was carried very far, for it was held that if a party secures the exclusion of evidence he can not successfully urge upon appeal the point that for want of the very evidence which he procured the court to reject, the judgment can not be sustained.⁵ Another case, much the same as that referred to, asserts, even in stronger terms, a similar doctrine.⁶ The doc-

¹ *Hodges v. Kowing*, 58 Conn. 12, S. C. 7 Lawyers Rep. Anno. 87.

² *Daniels v. Brodie*, 54 Ark. 216, 15 S.W. Rep. 467, 11 Law. Rep. Anno. 81.

³ *Graham v. Nowlin*, 54 Ind. 389.

⁴ *Larey v. Baker*, 85 Ga. 687, 11 S. E. Rep. 800, 802. In the case cited the court said: "We think the court was wrong in admitting the record from the clerk's office and rejecting the original homestead papers. He should have admitted the original papers and rejected those from the clerk's office as was decided by this court in the case of *Brown v. Driggers*, 60 Ga. 114. But, as the error was caused by Baker objecting to the original homestead papers he ought not to be allowed to take advantage of it. He can not take a benefit from his own wrong."

⁵ *Jobbins v. Gray*, 34 Ill. App. 208, 219. The court said in the case referred to: "Appellant can not be allowed to procure an erroneous ruling in his favor and exclude competent and material evidence on the trial when it is offered

and ready to be produced, and then on appeal insist that, for want of that very proof, the decree can not be sustained. A party will never be allowed to so take advantage of his own wrong, or the errors of the court induced on his own motion, and then compel the opposite party to suffer the consequences. Such a proceeding would be the merest trifling with the court."

⁶ *Insurance Co. of Pennsylvania v. O'Connell*, 34 Ill. App. 357, 362. The court, in the case cited, thus expressed its decision: "It comes in poor grace and entirely too late from appellant, to now insist that the verdict was not supported by the evidence, when the appellee was ready and anxious to make full and complete proof, so as to fasten liability on the appellant, and yet was prevented from so doing by the court, on the motion or objection of appellant. A party will not be permitted to thus force error into the record and then himself take advantage of it on appeal."

trine asserted by the cases to which we have referred is a wholesome one, inasmuch as it tends to make parties cautious in interposing objections. It is founded on solid principle. It rests on the long established rule that a party who makes a representation by words or conduct will not be allowed to withdraw it to the prejudice of another who has rightfully acted upon it.

CHAPTER IV.

HARMLESS ERROR

- § 631. Difference between decisions affecting primary rights and decisions affecting procedure.
- 632. Error without prejudice.
- 633. Right result reached by wrong mode.
- 634. Limitations of the rule that there is no available error where a right result is reached.
- 635. Uninfluential error.
- 636. Nominal damages—Failure to assess.
- 637. Rulings on demurrer.
- 638. Resorting to the evidence to avoid the effect of a wrong ruling upon demurrer.
- 639. Rulings on motions to strike out or reject pleadings.
- 640. Pleadings defective in form.
- 641. Rulings in admitting and excluding evidence.
- 642. Instructions—What errors are in general regarded as uninfluential.
- § 643. Verdict clearly right on the evidence, erroneous instructions harmless.
- 644. Instructions—Verbal inaccuracies.
- 645. Erroneous instructions are generally harmless where there is a special verdict.
- 646. Equity cases—General instructions unnecessary.
- 647. Incomplete instructions.
- 648. Instructions—Construction of on appeal.
- 649. Erroneous rulings in selecting and impaneling the jury often harmless.
- 650. Misconduct of jurors.
- 651. Special interrogatories to jury—What rulings are harmless, although erroneous.
- 652. Erroneous rulings upon verdicts that are regarded as harmless.

§ 631. **Difference between Decisions affecting Primary Rights and Decisions affecting Procedure**—In order to obtain a clear and adequate conception of the meaning of the term “harmless errors,” it is necessary to mark the difference between decisions affecting primary or fundamental rights and decisions affecting rights which exist by virtue of rules established for the conduct and regulation of matters of procedure. The difference exists and is important. A primary right is violated when a recovery is denied in a case where there is a meritorious cause of action well presented, as, for instance, where a party shows a valid contract, full performance and damages; a remedial right is

violated where some rule of procedure is disregarded, as, for instance, where a court refuses to instruct in writing when properly requested. The one class of decisions affects directly the primary right while the decisions of the other class, while they may indirectly affect the primary right, do not necessarily do so, but do directly affect the remedy. Thus, a decision that a recovery can be had upon a contract where there has been no performance affects the primary right directly, while a decision admitting parol evidence where only written evidence is competent, directly violates a rule of evidence, but indirectly violates a primary right. A wrong decision is, as a rule, prejudicial where it impairs a primary right or denies a remedy for such a right, but where the wrong decision affects mere matters of procedure and does not impair a primary right nor deny or abridge a remedy, it is in many cases, but not in all, regarded as a harmless error. But not all errors in matters of procedure can be regarded as harmless, for parties have a right to a judicial hearing and judgment according to the established rules of law. It is enough to say now that harmless errors are generally such as concern matters of procedure, while errors affecting the primary right are generally prejudicial.

§ 632. **Error without Prejudice**—An error without prejudice is always a harmless error.¹ The general statement we have made is undoubtedly correct; it is, indeed, self-evident, and it may be extended by adding that the record must be so made up as to authorize the inference that the error was prejudicial

¹ De *Johnson v. Sepulbeda*, 5 Cal. 149; *Fulmer v. Fulmer*, 22 Iowa, 230; *Ealer v. Freret*, 11 La. Ann. 455; *Bosley v. Chesapeake Ins. Co.*, 3 Gill. & J. 450; *Orth v. Dorschlein*, 32 Mo. 366; *Greenough v. Sheldon*, 9 Iowa, 503; *Woodward v. Horst*, 10 Iowa, 120; *Oliver v. Depew*, 14 Iowa, 490; *Willis v. Chambers*, 8 Texas, 150; *Indianapolis, etc., Co. v. Smythe*, 45 Ind. 322; *Lynch v. Leurs*, 30 Ind. 411; *Morse v. Morse*, 25 Ind. 156; *Starr v. Hunt*, 25 Ind. 313; *Cincinnati, etc., Co. v. Rodgers*, 24 Ind. 103; *Hubble v. Wright*, 23 Ind. 322; *Fankboner v. Fankboner*, 20 Ind. 62; *Gross v. Haisley* (Ind. App. Ct.), 28 N. E. Rep. 123; *Mansfield v. Shipp*, 128 Ind. 55, 27 N. E. Rep. 427; *Nixon v. Campbell*, 106 Ind. 47; *Davis v. Reamer*, 105 Ind. 318; *Leary v. Moran*, 106 Ind. 560; *Union Mutual Life Ins. Co. v. Buchanan*, 100 Ind. 63; *McGee v. State*, 103 Ind. 444; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442; *New v. New*, 127 Ind. 576; *Stefani v. State*, 124 Ind. 3; *Prootus v. Holmes*, 33 Ill. App. 312; *Kelsey v. Cooley*, 58 Hun. 601, 11 N. Y. Supp. 745; *Herbert v. City of North Hampton*, 152 Mass. 266, 25 N. E. Rep. 467; *Waarich v. Winter*, 33 Ill. App. 36.

or was probably prejudicial.¹ The difficulty lies in the application of the general rule. Some of the cases assert that where the record shows error the court must presume injury,² but this statement is too broad. We suppose that whether an error is or is not prejudicial may always be determined as a matter of inference from the record, and that, while it can hardly be said that there is a general rule for determining whether an error is or is not prejudicial, it may, nevertheless, be safely said that there must be enough in the record to overcome the presumption that no wrong was done by the trial court and to fairly and reasonably warrant the inference that the wrong ruling was, at least, probably prejudicial. It is undoubtedly true that there may be cases where the record shows that the materiality of the ruling is such as to authorize the inference that injury resulted, and where this is so the error can not be regarded as harmless. This is often true with respect to the admission of incompetent evidence, for the reason that the appellate tribunal can not say in all cases whether the incompetent evidence did not influence the jury.³ There may be many witnesses against one, and yet the testimony of the one may carry conviction, so that if he is not a competent witness there is in the one case prejudicial error in excluding him, in the other there is prejudicial error in allowing him to testify. While it is true that prejudice must

¹ *Ante*, §§ 593, 594.

² *Morrison v. Judge*, 14 Ala. 182; *Ex parte Keenan*, 21 Ala. 558; *Thomas v. De Gaffenreid*, 27 Ala. 651; *Buford v. Gould*, 35 Ala. 265; *Jackson v. Feather River, etc., Co.* 14 Cal. 18; *Norwood v. Kenfield*, 30 Cal. 393; *State v. Patton*, 13 Ired. L. 421; *Wiley v. Givens*, 6 Gratt. (Va.) 277; *Kepler v. Conkling*, 89 Ind. 392. The statements of the court in the cases referred to must be taken, as the long settled rule requires, with reference to the facts and the record of the particular case in which the statements were made, and when thus taken it is evident that they mean no more than that where there is enough in the record to justify the inference that the wrong ruling was

prejudicial, it will be so held unless some other record recital overcomes the inference. The courts that decided the cases to which we have referred assert as strongly as any others that error is not presumed to be prejudicial, but must be affirmatively shown to be prejudicial. Neither these courts, however, nor any others, hold that the prejudicial nature of the wrong ruling must be shown by express recitals or direct statements.

³ *Wiseman v. Wiseman*, 73 Ind. 112, 116; *Peterson v. Hutchinson*, 30 Ind. 38; *Morgan v. State*, 31 Ind. 193; *Bellefontaine R. R. Co. v. Hunter*, 33 Ind. 335; *Thompson v. Thompson*, 34 Ind. 94; *King v. Enterprise Ins. Co.*, 45 Ind. 43; *Carpentier v. Thurst*, 30 Cal. 123.

directly or inferentially appear from the record, it is also true that if the wrong ruling appears to affect a material point adversely to the party complaining, the appellate tribunal will not, as a general rule, inquire specifically as to the extent of the prejudice.¹ The rule that where there is no prejudice the errors are harmless applies, of course, to rulings that benefit the complaining party, however full of error they may be.² Thus, a party can not object to a judgment rendered in his own favor upon a defective process against the adverse party,³ nor upon instructions in his own favor, nor for a failure to assess all the damages against him to which his adversary was entitled, nor to a refusal to admit evidence injurious to the opposite party and favorable to him. Cases too numerous to warrant citation support the propositions just stated. The rule that error which is without prejudice is not available precludes a party not injured from making available errors committed against other parties.⁴

¹ *Greene v. White*, 37 N. Y. 405; *Union Bank v. Mott*, 39 Barb. 180. In the case first cited the court referred to the cases of *Thacher v. Jones*, 31 Me. 528; *Lane v. Crombie*, 12 Pick. 177; *Clark v. Dutcher*, 9 Cow. 674; *Camden, etc., Co. v. Belknap*, 21 Wend. 354; *People v. Wiley*, 3 Hill, 194. It was said in the course of the opinion that, "It is not for the defendant to show how or to what extent he was prejudiced. The existence of the error establishes the claim to relief. If the plaintiffs wish to sustain the verdict it is for them to show that the error did not and could not have affected it." In the case from which we have quoted the court had under consideration an instruction upon a material point, and as to such a case the language of the court is, perhaps, not too strong, but the language employed can not be regarded as stating the general rule with entire accuracy, inasmuch as it indicates that the rule is much broader than it can be justly considered to be.

² *Barker v. Hobbs*, 6 Ind. 385; *Fischer v. Holmes*, 123 Ind. 525; *Robertson v.*

Caldwell, 9 Ind. 514; *Gaven v. Dopman*, 5 Cal. 342; *Winona, etc., Co. v. Denman*, 10 Minn. 267; *Smith v. Williams*, 22 Ill. 357; *Lee v. Merrick*, 5 Wis. 229; *Mooney v. Hough*, 84 Ala. 80, 4 So. Rep. 19; *Wright v. State*, 78 Ga. 102, 2 S. E. Rep. 693; *Hill v. Finigan*, 77 Cal. 267, 19 Pac. Rep. 494; *Miles v. Wikel*, 74 Iowa, 712, 39 N. W. Rep. 95; *Hammond v. Pinkham*, 149 Mass. 356, 21 N. E. Rep. 871; *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. Rep. 308; *Northern Pacific, etc., Co. v. Holmes*, 3 Wash. Ty. 543, 18 Pac. Rep. 76; *Kircher v. Milwaukee, etc., Co.*, 74 Wis. 470, 43 N. W. Rep. 487; *Dick v. Williams*, 130 Pa. St. 41, 18 Atl. Rep. 615; *State v. Jackson*, 32 So. Car. 27, 10 S. E. Rep. 769; *Treadwell v. Whittier*, 80 Cal. 575, S. C. 13 Am. St. Rep. 175.

³ *Cunningham v. Smithson*, 12 Leigh (Va.), 32.

⁴ *Westcott v. Huff*, 18 Ind. 245; *Wiley v. Coovert*, 127 Ind. 559; *Duesterberg v. Swartzel*, 115 Ind. 180, 17 N. E. Rep. 165; *Heyman v. McBurney*, 66 Ala. 51; *Seward v. Malotte*, 15 Cal. 304; *Hohen-*

It is no cause for complaint on the part of one defendant that a judgment was erroneously rendered against another defendant, or that some other defendant was released by the judgment where no injury was done him by such release.¹

§ 633. **Right Result reached by Wrong Mode**—The statement in the opening paragraph of the present chapter that harmless errors are generally found in rulings affecting mere matters of procedure is confirmed and illustrated by the cases which assert the doctrine that where a right result is reached errors in the mode pursued in reaching it are generally harmless ones.² Errors not affecting the final result in cases where the record proper affirmatively shows it to be right may be deemed uninfluential and hence may be regarded as harmless. The doctrine that a wrong ruling affecting the procedure is a harmless error where a right result is reached has been applied in many cases. One class is represented by the cases which hold that where an objection is taken by a motion when a demurrer would be appropriate, the substitution of the one mode of procedure for the other is a harmless error if the result reached is clearly right.³ Another class is represented by the cases which

thal v. Watson, 28 Mo. 360; Knox v. Cleveland, 13 Wis. 245; Eyre v. Cook, 9 Iowa, 185; Warner v. Whittaker, 6 Mich. 133; Schiffer v. Adams, 13 Col. 572, 22 Pac. Rep. 964; H. G. Olds Wagon Works v. Combs, 124 Ind. 62, 24 N. E. Rep. 589; Stribling v. Splint Coal Co., 31 W. Va. 82, 5 S. E. Rep. 321; Kraft-Holmes, etc., Co. v. Crow, 36 Mo. App. 288; Kansas City, etc., Co. v. Doggett, 67 Miss. 44, 7 So. Rep. 278.

¹ Ahern v. McGeary, 79 Cal. 250, 21 Pac. Rep. 540; Dickerson v. Chrisman, 28 Mo. 134; Garner v. Beauchamp, 20 Mo. 318; Mann v. Lewis, 13 W. Va. 215; Ward v. Kalfleish, 21 How. Pr. 283. See, generally, Elkin v. Gregory, 30 So. Car. 422, 9 S. E. Rep. 335; Sellers v. Foster, 27 Neb. 1, 42 N. W. Rep. 907; Ingram v. State, 24 Neb. 33, 37 N. W. Rep. 943.

² The doctrine that where a right re-

sult is reached errors in the mode pursued are ordinarily regarded as harmless is closely allied to the doctrine that intermediate errors may be deemed harmless if the final judgment or decree is right. (*Ante*, § 590.) It is, indeed, as a close analysis will show, at bottom, little else than a phase of that general doctrine.

³ Holcraft v. King, 25 Ind. 352, 356; Lane v. State, 27 Ind. 108, 113. In Holcraft v. King, *supra*, it was said: "The objection was not properly taken by demurrer, but a proper result having been attained by the decision of the court, the case should not be reversed for an error of the court in the mode in which it was effected." Very similar language was used in Lane v. State, *supra*: "A proper result having been reached by the demurrer, we can not," it was said by the court, "reverse the

hold that where a right result is reached the error in trying the case upon pleadings where pleadings are inappropriate is harmless.¹ Still another class is represented by the cases which hold that where the trial court strikes out a motion when the appropriate procedure is to overrule it, the error in the mode pursued is not sufficient to reverse the judgment.² The doctrine has been applied to the proceedings of statutory tribunals, and their decisions have been upheld, although the mode of procedure adopted was erroneous.³ A strong, and, perhaps, an unsafe extension of the rule is made by the cases wherein it is held that, although it is erroneous to submit to the jury a written contract for construction the error is not available if it appears that the jury gave a correct construction to the contract. In another case it was held harmless error to submit a question

judgment merely because it was not attained in a different mode." In *McGrew v. McCarty*, 78 Ind. 496, the court said: "The proper practice would have been to demur to the complaint. Where there is no personal liability and the entire right of action depends upon the validity of the lien, which affirmatively appears to be invalid, the proper practice is to demur. *Lawton v. Case*, 73 Ind. 60. But where a right result is reached, no harm is done, although an inappropriate remedy is adopted. Judgments are not reversed because of harmless errors."

¹ *Gray v. Robinson*, 90 Ind. 527, 532, citing *Bales v. Brown*, 57 Ind. 282. In the case first named it was said: "But the controversy was heard and determined upon the evidence. In such a case the pleadings and rulings thereon are harmless. When a correct result is reached a cause will not be reversed for an error in the mode of reaching it."

² *Matthews v. Droul*, 114 Ind. 268, 271; *Logan v. Kiser*, 25 Ind. 393. In the case first cited the court said: "The striking out of the motion for a *venire*

de novo was not the proper method of disposing of that motion, but as a right result was reached, a mistake in the mode of reaching it is not available error."

³ *Neptune v. Taylor*, 108 Ind. 459, 561; *City of Logansport v. Shirk (Ind.)*, 28 N. E. Rep. 538, 541. In the case last cited it was said: "The proper conclusion was reached and judgment rendered under the facts disclosed by the record, and it is immaterial by what method it is arrived at. The proper conclusion having been reached the judgment will not be reversed."

⁴ *Martineau v. Steele*, 14 Wis. (2d ed.) 295, 300. In the case cited the court said: "We suppose there can be no doubt that it was the duty of the county court to construe the written agreement instead of leaving the question of its proper construction to the jury. The jury, however, placed the true construction upon the writing—the one which the court should have placed upon it. and therefore this error becomes immaterial, since it could not have prejudiced the appellant."

of law to the jury for decision, for the reason that the jury correctly decided the question and a right result was reached.¹

§ 634. Limitations of the Rule that there is no Available Error where a Right Result is reached—It must, as we suppose, be true that the rule stated in the preceding paragraph is not entirely without limitation. It seems quite clear that there may be cases where a right result is reached, but errors in the mode of reaching it may be so grave as to be regarded as prejudicial. If, for instance, the court should deny a jury trial in a case where the party was entitled to it, the ruling would, as a general rule, be available as error even though the appellate tribunal might be satisfied that the trial court reached the proper conclusion and rendered the appropriate judgment. It seems, also, that there may be cases where there is such a clear and wide departure from the established rules of evidence that the judgment must fall, although it appears to be right. If there are no limitations upon the rule that a right result makes harmless all intermediate rulings the consequence must be that there may be cases wherein a party is denied a right to have his cause tried and determined as the law directs. The general rule, however, is well established and is a strong one, so that a party who attempts to escape its force must make a very clear case.

§ 635. Uninfluential Error—There may be a wrong ruling and no available error, for the reason that the ruling may have no influence upon the substantial rights of the party who makes complaint.² It is difficult, if not impossible, to accurately lay

¹ Consolidated Coal Co. v. Schaefer (Ill.), 25 N. E. Rep. 788. The court, in the case cited, conceded that the instruction did submit a question of law to the jury, but held the error not available, saying: "But as the jury gave a correct answer to the question propounded to them, and rendered a verdict that was just and right under the law and the evidence, it is not perceived that the action of the court in this regard affords good ground for reversing

the judgment." For other decisions upon the general subject, see Hunter v. Harris, 24 Ill. App. 637; Ochs v. People, 124 Ill. 399; Marvin v. Universal, etc., Co., 85 N. Y. 278.

² Holmes v. Fairbank, 17 Wis. 434; Menk v. Steinfert, 39 Wis. 370; Alexander v. Oshkosh, 33 Wis. 277; Alkan v. New Hampshire, etc., Co., 53 Wis. 136; Gready v. Ready, 40 Wis. 478; Gallo-way v. Week, 54 Wis. 604. See, generally, Smith v. Eaton, 50 Iowa, 488;

down any general rule for determining when the wrong ruling can be considered so influential as to constitute available error. It may, however, be said that where it appears from the record that there was no right which could be impaired or destroyed by the ruling it may be regarded as destitute of influence, although it may be radically erroneous. Thus, a wrong ruling on an entirely immaterial issue is generally uninfluential.¹ So where a party obtains all he is entitled to receive the error is without influence.² The same general doctrine prevails where damages are assessed upon the wrong theory and include improper items, but, in the aggregate, the recovery awarded is no more than that to which the successful party was rightfully entitled.³ The general doctrine applies to a case wherein the only issue is as to the title to personal property and an erroneous ruling is made concerning the value of the property in controversy.⁴ It may be observed of the case last referred to that the ground upon which it proceeds is that the only ruling that could be influential would be one affecting the only controverted point, namely, the title to the property in dispute. A case involving the title to property falls under the general rule that uninfluential errors are harmless where it appears that the party who complains has no interest in the property disposed of by the judgment or decree.⁵ What errors shall or shall not be deemed influential, must, we may say in conclusion, be determined upon the facts and record in the particular case, for it is not possible to formulate a general rule for determining what errors are influential and what are without influence.

Dawson v. Wisner, 11 Iowa, 6; *Granger v. Buzick*, 3 G. Greehe (Iowa), 570; *Cooper v. Mills County*, 69 Iowa, 350; *Heckle v. Grewe*, 125 Ill. 58, 61; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403, 35 Am. Dec. 155; *Ward v. Ringo*, 2 Texas, 420, S. C. 47 Am. Dec. 654.

¹ *Dabbs v. Dabbs*, 27 Ala. 646; *Dressler v. Davis*, 7 Wis. 527; *Thompson v. Lyon*, 14 Cal. 39.

² *Denny v. Moore*, 13 Ind. 418.

³ *Hood v. Knox*, 8 La. Ann. 73; *Stevens v. Wolf*, 77 Texas, 215, 14 S.

W. Rep. 29. See, upon the general subject, *Allen v. Commonwealth (Ky.)*, 12 S. W. Rep. 582; *State v. Bruder*, 35 Mo. App. 475; *Allen v. Etheridge*, 84 Ga. 550, 11 S. E. Rep. 136.

⁴ *Foster v. Berkley*, 8 Minn. 351.

⁵ *Case v. Kelly*, 133 U. S. 21. See, generally, *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. Rep. 551; *Gage v. DuPuy*, 132 Ill. 134, 24 N. E. Rep. 866; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. Rep. 573; *Harrington v. Sedalia*, 98 Mo. 583, 12 S. W. Rep. 342.

§ 636. **Nominal Damages—Failure to Assess**—The doctrine running throughout the adjudged cases is that a wrong ruling is not available as error unless it does harm in a material degree to the substantial rights of the complaining party. It is not enough that there is harm, it must be so important as to merit the consideration of the appellate tribunal and to take something of more than nominal value from the party who alleges error. It is upon this principle that it is held that the failure to assess nominal damages may be placed in the category of harmless errors.¹ But there may be cases where a right of importance is to be vindicated by the assessment of nominal damages, and where this is so the failure to assess nominal damages may be prejudicial, not, indeed, because of the amount involved but because of the right which requires vindication and establishment. Thus, where a party sues to prevent the wrongful seizure and occupancy of his land, or to prevent the destruction of his right in a highway, there may be more than harmless error in a ruling denying the recovery of nominal damages.² The reason of the rule that there may be prejudicial error in some cases where there is apparently nothing more than a wrong ruling affecting the right to nominal damages, is that the right which the damages represent may be lost unless damages are assessed.³ This principle is illustrated in cases where it is necessary for a party to bring an action and recover in order to prevent a claim from ripening into a right by long continued possession or use. The members of the class of cases under immediate mention form, however, exceptions to the general rule, for that rule is that where there is a ruling affecting only the right to nominal damages, the ruling, though wrong, is assigned a place in the general class denominated harmless errors.

¹ Mahoney v. Robbins, 49 Ind. 146; v. Haven, 65 Iowa, 359; Norman v. Estep v. Estep, 23 Ind. 114; Hacker v. Winch, 65 Iowa, 263.
 Blake, 17 Ind. 97; Small v. Reeves, 14
² Ross v. Thompson, 78 Ind. 90, 97.
 Ind. 163; Tate v. Booe, 9 Ind. 13; Patton
³ Webb v. Portland, etc., Co., 3 Sumn.
 v. Hamilton, 12 Ind. 256; Black v. Coan, (U. S. Cir.), 189; Faust v. City of Hunt-
 48 Ind. 385; Wimberg v. Schwegeman, ington, 91 Ind. 493, 496; Kyle v. Board,
 97 Ind. 528; Watson v. Van Meter, 43 94 Ind. 115, 118.
 Iowa, 76; Case Threshing-Machine Co.

§ 637. **Rulings on Demurrer**—Where the record shows that the judgment rests entirely on good paragraphs of a complaint an error in overruling a demurrer to a bad paragraph will be regarded as harmless.¹ So, where the record affirmatively shows that no harm resulted from overruling a demurrer to one of several paragraphs of an answer the error will be deemed not prejudicial.² But it is to be observed of cases of the class last referred to that the record proper must show that the ruling was harmless, for the court will not search through the evidence for the purpose of ascertaining whether harm did or did not result.³ Where a demurrer is sustained to one of several paragraphs of an answer the error is harmless if there are other paragraphs under which the same evidence is admissible.⁴ If

¹ *Burckham v. Burk*, 96 Ind. 270; *Tracewell v. Farnsley*, 104 Ind. 497; *Bidinger v. Bishop*, 76 Ind. 244; *Burgett v. Teal*, 91 Ind. 260; *Reed v. Dougan*, 54 Ind. 306; *Peery v. Greensburgh*, etc., *Turnpike Co.*, 43 Ind. 321; *Blasingame v. Blasingame*, 24 Ind. 86; *Stone v. State*, 75 Ind. 235; *Martin v. Cauble*, 72 Ind. 67; *Cincinnati, etc., Co. v. Gaines*, 104 Ind. 526; *Smith v. McKean*, 99 Ind. 101; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480; *Hawley v. Smith*, 45 Ind. 183, 184; *Stanton v. State*, 82 Ind. 463; *Johnson v. Ramsay*, 91 Ind. 189, 196; *Barnett v. Feary*, 101 Ind. 95, 98; *Wolf v. Schofield*, 38 Ind. 175; *Knox Co. Bank v. Lloyd*, 18 Ohio St. 353; *Trammel v. Chipman*, 74 Ind. 474; *Snell v. Hancock*, 11 Iowa, 117. But the record must affirmatively show that the judgment rests on the good paragraphs. See *post*, § —.

² *Walling v. Burgess*, 122 Ind. 299, 308, citing *Over v. Shannon*, 75 Ind. 352; *Nixon v. Campbell*, 106 Ind. 47; *Krug v. Davis*, 101 Ind. 75; *Sohn v. Cambern*, 106 Ind. 302.

³ *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Belt R. Co. v. Mann*, 107 Ind. 89; *Fleetwood v. Brown*, 109 Ind. 567; *Rush v. Thompson*, 112 Ind. 153; *Ryan*

v. Hurley, 119 Ind. 115; *Eagle Machine Works v. Arens*, 123 Ind. 233; *Weir v. State*, 96 Ind. 311, 315; *Wilson v. Town of Monticello*, 85 Ind. 10; *Sims v. City of Frankfort*, 79 Ind. 446, 449; *Conyers v. Mericles*, 75 Ind. 443; *Johnson v. Breedlove*, 72 Ind. 368; *Over v. Shannon*, 75 Ind. 352; *Pennsylvania Co. v. Poor*, 103 Ind. 553; *Godfrey v. Craycraft*, 81 Ind. 476; *Travelers Ins. Co. v. Noland*, 97 Ind. 217.

⁴ *Harding v. Cowgar*, 127 Ind. 245; *Lawrenceburgh, etc., Co. v. Hinke*, 119 Ind. 47; *Whiteman v. Harriman*, 85 Ind. 49; *Luntz v. Greve*, 102 Ind. 173; *City of Elkhart v. Wickwire*, 87 Ind. 77; *Long v. Williams*, 74 Ind. 115; *Lester v. Brier*, 88 Ind. 296; *George v. Brooks*, 94 Ind. 274; *Madgett v. Fleenor*, 90 Ind. 517; *Moore v. Boyd*, 95 Ind. 134; *McClelland v. Louisville, etc., Co.*, 94 Ind. 276; *Hazelett v. Butler University*, 84 Ind. 230; *City of Aurora v. Fox*, 78 Ind. 1; *Ohio, etc., Co. v. Nickless*, 73 Ind. 382; *Moral School Township*, 74 Ind. 93; *Mason v. Mason*, 102 Ind. 38; *Nixon v. Beard*, 111 Ind. 137; *Henderson v. Henderson*, 110 Ind. 316; *Ralston v. Moore*, 105 Ind. 243. The earlier cases are collected in *Ripley's Indiana Digest*, pp. 585, 586. There is, it is important

the answer to which a demurrer is addressed is bad, no harm is done in sustaining the demurrer, although the demurrer may not state a sufficient cause or be properly framed.¹ Where facts are admitted in an agreed statement an error in overruling a demurrer to a bad paragraph of answer is, as it has been held, rendered harmless.² If the record clearly shows that a defendant was awarded the relief claimed in his answer an error in sustaining a demurrer will not be available.³ It is held that where the record affirmatively shows that the trial court excluded all evidence under a paragraph to which a demurrer was erroneously overruled that error is rendered harmless.⁴ It is held in some of the cases that if facts alleged in a pleading are found to be untrue an error in ruling upon a demurrer addressed to it is not available for the reversal of the judgment.⁵

to note, a very essential difference between sustaining a demurrer and overruling a demurrer. See *post*, § 669.

¹ *Davis v. Green*, 57 Ind. 493; *Hadley v. State*, 66 Ind. 271; *Palmer v. Hayes*, 112 Ind. 289.

² *State v. Blanch*, 70 Ind. 204.

³ *Putnam v. Tennyson*, 50 Ind. 456.

⁴ *State v. Julian*, 93 Ind. 292.

⁵ *Souders v. Jeffries*, 98 Ind. 31; *Bartlett v. Pittsburgh, etc., Co.*, 94 Ind. 281; *State v. Julian*, 93 Ind. 292; *Cooper v. Jackson*, 99 Ind. 566; *Keegan v. Carpenter*, 47 Ind. 597. We think, however, that the fact that a pleading is found to be untrue is not always and of itself sufficient to show the error to be harmless. It is to be regarded as prejudicial unless it appears from the record proper that the judgment was not influenced in any material particular by the bad pleading. The decisions do not, as we believe, sustain the broad statement that if the pleading is found to be untrue the error is harmless. In *State v. Julian*, *supra*, the question was not before the court, for there all evidence under the bad pleading was excluded, so that it was perfectly clear that the ruling holding it good was un-

influential. In *Nave v. Wilson*, 33 Ind. 294, cited as sustaining the doctrine we disapprove, the same point was ruled as that which the decision turned upon in *State v. Julian*. In *Blessing v. Blair*, 45 Ind. 546, also cited in support of that doctrine, the verdict was for the plaintiff, and he, of course, suffered no injury. The point decided in *Hawley v. Smith*, 45 Ind. 183, and in all the other cases cited in *State v. Julian*, except those just named, and except *McComas v. Haas*, 93 Ind. 276, and *Keegan v. Carpenter*, *supra*, was that an error in ruling upon a demurrer to a bad paragraph of a pleading is harmless where the record proper affirmatively shows that the judgment rests on a good paragraph. In *Keegan v. Carpenter*, *supra*, the same ruling was made as in *Blessing v. Blair*, *supra*, and that was, in substance, that as the record proper affirmatively showed that the party who pleaded the bad pleading was denied all benefit the adverse party was not harmed. In *McComas v. Haas*, *supra*, the answer of the jury to interrogatories clearly showed that the defendant who pleaded the answer to which a demurrer was erroneously overruled received no

§ 638. **Resorting to the Evidence to Avoid the effect of an Erroneous Ruling upon Demurrer**—The intimation in some of the cases that the evidence may be searched in order to determine whether or not a ruling upon demurrer was harmless can not, as we believe, be regarded as asserting a correct general rule. It is possible that where there is absolutely no conflict in the evidence, it may be determined from an inspection of the evidence, but the doctrine certainly can not be correctly applied in cases where the evidence is conflicting. We believe that as a general rule resort to the evidence is not proper or permissible. If a party tenders a bad pleading he has no right to insist, for the purpose of saving a judgment in his favor, that the pleading although bad is shown by the evidence to have done no injury to his adversary. The party who files a pleading does so because he conceives that it will secure him some advantage, and an advantage he can not obtain without a corresponding injury to his adversary. Nor is it just to the court or to the adverse party for such a party to compel the decision of a question as one of evidence when he himself put it forward as one of pleading. There is no justice in driving a party from the certainty of pleading to the uncertainty of evidence. There is no tinge of right in a claim that the court or the adverse party must explore the evidence to determine whether a ruling upon demurrer was or was not harmless. The object of requiring pleadings would be in a great measure defeated if parties were allowed

benefit from that answer and that the ruling did no injury to the plaintiff. In that case it was expressly decided that resort could not be made to the evidence. In *State v. Jeffries, supra*, the judgment went against the plaintiff upon his complaint so that the answer was not influential. It was, therefore, unnecessary to say in that case anything as to the effect of proving an answer to be untrue. The point decided, and the only point in judgment, is thus exhibited in the opinion: "As the court found and gave judgment against the appellee upon his complaint the error, if any, of overruling the appellant's demurrer

thereto was harmless." The decision in *Bartlett v. Pittsburgh, etc., Co., supra*, may be sustained upon the ground that the record proper showed that no harm was done the appellant. The effect of the decision in *Cooper v. Jackson, supra*, probably is that the evidence may be looked to in order to determine whether a ruling on demurrer is or is not harmless, but as will clearly appear from the authorities referred to in the next paragraph, this doctrine is not the true one. It may, perhaps, be correct if qualified and limited by restricting it to a case where there is no conflict in the evidence.

to invoke the aid of evidence to make bad pleadings good or rescue them from condemnation. It is carrying the rule quite far enough to hold that if the record proper, as a special finding, a special verdict, or the like, affirmatively shows the harmlessness of an erroneous ruling the error will not avail the party against whom it was committed. Beyond that it can not be carried without producing discord and working injury. The later decisions sustain our views and supply strong reasons supporting them.¹ It is quite clear that where a demurrer is

¹ In the case of *Ryan v. Hurley*, 119 Ind. 115, the court in speaking of an erroneous ruling upon demurrer said: "We can not look into the evidence to determine whether injury did or did not result from such error." In *McComas v. Haas*, 93 Ind. 276, 281, it was said: "But the sufficiency of a paragraph of answer when demurred to must be determined upon the facts stated therein and not upon matters elsewhere appearing in the record. The effect of overruling a demurrer to a bad paragraph of answer is to adjudge that if the facts therein are proved, the defendant is entitled to a verdict, however insufficient such facts may be to constitute a defense to the action." In the case of *Wilson v. Town of Monticello*, 85 Ind. 10, 20, the question was as to the right to resort to the evidence to obviate the effect of an error in ruling upon a demurrer to an answer, and it was held that resort could not be made to the evidence, the court saying: "Where good answers are held on demurrer or are rejected on motion, the defendant is entitled to the benefit of the exception reserved upon that ruling, unless there are other answers entitling him to put in evidence substantially the same matters as are pleaded in the answers held bad or rejected. The evidence is not to be looked to for the purpose of discovering whether the ruling did or did not do him harm. Where a plea is struck down the presumption is that the rule

of law involved in the ruling was acted upon throughout the case and the defendant is not bound to again present the question." The cases of *Friddle v. Crane*, 68 Ind. 583; *Johnson v. Breedlove*, 72 Ind. 368; *Abell v. Riddle*, 75 Ind. 345; *Conyers v. Mericles*, 75 Ind. 443, and *Sims v. City of Frankfort*, 79 Ind. 446, were cited. It was said in *Pennsylvania Co. v. Poor*, 103 Ind. 553, 555: "The court can not examine evidence to determine questions presented by demurrer, for the demurrer presents the question fully, and the question presented must be decided according to the record." To the same effect are the cases of *Belt R. R. Co. v. Mann*, 107 Ind. 89; *Rush v. Thompson*, 112 Ind. 158; *Fleetwood v. Brown*, 109 Ind. 567. In the case last cited it was said, in speaking of the cases of *Campbell v. Nebeker*, 58 Ind. 446; *Layman v. Shultz*, 60 Ind. 541; *Gallagher v. Himmelberger*, 57 Ind. 63, and *Landwerlen v. Wheeler*, 106 Ind. 523, that: "It was not therein held, nor intended to be held, that this court may look to the evidence to ascertain whether or not the sustaining of a demurrer to a good paragraph of an answer was a harmless error. It has never been so held by this court. On the contrary, the holding has been that the evidence is not to be looked to for the purpose of discovering whether the ruling did or did not do harm."

sustained, a resort to the evidence can not be had, since the effect of such a ruling is to assert that no evidence of the facts alleged is competent, and the presumption upon which the parties had a right to act is that the theory announced in the ruling on the pleadings would be adhered to throughout the entire case. The question is not very different where a demurrer is erroneously overruled, inasmuch as the presumption is the same as that which prevails in cases where the demurrer is sustained. Parties are not bound to anticipate changes in the views of the court, nor, indeed, have they any right to act upon the supposition that the court will depart from the theory outlined in its rulings upon demurrer.¹

§ 639. **Rulings on Motions to strike out or reject Pleadings**—It is not an available error to deny a motion to strike out surplusage or redundant matter in pleadings or to deny a motion to strike out a pleading because it is the same as other pleadings or embraced in them.² Although an erroneous ruling may be made in sustaining a motion to strike out it will be harmless if enough is left to entitle the party to give evidence of all the material facts originally pleaded.³ It is error to sustain a motion to strike out where the parts of the pleading ordered to be struck out are material and necessary.⁴ There is, of course, no error in sustaining a motion to strike out or reject where the

¹ *Ante*, § 591. "Presumption that the court adheres to a declared or indicated theory." *Wilson v. Town of Monticello*, 85 Ind. 10, 20.

² *Walker v. Larkin*, 127 Ind. 100; *Keesling v. Watson*, 91 Ind. 578; *Owen v. Phillips*, 73 Ind. 284; *Lowry v. McAlister*, 86 Ind. 543; *Goodwine v. Miller*, 32 Ind. 419; *Turner v. Campbell*, 59 Ind. 279; *City of Evansville v. Thayer*, 59 Ind. 324; *McFall v. Howe Co.*, 90 Ind. 148; *Losey v. Bond*, 94 Ind. 67; *Morris v. Stern*, 80 Ind. 227; *Clark v. Jeffersonville, etc., Co.*, 44 Ind. 248; *Dill v. O'Ferrell*, 45 Ind. 268; *City of Craw-*

fordsville v. Brundage, 57 Ind. 262; *Sprague v. Pritchard*, 108 Ind. 491; *Mires v. Alley*, 51 Ind. 507; *House v. McKinney*, 54 Ind. 240; *George v. Brooks*, 94 Ind. 274; *Hoke v. Applegate*, 92 Ind. 570; *Smith v. Martin*, 80 Ind. 260; *Hewitt v. Powers*, 84 Ind. 295; *Strong v. Taylor School Tp.*, 79 Ind. 208.

³ *Humphreys v. Stevens*, 49 Ind. 491; *Board v. Reynolds*, 44 Ind. 509.

⁴ *Clark v. Jeffersonville, etc., Co.*, 44 Ind. 248; *Chicago, etc., Co. v. Summers*, 113 Ind. 10; *Stanton v. State*, 74 Ind. 503.

part of the pleading objected to by the motion is redundant, immaterial or irrelevant.¹

§ 640. **Pleadings defective in Form**—Defects in form are not available for the overthrow of pleadings upon appeal. The statute provides that matters of form shall be disregarded and that, as to such matters, pleadings that might be amended below shall be deemed to be amended in the higher court.² The provisions of the code have been liberally applied.³ The practical difficulty in applying the provisions of the statute arises in cases where the borderland between matters of substance and matters of form is so narrow that the side on which the particular case falls can scarcely be discerned. Where the defect is one of substance and not of form the statutory provision does not apply.⁴

§ 641. **Rulings in admitting and excluding Evidence**—Where a point upon which evidence is excluded is conceded by an admission made during the trial, or by an admission in the pleadings, as well as where it is established by uncontradicted evidence, error in excluding additional evidence is generally said to be harmless, although it would, perhaps, be more accurate to say there is no error.⁵ Permitting the introduction of evidence

¹ *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Board v. Huff*, 91 Ind. 333; *Gheens v. Golden*, 90 Ind. 427; *Robinson v. Snyder*, 74 Ind. 110; *Lake Erie, etc., v. Fix*, 88 Ind. 381; *Boyce v. Graham*, 91 Ind. 420; *Gerard v. Jones*, 78 Ind. 378; *Columbus, etc., Co. v. Braden*, 110 Ind. 558; *Hervey v. Parry*, 82 Ind. 283.

² R. S. 1881, § 658.

³ *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143, 148; *Stockwell v. Johnson*, 101 Ind. 1, 17, and cases cited; *Buchanan v. State*, 106 Ind. 251; *Torr v. Torr*, 20 Ind. 118; *McKinlay v. Shank*, 24 Ind. 258; *Lowry v. Dutton*, 28 Ind. 473; *Numbers v. Bowser*, 29 Ind. 491; *Lucas v. Smith*, 42 Ind. 103; *Hamilton v. Winterrowd*, 43 Ind. 393; *Krewson v. Cloud*, 45 Ind. 273; *Bristol, etc., Co. v. Boyer*,

67 Ind. 236; *White v. Stellwagon*, 54 Ind. 186; *Donellan v. Hardy*, 57 Ind. 393; *Bremmerman v. Jennings*, 101 Ind. 253; *Carver v. Carver*, 97 Ind. 497; *Waltz v. Waltz*, 84 Ind. 403, 408.

⁴ *May v. State Bank*, 9 Ind. 233; *Johnson v. Breedlove*, 72 Ind. 368; *Friddle v. Crane*, 68 Ind. 583; *Old v. Mohler*, 122 Ind. 594. See, generally, *Mansur v. Streight*, 103 Ind. 358; *Eberhart v. Reister*, 96 Ind. 478.

⁵ *Citizens' State Bank v. Adams*, 91 Ind. 280; *Holliday v. Thomas*, 90 Ind. 398; *Cooper v. Blood*, 2 Wis. 62; *State v. Avery*, 17 Wis. 672; *Heath v. Keyes*, 35 Wis. 668; *Axtel v. Chase*, 83 Ind. 546; *Davis v. Liberty, etc., Co.*, 84 Ind. 36; *McKesson v. Sherman*, 51 Wis. 303; *Davis v. Town of Fulton*, 52 Wis. 657; *West Coast, etc., Co. v. Newkirk*, 80

that is clearly immaterial is, as a general rule, harmless even if erroneous.¹ But this rule is one to be applied with some care, since it is not always possible for the appellate tribunal to ascertain what effect apparently immaterial evidence may have had upon a jury. It is, at all events, not safe to apply the rule strictly or too generally.² Where it affirmatively appears or where it may be fairly inferred that in the particular case the erroneous admission of the evidence could not have influenced the verdict, the error is always to be regarded as harmless. As evidence seemingly immaterial may sometimes arouse prejudice, create undue passion, or carry the jury to collateral issues, it must be true that there are cases forming exceptions to the settled general rule.³ Where objection is made, but no evidence is introduced, the error in overruling the objection is rendered harmless for the reason that the ruling was uninfluential.⁴ It is held in one of our cases that "Illegal proof of what need not be proved at all will not vitiate a verdict."⁵ But this doctrine requires some little qualification, for it is very clear that serious harm may be done by permitting a party to give incompetent evidence, although he may

Cal. 275, 22 Pac. Rep. 231; Dickinson v. Coulter, 45 Ind. 445; Indianapolis, etc., Co. v. Anthony, 43 Ind. 183; Persons v. McKibben, 5 Ind. 261, S. C. 61 Am. Dec. 85; *In re* Crawford, 113 N.Y. 560; City of Kinsley v. Morse, 40 Kan. 577, 20 Pac. Rep. 217; Oshkosh, etc., Co. v. Germania, etc., Co., 71 Wis. 454, S. C. 5 Am. St. Rep. 233.

¹ *Latterett v. Cook*, 1 Ia. 1, S. C. 63 Am. Dec. 428; *Barton v. Kane*, 17 Wis. 38, S. C. 84 Am. Dec. 728; *Winkley v. Foye*, 33 N. H. 171, S. C. 66 Am. Dec. 715, 720, note; *Edgerly v. Emerson*, 23 N. H. 555, S. C. 55 Am. Dec. 207; *Shepherd v. Lanfear*, 5 La. 336, 25 Am. Dec. 181; *Miles v. Stevens*, 3 Pa. St. 21, S. C. 45 Am. Dec. 621; *Brooks v. Dutcher*, 22 Neb. 644, 36 N. W. Rep. 128; *Hanson v. Elton*, 38 Minn. 493, 38 N. W. Rep. 614; *Robinson v. Shanks*, 118 Ind. 125, 20 N. E. Rep. 713; *Klein v. Hoffheimer*,

132 U. S. 367; *McDermitt v. Hubanks*, 25 Ind. 232; *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *Naugle v. State*, 101 Ind. 284; *Gebhart v. Burket*, 57 Ind. 378; *Lovinger v. First National Bank*, 81 Ind. 354; *Deig v. Morhead*, 110 Ind. 451.

² *Graves v. Campbell*, 74 Texas. 576, 12 S. W. Rep. 238; *Taylor v. Baltimore, etc., Co.*, 33 W. Va. 39, 10 S. E. Rep. 29; *Bartlett v. Beardmore*, 74 Wis. 485, 43 N. W. Rep. 492; *Fordyce v. McCants*, 59 Ark. 509, 11 S. W. Rep. 694; *Baker v. Dessauer*, 49 Ind. 28.

³ If the evidence is in the strict sense immaterial, that is, wholly without influence, the rule applies in full vigor. *Fordyce v. McCants*, 59 Ark. 509, 11 S. W. Rep. 694.

⁴ *Findley v. State*, 5 Blackf. 576.

⁵ *Beagles v. Sefton*, 7 Ind. 496. The general rule undoubtedly is that per-

not be under any obligation to give any evidence upon the point. Jurors having evidence laid before them with the sanction of the court often deem it material and yield to it when to yield is to do wrong. Where a party himself proves a fact the error in permitting his adversary to give evidence upon the same point is uninfluential.¹ There is no prejudicial error where an objectionable question is asked but no answer is given,² except in cases where it is fairly inferable that a persistence in asking improper questions has probably influenced the jury to believe that the facts assumed in the questions are true.³ The cases to which we have referred, and to which a multitude more may be added, are all instances of the application of the wide-reaching general rule that where a ruling either in admitting or excluding evidence is not influential the error will be regarded as harmless.⁴

§ 642. Instructions—What errors are in general regarded as Uninfluential—Errors in instructions which the record shows

mitting a party to give evidence upon a point that he is not obliged to prove is a harmless error. *Linard v. Crossland*, 10 Texas, 462, S. C. 60 Am. Dec. 213; *Donley v. Camp*, 22 Ala. 659, S. C. 58 Am. Dec. 274; *Sims v. Boynton*, 32 Ala. 353, S. C. 70 Am. Dec. 540.

¹ *Knowles v. Dow*, 22 N. H. 387, S. C. 55 Am. Dec. 163. In such a case as that cited the decision might well be placed upon the ground that the party invited the ruling and is, therefore, precluded from successfully complaining. It may happen in such a case, as it does in many others, that the ruling of the trial court may be upheld upon more reasons than one. In matters of procedure it is often true that a case may be brought within one rule with almost as much propriety as another. One who sustains a ruling has very frequently more than "one string to his bow."

² *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26; *Warson v. McElroy*, 33 Mo. App. 553.

³ *People v. Mullings*, 83 Cal. 138, 12 Crim. Law Mag. 436. It is evident that this rule ought to apply to a persistent offer to prove facts which it is assumed a witness will testify to, for such offers, as every lawyer of experience knows, do often wrongfully and materially influence jurymen. A party who persists in a course so manifestly unfair and so clearly disrespectful to the trial court has no reason to complain if it costs him the judgment he obtains. The doctrine can not, of course, apply where the offers are of essentially different evidence.

⁴ The rule prevails where the decision is rendered by the trial court upon a motion to strike out or reject evidence. *Wasson v. Hodsire*, 108 Ind. 26; *Rotan v. Stoeber*, 81 Ind. 145. See, generally, *Johnson v. Gwin*, 100 Ind. 466; *Baker v. Carr*, 100 Ind. 330; *Henry v. Carson*, 96 Ind. 412; *Kimble v. Seal*, 92 Ind. 276; *Newcomer v. Hutchings*, 96 Ind. 119.

were not likely to mislead the jury are regarded as harmless.¹ The general rule is well settled, and the only difficulty in its practical enforcement is in determining what errors were or were not influential. Irrelevant instructions are as a general rule, but not always, regarded as harmless, although they may be erroneous.² Where instructions are given by the court substantially the same as those requested by the party who complains there is no error in refusing to give the instructions asked.³ Although instructions should properly direct the jury upon the measure of damages, nevertheless, if the court gives an erroneous instruction it will be regarded as harmless if it affirmatively appears from the record that the amount of damages assessed is correct.⁴ If it affirmatively appears from the

¹ The rule stated in the text is so well settled and so familiar that it is unnecessary to cite cases for the simple purpose of supporting it, and we have therefore cited cases only for the purpose of illustrating its application in particular instances: *Armstrong v. Tait*, 8 Ala. 635, S. C. 42 Am. Dec. 656; *Klingle v. Boelter*, 44 Minn. 172, 46 N. W. Rep. 306; *Hogshead v. State*, 120 Ind. 327, 22 N. E. Rep. 330; *Whidden v. Seelye*, 40 Me. 247, S. C. 63 Am. Dec. 661; *Walters v. Jordan*, 13 Ired. Law, 361, 57 Am. Dec. 558; *Bosley v. Chesapeake, etc., Co.*, 3 Gill & J. 450, S. C. 22 Am. Dec. 337; *Johnson v. Evans*, 8 Gill, 155, S. C. 50 Am. Dec. 669; *Sawyer v. Chicago, etc., Co.*, 22 Wis. 402, S. C. 99 Am. Dec. 49; *Zachary v. Pace*, 9 Ark. 212, S. C. 47 Am. Dec. 744; *Hovey v. Chase*, 52 Me. 304, S. C. 83 Am. Dec. 514; *Lackawanna, etc., Co. v. Doak*, 52 Pa. St. 379, S. C. 91 Am. Dec. 166; *Worley v. Moore*, 97 Ind. 15; *Ricketts v. Harvey*, 106 Ind. 564; *Andis v. Personett*, 108 Ind. 202; *Jones v. Angell*, 95 Ind. 376; *Atkinson v. Dailley*, 107 Ind. 117; *Copeland v. Koontz*, 125 Ind. 126; *Staser v. Hogan*, 120 Ind. 207; *Cooper v. State*, 120 Ind. 377; *West v. Camden*, 135 U. S. 507; *O'Cal-*

laghan v. Bode, 84 Cal. 489, 24 Pac. Rep. 269.

² *Hummel v. Tyner*, 70 Ind. 84; *Atkinson v. Gwin*, 8 Ind. 376; *Parmlee v. Sloan*, 37 Ind. 469; *Felkner v. Scarlet*, 29 Ind. 154; *Wallace v. Cravens*, 34 Ind. 534; *Rollins v. State*, 62 Ind. 46; *Cassel v. Cooke*, 8 Serg. & R. 268, S. C. 11 Am. Dec. 610; *Stockton v. Stockton*, 73 Ind. 510; *Mooney v. Kinsey*, 90 Ind. 33; *Ryman v. Crawford*, 86 Ind. 262.

³ *Patrick v. Graham*, 132 U. S. 627; *Hudson v. Houser*, 123 Ind. 309; *Conrad v. Clauve*, 93 Ind. 476; *Williamson v. Gingling*, 93 Ind. 42; *Logan v. Logan*, 77 Ind. 558; *Union Mutual, etc., Co. v. Buchanan*, 100 Ind. 63, and cases cited: *Chicago, etc., Co. v. Boggs*, 101 Ind. 522; *Louisville, etc., Co. v. Jones*, 108 Ind. 551; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Daegling v. Illinois, etc., Co.*, 33 Ill. App. 341; *McMahon v. Sankey*, 35 Ill. App. 341, S. C. 24 N. E. Rep. 1027.

⁴ *Poland v. Miller*, 95 Ind. 387; *State v. Parish*, 83 Ind. 223; *Chicago, etc., Co. v. Hunter*, 128 Ind. 213, 27 N. E. Rep. 477; *Copeland v. Koontz*, 125 Ind. 126, 25 N. E. Rep. 174; *Anderson v. Donaldson*, 32 Ill. 404; *Linck v. Scheffel*,

record that in no event can the complaining party recover upon the facts, errors in the instructions, however flagrant, may be regarded as harmless.¹ If the answers of the jury to special interrogatories clearly show that the party suffered no substantial injury from a wrong instruction, there is no available error.² An erroneous instruction relating to a point upon which there is no dispute, and having no bearing upon any other, is without prejudicial influence.³ There is no prejudicial error in refusing an instruction asked by a party upon an issue fully decided in his favor.⁴ It is entirely proper to refuse instructions that have no application to the evidence.

32 Ill. App. 17; *Werner v. O'Brien*, 40 Mo. App. 483; *Sanders v. Reister*, 1 Dak. 151, 46 N. W. Rep. 680; *Stephens v. Regenstein*, 89 Ala. 561, 8 So. Rep. 68; Ohio, etc., Co. v. *Dooley*, 32 Ill. App. 228; *Wilson v. Everett*, 139 W. S. 616; *Town of Lake v. Bok*, 33 Ill. App. 45.

¹ *Walbrun v. Babbitt*, 16 Wall. 577; *Barth v. Clise*, 12 Wall. 400; *Evans v. Pike*, 118 U. S. 241; *Deery v. Cray*, 10 Wall. 263; *Brobst v. Brock*, 10 Wall. 519.

² *Louisville, etc., Co. v. Orr*, 84 Ind. 50; *Worley v. Moore*, 97 Ind. 15; *Whitewater R. R. Co. v. Budgett*, 94 Ind. 216; *Cline v. Lindsey*, 110 Ind. 337. 11 N. E. Rep. 441; *Woolery v. Louisville, etc., Co.*, 107 Ind. 381; *Cleveland, etc., Co. v. Newell*, 104 Ind. 264; *Ronan v. Meyer*, 84 Ind. 390; *Moore v. Lynn*, 79 Ind. 299; *Louisville, etc., Co. v. Krinning*, 87 Ind. 351; *Barnett v. Feary*, 101 Ind. 95; *Kuhns v. Gates*, 92 Ind. 66; *Bedford, etc., Co. v. Rainbolt*, 99 Ind. 551; *Hayden v. Souger*, 56 Ind. 42, S. C. 26 Am. Rep. 1; Ohio, etc., Co. v. *Dooley*, 32 Ill. App. 228. Where a case is submitted on an agreed statement of facts, it has been held that instructions need not be noticed. *Payne v. First National Bank*, 43 Mo. App. 377. But we suppose that this can hardly be correct as a general

rule, although it may be correct in some cases, for where parties simply agree as to what facts the evidence will prove there may be material error in directing the jury as to the law.

³ *Tomlinson v. Briles*, 101 Ind. 538.

⁴ *Woodward v. Beegue*, 53 Ind. 176. It is not prejudicial error for the court to refuse to instruct the jury upon matters of known duty, as, for instance, that they should decide the case before them without prejudice, partiality or favor. A party can not complain of the refusal to give instructions asked by his adversary. *Chicago, etc., Co. v. Powell*, 40 Ind. 37. We think, however, that there may be cases where a party could justly complain, as, for instance, if the court had misled him by signifying a purpose to give the instructions asked and then failing to do so. But such a case forms a marked exception to the general rule. Where it affirmatively appears that an instruction is not applicable to the facts, there is no error in refusing it. *Beard v. Sloan*, 38 Ind. 128; *Sering v. Doan*, 23 Ind. 455. See, generally, *Huntington v. Colman*, 1 Blackf. 348; *Fitzgerald v. Jerolaman*, 10 Ind. 338; *Musselman v. Pratt*, 44 Ind. 126; *Hays v. Hynds*, 28 Ind. 531; *Carter v. Pomeroy*, 30 Ind. 438; *Miles v. Douglass*, 34 Conn. 393; *People v. Muller*, 96 N. Y. 408. 413;

§ 643. **Verdict clearly Right on the Evidence, Erroneous Instructions Harmless**—It is held in many cases that when the verdict is clearly right on the evidence errors in instructions may be treated as harmless.¹ The general rule is firmly settled, but there is difficulty in giving it just application to particular instances. Where the evidence is uncontradicted, or where the complaining party could not have prevailed, no matter what instructions were given,² the rule may be readily and easily applied, but where there is some, although apparently no very material conflict in the evidence, there is much difficulty in practically applying the general rule, inasmuch as in such cases there is danger of invading the province of the jury and usurping functions that do not belong to the court. In truth, the application of the rule is in a great measure arbitrary and rests chiefly in the discretion of the court. It is very difficult to reconcile the broad doctrine of some of the cases, which assert that where the verdict is right on the evidence, erroneous instructions may be regarded as harmless, with the long settled and familiar doctrine that the court can not charge upon the weight of evidence or instruct as to the credibility of witnesses.³ It is like-

Jellison v. Goodwin, 43 Me. 287, S. C. 69 Am. Dec. 62; *Thorwegan v. King*, 111 U. S. 549.

¹ *Standard Oil Co. v. Bretz*, 98 Ind. 231; *Ashley v. Foreman*, 85 Ind. 55; *Cheek v. City of Aurora*, 92 Ind. 107; *Mand v. Trail*, 92 Ind. 521; *Musselman v. Wise*, 84 Ind. 248; *Morris v. State*, 94 Ind. 565; *Wolfe v. Pugh*, 101 Ind. 293; *Perry v. Makemson*, 103 Ind. 300; *Cassady v. Magher*, 85 Ind. 228; *Simmon v. Larkin*, 82 Ind. 385; *Louisville, etc., Co. v. Grubb*, 88 Ind. 85; *Payne v. June*, 92 Ind. 252; *Daniels v. McGinnis*, 97 Ind. 549; *Wood v. Ostram*, 29 Ind. 177; *Roberts v. Nodwift*, 8 Ind. 339; *Brooster v. State*, 15 Ind. 190; *Lafayette, etc., Co. v. Adams*, 26 Ind. 76; *Blake v. Hedges*, 14 Ind. 566; *Thompson v. Thompson*, 9 Ind. 323, S. C. 68 Am. Dec. 638; *Davis v. Liberty, etc., Co.*, 84 Ind. 36; *Ledford v. Ledford*, 95 Ind. 283.

² *Donley v. Camp*, 22 Ala. 659, S. C. 58 Am. Dec. 274.

³ *Fulwider v. Ingels*, 87 Ind. 414; *State v. Huffman*, 16 Ore. 15, 16 Pac. Rep. 640; *Frame v. Badger*, 79 Ill. 441; *Jenkins v. Tobin*, 31 Ark. 306; *Wannack v. Mayor, etc.*, 53 Ga. 162; *Clapp v. Bromaghan*, 9 Cow. 530; *Morris v. Lachman*, 68 Cal. 109, 113; *Cutchfield v. Richmond, etc., Co.*, 76 N. C. 320; *McMinn v. Whelan*, 27 Cal. 300; *Rice v. State*, 3 Tex. App. 451; *Commonwealth v. Barry*, 9 Allen, 276; *Gillian v. Ball*, 49 Mo. 249; *State v. Smith*, 49 Conn. 376, 387; *People v. Kelly*, 35 Hun. (N.Y.) 295; *Andrews v. Runyon*, 65 Cal. 629; *Cunningham v. State*, 65 Ind. 377; *Matthews v. Story*, 54 Ind. 417; *Broker v. Scobey*, 56 Ind. 588; *Carter v. Pomeroy*, 30 Ind. 438. See *post*, § —.

wise quite difficult to harmonize the doctrine with the settled rule that where there is any material evidence fairly entitled to consideration a party has a right to have the law applicable to that evidence declared to the jury by the court.¹ The doctrine is one, it is quite safe to say, that is to be cautiously and sparingly applied, for the reason that without the witnesses before the court, it is difficult for the court to correctly weigh the evidence,² and for the further reason that it is almost impossible to undertake that work without invading the province of the jury. The general rule, as declared by high authority is, that where there is a radically erroneous instruction it must appear from the record "beyond doubt," that it did not prejudice the complaining party, or the judgment will be reversed.³ It is probably

¹ *Chamberlin v. Chamberlin*, 116 Ill. 180, 6 N. E. Rep. 444; *State v. Dunlop*, 55 N. C. 288; *Carpenter v. State*, 43 Ind. 371; *People v. Taylor*, 36 Cal. 255.

² In cases far too numerous for citation the courts have declared that they will not weigh the evidence. The soundness of the rule that the courts will not weigh the evidence where all they know of it is what appears in the record, is vindicated in an article in the *Washington Law Rep.* See 33 *Central Law Jour.* 293.

³ In the case of *Gilmer v. Higley*, 110 U. S. 47, 30, the Supreme Court of the United States, in speaking of the contention that the record did not affirmatively show that the complaining party was prejudiced, said: "We have not heard of such a rule in a revisory court. The furthest that any court has gone has been to hold that when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded. This court in *Deery v. Cray*, 5 Wall. 795, 807, used this language: 'Whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.'" To much the same effect is the decision in the case

of *Mobile, etc., Co. v. Jurey*, 111 U. S. 584. While the Supreme Court of the United States asserts, as the extracts made from its opinions show, a very strong doctrine, still it nevertheless fully recognizes the doctrine that error must be prejudicial or there will be no reversal. *Lancaster v. Collins*, 115 U. S. 222; *Smiths v. Shoemaker*, 17 Wall. 630; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294; *Allis v. Ins. Co.*, 97 U. S. 144; *Northern R. R. Co. v. Herbert*, 116 U. S. 642; *Grand Chute Co. v. Winegar*, 15 Wall. 355; *Hornbuckle v. Stafford*, 111 U. S. 389; *Mining Co. v. Taylor*, 100 U. S. 37; *Cooper v. Coates*, 21 Wall. 105. A very strong illustration of the rule that errors which do not prejudice the party complaining are harmless is supplied by the case of *Pence v. Langdon*, 99 U. S. 578. In that case the trial court submitted written instruments to the jury for construction, and it was held that even if this was error it was nothing more than harmless error, for the reason that the jury placed the correct construction upon the instruments. See, also, *Walden v. Bodley*, 14 Pet. 156; *Railroad Co. v. Pratt*, 22 Wall. 123; *Douglass v. McAllister*, 3 Cranch. 298; *Brobst v. Brock*, 10 Wall. 519; *Tweed's Case*, 16 Wall. 504; *Walk-*

true that the language employed in the case just referred to is somewhat stronger than the decisions of the majority of the courts sustained, but the principle asserted is that which generally prevails, and the difference is rather in the method of expressing the rule than as to the rule itself.

§ 644. *Instructions—Verbal Inaccuracies*—The rule is, that an error in framing an instruction is harmless if it was such as could not have misled the jury. Where the context shows the meaning of a term employed in an instruction and the meaning is so controlled as to prevent the jury from being misled as to the law, the error may well be regarded as uninfluential,¹ but where the term itself conveys an erroneous meaning, and it is not controlled or explained by the words with which it is associated, the error must be regarded as prejudicial. This rule simply means that if the language employed is such as to create an erroneous impression upon the minds of the jury, and the impression so created substantially affects a material point in the case, the error is influential against the party to whose interests it is adverse,² otherwise it is not.³

er v. Johnson, 96 U. S. 424; *Evans v. Pike*, 118 U. S. 241. It seems to us that the question is one dependent in most cases upon the character of the error itself, as exhibited by the record in the particular instance. If that error is in itself radical and affects substantial rights in a material degree, or may probably so affect such rights, then the error can not be regarded as uninfluential unless the record, with decisive clearness and strength, affirmatively shows that it did not influence the final decision in the case to the prejudice of the party who complains. See *ante*, § 635, and authorities cited. If this is the true rule then it must follow that the evidence can not decisively show a radical error to be harmless unless it so clearly, strongly and fully sustains the judgment below that it would not be error to sus-

tain a demurrer to the evidence or direct a verdict. But our cases, although in confusion, seem to indicate a rule less strict than that suggested.

¹ *Pittsburgh, etc., Co. v. Sponier*, 85 Ind. 165; *Chambers v. Kyle*, 87 Ind. 83; *Wilson v. Trafalgar, etc., Co.*, 93 Ind. 287; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Hogshead v. State*, 120 Ind. 327, 22 N. E. Rep. 330; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. Rep. 269; *Clem v. Clem* (Ky.), 13 S. W. Rep. 102; *Chambers v. Meaut*, 66 Miss. 625, 6 So. Rep. 465; *Steinkamper v. McManus*, 26 Mo. App. 51.

² *Abbott v. Dwinnell*, 74 Wis. 514, 43 N. W. Rep. 496.

³ *Walburn v. Babbitt*, 16 Wall. 577; *Chicago, etc., Co. v. Whitton*, 13 Wall. 270; *Kimble v. Seal*, 92 Ind. 276.

§ 645. **Erroneous Instructions generally harmless where there is a Special Verdict**—Where there is a special verdict it is unnecessary and, indeed, improper, to instruct the jury upon the general principles of law applicable to the case. As there is no propriety in giving general instructions, and as the law of the case must be pronounced upon the facts contained in the special verdict, general instructions can not, as a rule, be influential.¹ It is proper to instruct as to the form of the verdict and like matters, and it is possible to conceive that prejudicial error may be committed in giving such instructions. So, if the court should undertake, as it might with propriety do, to instruct the jury concerning the rules of evidence, errors in that class of instructions might be so influential and material as to constitute available error. So, again, if the court should invade the province of the jury in such instructions the error might be of such a character as to be deemed prejudicial.

§ 646. **Equity Cases—General Instructions Unnecessary**—As suits in equity are to be ultimately determined by the court and not by the jury general instructions are not required.² As general

¹ Louisville, etc., Co. v. Frawley, 110 Ind. 18; Johnson v. Culver, 116 Ind. 278, 294; Lake Shore, etc., Co. v. Stupak, 123 Ind. 210, 225; Stayner v. Joyce, 120 Ind. 99; Woollen v. Wire, 110 Ind. 251; Indianapolis, etc., Co. v. Bush, 101 Ind. 582; Louisville, etc., Co. v. Hart, 119 Ind. 273; Toler v. Keiher, 81 Ind. 383. The general doctrine was thus stated in Louisville, etc., Co. v. Frawley, *supra*: "There is, therefore, neither propriety nor fitness, that the court should, either upon its own motion or at the request of counsel, give any general instructions as to the law of the case. The jury should be left entirely free to find the facts material to the several issues, without instruction as to whether the law will declare one way or the other, upon the facts or state of facts, which may be found. A statement by the court of matters put in issue by the pleadings and of the rules for weighing or reconciling conflicting testimony,

with whatever else may be necessary to enable the jury clearly to comprehend the subjects which are to be covered by their special verdict, is all that is proper when a special verdict is to be returned." Cole v. Crawford, 69 Texas, 124, 5 S. W. Rep. 646.

² Swales v. Grubbs, 126 Ind. 106, 110. In the case cited the court used this language: "In chancery cases the province of the jury is to find facts, and not to administer equities in the light of legal rules. This is for the court when the facts are ascertained. It is enough, therefore, to say that in a case like the present, general instructions as to the law applicable to the facts are not proper, and available error can not be predicated upon the giving or the refusal to give instructions of a general nature. In that respect the rules which govern where the jury are required to find a special verdict are controlling."

instructions are not required, it must be true, as a general rule. that errors in giving or in refusing instructions in such cases are uninfluential. This conclusion follows from the settled general principle that where the ultimate conclusion is right intermediate errors are harmless,¹ and in the class of cases we are here considering the ultimate decision must be made by the court. If that decision is right the appeal must fail, no matter how erroneous the general instructions may have been. but if wrong, a well taken and properly presented appeal must be sustained no matter how correct the instructions may have been.

§ 647. *Incomplete Instructions*—The general rule, declared and enforced in many cases, is that, if an instruction is good as far as it goes, there is no prejudicial error, although it may not go as far as the party would have been entitled to have it go if he had appropriately and seasonably made the proper request. To make available an error in giving an instruction that does not fully state the law, the party must properly request a full instruction upon the point.² The general rule is not without exceptions, for there may be cases where the instructions are so incomplete as to convey a radically erroneous view of the law, and where this is so, the error, if proper exceptions are taken and saved, may be available for a reversal of the judgment. But to constitute an exception to the general rule the case must be one with strongly marked and very unusual characteristics. The general rule can not, of course, apply where it clearly appears that the instruction assumes to state all that is essential and states only a part, leaving out important and influential elements.³

§ 648. *Instructions—Construction of on Appeal*—Instructions are to be fairly and reasonably construed, and if, when so con-

¹ *Ante*, § 590. "The ultimate ruling is decisive."

² *Post*, § 736. "Requests where instructions are correct as far as they go." See, also, *Moore v. Brown*, 81 Ga. 10, 6 S. E. Rep. 833; *State v. Rook*, 42 Kan. 419, 22 Pac. Rep. 626; *Griffiths v. Clift*,

4 Utah, 462, 11 Pac. Rep. 609; *Vann v. State*, 83 Ga. 44, 9 S. E. Rep. 945; *Milburn Wagon Co. v. Kennedy*, 75 Texas, 212, 13 S. W. Rep. 28.

³ *State v. Bird*, 107 Ind. 154; *Harvey v. Cook*, 24 Ill. App. 134.

strued, there appears no reason to believe that the jury were misled to the injury of the complaining party, errors and inaccuracies contained in them may be treated as entirely uninfluential. The crucial test may be said to be this: Did the instructions, regarded as a whole, present the law of the particular case to the jury with reasonable clearness and accuracy? If the instructions taken as a whole did so present the law, the jury were not misled, and if they were not misled there is, as appears from the authorities heretofore cited, no available error. The rule that the instructions are to be considered as a whole and not in detached fragments has long prevailed, and is asserted in very many cases.¹ It is presumed that the jury acted upon the instructions as a whole, and that their verdict was not controlled by fragmentary or isolated parts of a series of instructions.² If the language employed by the trial court in its instructions is not accurate there is nothing more than harmless error at most, unless the inaccuracy was so great as to have misled "a jury of reasonable intelligence."³ The court is presumed to have framed the instructions to fit the particular case, and the instructions are to be considered with reference to the evidence.⁴ If the instructions considered with reference

¹ *Nave v. Flack*, 90 Ind. 205, 211, and cases cited; *Goodwin v. State*, 96 Ind. 550; *Union, etc., Co. v. Buchanan*, 100 Ind. 63, 74, and authorities cited; *Young v. McFadden*, 125 Ind. 254, 257; *Coble v. Eltzroth*, 125 Ind. 429; *Clanin v. Fagan*, 124 Ind. 304; *Conway v. Vizard*, 122 Ind. 266; *Atkinson v. Dailey*, 107 Ind. 117; *Brown v. State*, 105 Ind. 385; *Hodges v. Bales*, 102 Ind. 494; *Blanchard v. Jones*, 101 Ind. 542; *Eggleston v. Castle*, 42 Ind. 531; *United States v. Tenney (Ariz.)*, 8 Crim. Law. Mag. 486; *Lewis v. State*, 18 Texas App. 401; *Carrington v. Pacific, etc., Co.*, 1 Cal. 475; *Clark v. McElvy*, 11 Cal. 154; *People v. Turcott*, 65 Cal. 126; *Edwards v. Cary*, 60 Mo. 572; *Bartling v. Behrends*, 20 Neb. 211; 29 N. W. Rep. 472.

² *Union Mutual, etc., Co. v. Buchan-*

an, 100 Ind. 63, 74. In the case cited the court quoted from Judge Thompson's work on charging the jury, this language: "In every case, then, where error is assigned on instructions given or refused, the initial point of inquiry is, were the jury misled?" The court also quoted from the same work the following: "The jury are presumed to have understood the charge according to the fair import of its terms when taken together." *Thompson on Charging the Jury*, § 131.

³ *City of Indianapolis v. Scott*, 72 Ind. 196, 203; *McDonel v. State*, 90 Ind. 320, 327; *Louisville, etc., Co. v. Falvey*, 104 Ind. 409, 435.

⁴ *Price v. Johnson County*, 15 Mo. 433; *Smith v. Carr*, 16 Conn. 450; *Hooksett v. Amoskeag, etc., Co.*, 44 N. H. 105; *Lyman v. Redman*, 23 Me. 289; *Caosc*

to the evidence in the particular case could not have misled the jury, an error in stating a legal proposition will not, as a general rule, constitute available error.¹

§ 649. **Erroneous rulings in selecting and impaneling the jury often Harmless**—There may be a departure from the directions of the statute and a disobedience of the rules of law concerning the selection and impaneling of jurors and yet no available error.² The decided weight of authority is that where a challenge for cause is overruled, but the party without being required to exhaust all of his peremptory challenges secures the rejection of the juror by a peremptory challenge, there is no available error,³ but our decisions declare a different doctrine.⁴ It is, however, held by our court that unless the party is compelled by the ruling of the court to exercise the right of peremptorily challenging at least one juror, no available error is shown.⁵ We are unable to avoid the conclusion that the decision in the case in our own reports referred to⁶ is wrong for the reason that it violates the rule that where it does not

Bank v. Keene, 53 Me. 103; *Sword v. Keith*, 31 Mich. 247; *McBride v. Thompson*, 8 Ala. 650; *Jeffersonville, etc., Co. v. Lyon*, 55 Ind. 477.

¹ *Morford v. Woodworth*, 7 Ind. 83; *Rollins v. State*, 62 Ind. 46; *Stipp v. Spring Mill, etc., Co.* 54 Ind. 16; *Fitzgerald v. Jerolaman*, 10 Ind. 338; *Huntington v. Colman*, 1 Blackf. 348; *Swank v. Nichols*, 24 Ind. 199.

² *Sage v. State*, 127 Ind. 15; *Hardin v. State*, 22 Ind. 347; *Cooper v. State*, 120 Ind. 377; *State v. Mellor*, 13 R. I. 666; *Commonwealth v. Brown*, 147 Mass. 585; *State v. Merriman* (So. Car.), 12 S. E. Rep. 619; *People v. O'Brien*, 88 Cal. 483, 26 Pac. Rep. 362; *Londoner v. People*, 15 Col. 557, 26 Pac. Rep. 135; *Williams v. State*, 28 Tex. App. 301, 14 S.W. Rep. 388; *State v. Rockwell* (Iowa), 48 N.W. Rep. 721; *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. Rep. 255; *People v. Coffman*, 59 Mich. 1, 26 N. W. Rep. 207; *Babcock v. Peo-*

ple, 13 Col. 515, 22 Pac. Rep. 517; *Green v. State*, 88 Tenn. 614.

³ *Blackwell v. State* (Texas), 15 S. W. Rep. 597; *People v. Alpin*, 86 Mich. 393, 49 N.W. Rep. 148; *State v. Jackson*, 42 La. Ann. 1170, 8 So. Rep. 297; *State v. Aarons* (La.), 9 So. Rep. 114; *State v. Green*, 42 La. 644, 9 So. Rep. 47; *Drake v. State* (N. J.), 20 Atl. Rep. 747; *State v. Brady*, 107 N. C. 822, 12 S. E. Rep. 325; *Schoeffler v. State*, 3 Wis. 823; *Burt v. Panjaud*, 99 U. S. 180; *Freeman v. People*, 4 Denio, 9; *State v. Davis*, 41 Iowa, 311; *Wilson v. People*, 94 Ill. 299; *Conway v. Clinton*, 1 Utah, 215; *State v. Raymond*, 11 Nev. 98; *Mimms v. State*, 16 Ohio St. 221, *McGowan v. State*, 9 Yerg. 154; *People v. Gaunt*, 23 Cal. 156.

⁴ *Brown v. State*, 70 Ind. 576.

⁵ *Stephenson v. State*, 110 Ind. 358, 362, distinguishing *Brown v. State*, *supra*.

⁶ *Brown v. State*, *supra*.

appear that some substantial right was denied a party, the judgment can not be reversed.

§ 650. Misconduct of Jurors—The general rule, as declared in many cases, is that a breach of duty on the part of jurors is not available as error for the reversal of the judgment, unless it was of such a character as to authorize the inference or presumption that it injured the complaining party.¹ If the alleged misconduct operates in favor of the complaining party, he can not successfully insist that the wrong of the jury shall be treated as available error.² A party who expressly or impliedly invites the misconduct is not in a situation to make the conduct of the juror available for the reversal of the judgment.³

§ 651. Special Interrogatories to Jury—What Rulings are harmless although Erroneous—It is not available error to refuse to submit to a jury interrogatories calling for conclusions of law.⁴ Nor is it prejudicial error to refuse to submit interrogatories calling for matters of evidence merely.⁵ If it clearly appears

¹ *Cooper v. State*, 120 Ind. 377; *Mergentheim v. State*, 107 Ind. 567; *City of New Albany v. McCulloch*, 127 Ind. 500, 507; *Henning v. State*, 106 Ind. 386; *Drew v. State*, 124 Ind. 9; *Luck v. State*, 96 Ind. 16; *Achey v. State*, 64 Ind. 56; *Long v. State*, 95 Ind. 481, 486; *Flatter v. McDermitt*, 25 Ind. 326; *Porter v. State*, 2 Ind. 435; *Stutsman v. Barringer*, 16 Ind. 363; *Carter v. Ford, etc., Co.*, 85 Ind. 180; *McCarthy v. Kitchen*, 59 Ind. 500; *Medler v. State*, 26 Ind. 171; *Whelchell v. State*, 23 Ind. 89; *Harrison v. Price*, 22 Ind. 165; *McClary v. State*, 75 Ind. 260; *Morningstar v. Cunningham*, 110 Ind. 328; *Indianapolis v. Scott*, 72 Ind. 196; *Riley v. State*, 95 Ind. 446; *Henry v. Ricketts*, 1 Cranch. C. C. 545; *State v. Baker*, 63 N. C. 276; *Newell v. Ayers*, 32 Me. 334; *State v. Cucuel*, 31 N. J. L. 249; *Portis v. State*, 27 Ark. 360.

² *Allen v. State*, 61 Ga. 166; *Medler v. Dunn*, 26 Ind. 171.

³ *United States v. Salentine*, 8 Biss. C. C. 404.

⁴ *Chicago, etc., Co. v. Ostrander*, 116 Ind. 259; *Toledo, etc., Co. v. Goddard*, 25 Ind. 185; *Pittsburgh, etc., v. Adams*, 105 Ind. 151; *Louisville, etc., Co. v. Worley*, 107 Ind. 320; *Korrady v. Lake Shore, etc., Co. (Ind. Sup. Ct.)*, 29 N. E. Rep. 1069.

⁵ *Louisville, etc., Co. v. Hubbard*, 116 Ind. 193, 196; *Trentman v. Wiley*, 85 Ind. 33; *Manning v. Gasharie*, 27 Ind. 399; *Skillen v. Jones*, 44 Ind. 136; *Gates v. Scott*, 123 Ind. 459; *Louisville, etc., Co. v. Pedigo*, 108 Ind. 481; *Atchison, etc., Co. v. Plunkett*, 25 Kan. 188; *Dubois v. Campau*, 28 Mich. 304; *Miner v. Vedder*, 66 Mich. 97, 33 N. W. Rep. 47; *Louisville, etc., Co. v. Cauley*, 119 Ind. 142, 21 N. E. Rep. 546; *Blacker v. Slown*, 114 Ind. 322; *Heiney v. Garretson*, 1 Ind. App. 548, 27 N. E. Rep. 989.

that the facts sought to be elicited by the answers could exert no influence upon the final decision there is no error in refusing the interrogatories, at all events, nothing more than a harmless error.¹ Where immaterial or improper interrogatories are submitted to the jury there is no harmful error in refusing to compel the jury to answer them.² There is no error in refusing to submit an interrogatory that is not reasonably definite and specific.³ It is not error to refuse to submit an interrogatory where another has been propounded covering the same ground.⁴ It is, indeed, the right of the court to control the form and number of interrogatories, so that specific questions of fact shall be fairly presented to the jury without useless repetition.⁵ Permitting leading interrogatories to be submitted to the jury is not erroneous.⁶ If erroneous but immaterial interrogatories are submitted to a jury the error is not an influential one.⁷ Interrogatories not asked in due form and at the proper time may, as has been elsewhere shown, be refused.⁸

¹ Indianapolis, etc., Co. v. Stout, 76 Ind. 196; Huston v. McCloskey, 76 Ind. 38; Mutual, etc., Co. v. Cannon, 48 Ind. 264; Indianapolis, etc., Co. v. Rutherford, 29 Ind. 82; Donohue v. Dryer, 23 Ind. 521; Gilmore v. Bright, 101 N. C. 382, 7 S. E. Rep. 751; Hablichtel v. Yambert, 75 Ia. 539; Whalen v. Chicago, etc., Co., 75 Ia. 563, 39 N. W. Rep. 894; Van Horn v. Overman, 75 Ia. 421, 39 N. W. Rep. 679; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. Rep. 493; Northwestern Mutual, etc., Co. v. Helmann, 94 Ind. 24; Cottrell v. Shadley, 77 Ind. 348; Boots v. Griffiths, 97 Ind. 241; Chapin v. Clapp, 29 Ind. 611; Grosco v. Rainier, 111 Ind. 361.

² Town of Albion v. Hetrick, 90 Ind. 545; Porter v. Waltz, 108 Ind. 40; Campbell v. Frankem, 65 Ind. 591.

³ Morse v. Morse, 25 Ind. 156.

⁴ Louisville, etc., v. Kane, 120 Ind. 140; Nichols v. State, 65 Ind. 512; Scheible v. Slagle, 89 Ind. 323; Terry v. Shively, 93 Ind. 413; Ward v. Busack,

46 Wis. 407; Schreiber v. Butler, 84 Ind. 576.

⁵ Jewell v. Chicago, etc., Co., 54 Wis. 610; Davis v. Town of Farmington, 42 Wis. 252; Louisville, etc., Co. v. Cauley, 119 Ind. 142, 21 N. E. Rep. 546; Cotzhausen v. Simons, 47 Wis. 103; Singer, etc., Co. v. Sammons, 49 Wis. 310; Rosser v. Barnes, 16 Ind. 502; Murray v. Abbott, 61 Wis. 198; Missouri, etc., Co. v. Holley, 30 Kan. 465; City of Indianapolis v. Lawyer, 38 Ind. 343, 371. "It is not the object of the statute to permit many interrogatories to go to the jury and certainly not to permit the repetition of questions. The statute was designed to elicit material facts, not mere items of evidence."

Louisville, etc., Co. v. Kane, 120 Ind. 140.

⁶ Rice v. Rice, 6 Ind. 100; Harriman

v. Queen Ins. Co., 49 Wis. 71.

⁷ Indianapolis, etc., Co. v. Rutherford, 29 Ind. 82.

⁸ Post, § 737. "Request for the submission of interrogatories to the jury."

§ 652. **Errors in Rulings upon Verdicts that are regarded as Harmless**—The general rule is that there is no available error in refusing to set aside a verdict for informalities, irregularities or defects that do not exert a material influence upon the final decision of the case.¹ Where a verdict covers the value of property not claimed in the complaint and the plaintiff enters a *remittitur* for a sum exceeding the value of the property, the mistake of the jury exerts no influence upon the ultimate result, and there is no prejudicial error in rendering judgment for the plaintiff.² It is generally true that where the jury find for a party and designate a sum upon which interest is recoverable, leaving nothing to do in order to ascertain the amount of recovery but compute the interest, it is not error for the court to make the computation and add the interest to the sum specifically named in the verdict.³ Surplusage does not vitiate a verdict, and an erroneous ruling refusing to strike out mere surplusage does not constitute available error.⁴ Where the in-

¹ *Daniels v. McGinnis*, 97 Ind. 549; *Morrisette*, 46 Minn. 10, 48 N.W. Rep. 416; *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. Rep. 881; *Miles v. Edsall*, 7 Mont. 185, 14 Pac. Rep. 701; *Commonwealth v. Certain Intoxicating Liquors*, 148 Mass. 124, 19 S. E. Rep. 23; *Burlingame v. Central, etc., Co.*, 23 Fed. Rep. 706; *Dalrymple v. Williams*, 63 N. Y. 361; *Cogan v. Ebdon*, 1 Burr, 383.
Jones v. Julian, 12 Ind. 274; *Zink v. Dick*, 1 Ind. App. 269, 27 N. E. Rep. 622; *Hall v. King*, 29 Ind. 205; *Alexandria, etc., Co. v. Painter*, 1 Ind. App. Ct. 587, 28 N. E. Rep. 113; *Board v. Pearson*, 120 Ind. 426; *Bartley v. Phillips*, 114 Ind. 189; *Carver v. Carver*, 83 Ind. 368; *North, etc., Co. v. Crayton*, 86 Ga. 499, 12 S. E. Rep. 877; *New York, etc., Co. v. Gallagher*, 79 Texas, 685, 15 S. W. Rep. 694; *Patry v. Chicago, etc., Co.*, 77 Wis. 218; *Meeker v. Gardelia*, 1 Wash. St. 139; *Jeansch v. Lewis* (S. Dak.), 48 N.W. Rep. 128. See, generally, *Woodard v. Davis*, 127 Ind. 172, 25 N. E. Rep. 687; *Lyons v. Planters', etc., Bank*, 86 Ga. 485, 12 S. E. Rep. 882; *Thayer v. Burger*, 100 Ind. 262; *State v. Wilson*, 40 La. Ann. 751, 5 So. Rep. 52; *Harkey v. Cain*, 69 Texas, 146, 6 S. W. Rep. 637; *Snyder v. United States*, 112 U. S. 216; *Lincoln v. Iron Co.*, 103 U. S. 412. *Ante*, §§ 342, 343.

² *Perkins v. Marrs*, 15 Col. 262, 25 Pac. Rep. 168. See, generally, *Abbott v.*

³ *Buchanan v. Townsend* (Texas), 16 S. W. Rep. 315; *Clapp v. Martin*, 33 Ill. App. 438; *Thames, etc., Co. v. Beville*, 100 Ind. 309; *Gaff v. Hutchinson*, 38 Ind. 341; *McCormick v. Hickey*, 24 Mo. App. 362; *Beyer v. Soper, etc., Co.*, 76 Wis. 14, 44 N. W. Rep. 833. See *contra*. *Silsby v. Frost*, 3 Wash. Ty. 388, 17 Pac. Rep. 887.

⁴ *Conner v. Winton*, 8 Ind. 315; *Dunlop v. Hayden*, 29 Ind. 303; *Thompson v. Lassiter*, 85 Ala. 223, 6 So. Rep. 33; *Van Meter v. Barnett*, 119 Ind. 35, 20 N. E. Rep. 426; *Indiana, etc., Co. v. Finnell*, 116 Ind. 414, 19 N. E. Rep. 204; *Louisville, etc., Co. v. Frawley*, 110

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CHAPTER V.

PREJUDICIAL ERROR.

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| <p>to determine whether error is prejudicial the entire record must be examined.</p> <p>cases wherein prejudicial error may exist.</p> <p>making the remedy.</p> <p>of remedies—Waiver of rights.</p> <p>ordinary and extraordinary remedies.</p> <p>consequences of mistaking the remedy—Making the error available.</p> <p>ties to the action—Necessary and proper.</p> <p>necessary parties—Illustrative cases.</p> <p>criterion for determining who are necessary parties.</p> <p>who should be plaintiffs and who defendants—General rule.</p> | <p>§ 663. Joinder of parties.</p> <p>664. A right of action must exist in all who join in a complaint.</p> <p>665. Pleadings — Motion to make specific.</p> <p>666. Rulings on demurrer.</p> <p>667. A wrong ruling which operates to exclude material facts is prejudicial.</p> <p>668. Error once effectively saved is sufficient.</p> <p>669. The difference between overruling and sustaining a demurrer to one of several paragraphs of a pleading.</p> <p>670. Rulings in admitting and excluding evidence.</p> <p>671. Conduct of the trial.</p> <p>672. Misconduct of parties and counsel.</p> <p>673. Interrogatories to the jury.</p> |
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To determine whether Error is Prejudicial the entire Record must be Examined—Whether a wrong ruling is of such a prejudicial nature as to authorize or require a reversal of the judgment assailed by the appeal depends, as has been elsewhere shown, upon the influence it exerts upon the ultimate result rendered in the case.¹ If it contributes in a material way to bring about a wrong result it is a prejudicial error and will be so regarded. If the ruling is wrong and is of such character and influence as make it probable that it operated adversely to the party who properly specifies error, it will be reversible for a reversal of the judgment. Whether it did prob-

¹ *Ante*, § 590. "The ultimate ruling is decisive."

tertion of the jury is clearly manifested by their verdict, it is not error for the court to make formal amendments by supplying omissions or the like, so as to make the verdict fully express the decision really reached by the jury, but not accurately expressed.¹ The judge can not, however, in any case where a jury trial is demandable as a matter of right so change the form of the verdict as to make it embody his decision and not that of the jury.²

Ind. 18, 29. In the case of Louisville, etc., Co. v. Hart, 119 Ind. 273, 282, it was said by the court: "If the matter objected to is immaterial, the court will treat it as surplusage, and the party making the motion can not, therefore, be prejudiced because of the immaterial matter, but if the matter objected to is material then it should not be struck out. And if the court should entertain a motion to strike out a part of a verdict, then the verdict would no longer be the verdict of the jury, but the finding of the court." The case of Louisville, etc., Co. v. Flanagan, 113 Ind. 488, was cited in the case from which we have quoted. The caption to a verdict is surplusage and an error therein is harmless. *Rogers v. Overton*, 87

Ind. 410; *Miller v. Morgan*, 143 Mass. 25.

¹ *Crich v. Williamsburgh, etc., Co.* 45 Minn. 441, 48 N. W. Rep. 198; *State v. Knight*, 46 Mo. 83; *Case v. Colter*, 66 Ind. 336; *Smith v. Meldren*, 107 Pa. St. 348; *Fathman v. Tumulty*, 34 Mo. App. 236; *Hodkins v. Mead*, 119 N. Y. 166, 23 N. E. Rep. 559; *Segelke v. Finan*, 48 Hun. 310; *Matthewson v. Stewart*, 2 How. U. S. 263; *Clark v. Lamb*, 8 Pick. 415; *Hay v. Osterout*, 3 Ohio, 384; *Henley v. Mayor*, 6 Bing. 100.

² *McDonald v. Union, etc., Co.* 42 Fed. Rep. 579; *Gaither v. Wilmer*, 71 Md. 361, 18 Atl. Rep. 590; *Acton v. Dooley*, 16 Mo. App. 441, 449.

CHAPTER V.

PREJUDICIAL ERROR.

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| § 653. To determine whether error is prejudicial the entire record must be examined. | § 663. Joinder of parties. |
| 654. Rulings wherein prejudicial error may exist. | 664. A right of action must exist in all who join in a complaint. |
| 655. Mistaking the remedy. | 665. Pleadings — Motion to make specific. |
| 656. Election of remedies—Waiver of torts. | 666. Rulings on demurrer. |
| 657. Ordinary and extraordinary remedies. | 667. A wrong ruling which operates to exclude material facts is prejudicial. |
| 658. Consequences of mistaking the remedy — Making the error available. | 668. Error once effectively saved is sufficient. |
| 659. Parties to the action—Necessary and proper. | 669. The difference between overruling and sustaining a demurrer to one of several paragraphs of a pleading. |
| 660. Necessary parties—Illustrative cases. | 670. Rulings in admitting and excluding evidence. |
| 661. A criterion for determining who are necessary parties. | 671. Conduct of the trial. |
| 662. Who should be plaintiffs and who defendants—General rule. | 672. Misconduct of parties and counsel. |
| | 673. Interrogatories to the jury. |

§ 653. **To determine whether Error is Prejudicial the entire Record must be Examined**—Whether a wrong ruling is of such a prejudicial nature as to authorize or require a reversal of the judgment assailed by the appeal depends, as has been elsewhere shown, upon the influence it exerts upon the ultimate decision rendered in the case.¹ If it contributes in a material degree to bring about a wrong result it is a prejudicial error and will be so regarded. If the ruling is wrong and is of such character and influence as make it probable that it operated harmfully to the party who properly specifies error, it will be available for a reversal of the judgment. Whether it did prob-

¹ *Ante*, § 590. "The ultimate ruling is decisive."

ably work harmfully is in many instances to be ascertained from an examination of the entire record, for, if the facts or recitals of the record are such as authorize the inference or presumption that a wrong ruling operated to the injury of the party who complains, the judgment must fall.¹ But the influence and effect of a wrong ruling are not ordinarily determined by considering the ruling itself isolated and detached from other parts of the record; on the contrary, the appellate tribunal will examine the entire record, and if, from such an examination, it appears that the wrong ruling did not influence the ultimate decision to the injury of the complaining party it will not be considered as prejudicial error.² In general, the evidence is not regarded as part of the record proper in cases where the search is made for the purpose of determining whether a manifestly wrong ruling worked harm, but there are cases where the evidence will be regarded as part of the record even in such instances as those wherein the search is prosecuted for the purpose of ascertaining whether a wrong ruling exerted a prejudicial influence upon the ultimate decision.³

§ 654. Rulings wherein Prejudicial error may Exist—A prejudicial error exists, as a general rule, where a party is wrongfully deprived of a right to a trial of his cause according to the established rules of law as well as where the ruling directly affects a primary and substantive right. Thus, it is error to deny a party the right to have the jury answer material, proper and relevant interrogatories, or to deny him a trial by jury where the law secures it to him, or to deny him the right to the testi-

¹ See *post*, § 666. "A wrong ruling which operates to exclude material facts is prejudicial."

² In *Higgins v. Carlton*, 28 Md. 115, S. C. 92 Am. Dec. 666, it was said: "It has been repeatedly settled by the decisions of this court that a judgment will not be reversed where it appears from the record that the appellants have not been injured by the rulings of the court below, although such rulings may be erroneous. For this purpose, it is proper to look to the whole record,

and not, as was argued in this case, to that part only of the record which precedes and includes the particular exception under consideration." The validity of the conclusion is perfectly clear when it is brought to mind that there are many instances where error is effectually cured or completely obviated by other rulings exhibited in the record.

³ *Ante*, § 638. "Resorting to the evidence to avoid the effect of an erroneous ruling upon demurrer."

mony of competent witnesses, and so it is to deny a recovery where he proves the existence of some primary right, and its wrongful invasion, as, for instance, where a plaintiff proves a verbal contract for the purchase of land, possession taken and improvements made under the contract, and the court refuses to enforce the contract upon the mistaken theory that the contract is made voidable by the statute of frauds. It is obvious that in such a work as this it is chiefly rulings directly affecting the remedy and not the primary right that require consideration, since a consideration of substantive or primary rights is only incidentally connected with the general subject of the work. But while it is true that such a work as this deals chiefly and directly with rights affecting the procedure, or, as Mr. Pomeroy calls them, "remedial rights,"¹ still, primary or substantive rights must often come under consideration in an incidental way, inasmuch as it is often true that an error will be disregarded because the complaining party shows no primary or substantive right. Where it appears from the record that there is no right of that nature that can possibly be injuriously affected, there can be no prejudicial error. In many cases the courts have refused to reverse a judgment, although the errors in the mode of procedure were manifest, upon the ground that the record showed that there was no substantive right existing in the party by whom the erroneous rulings were sought to be made available. A prejudicial error may be committed where a substantive right is invaded by granting a kind of relief not authorized by law, as, for instance, in granting an injunction where nothing more than a fugitive trespass is shown. So, a prejudicial error may be committed in upholding a party who pursues a wrong remedy, as, for instance, in awarding a mandamus to coerce performance of an ordinary business contract entered into between individual citizens. Again, prejudicial error may be committed in permitting a recovery in a proceeding of one class where it would not be error to award a recovery in another proceeding. Thus, a party may by appeal re-

¹ "Remedial rights, or rights of remedy, are rights which an injured person has to avail himself of some one or more of these final means, or to avail himself of some or more of these final equivalents." Pomeroy's Remedies, 3.

cover in a case where he seeks to avoid an assessment for the construction of a ditch, a street or a road, and yet fail in an injunction proceeding.

§ 655. **Mistaking the Remedy**—Where the common law prevails errors in choosing the remedy much oftener occur than in jurisdictions where the code system is in force. A party who declared in assumpsit when the appropriate action was debt could not recover at common law because his error was a material one. But, while there is much less danger of mistaking the remedy under the code system than there is under the common law, there is, nevertheless, danger of electing the wrong remedy under the code system, liberal as it is and little as it regards matters of form. There are many matters affecting the remedy that lie beneath form and are matters of substance. The declaration of the statute that forms of actions are abolished does not abrogate the distinction between substantive rights of radically different classes, nor does it entirely abrogate the distinction between different classes of remedial rights.¹ It is clear that a prejudicial error may occur in choosing the remedy even under the liberal system created by the provisions of the code, although much less likely to occur than under the common law rules of procedure. Remedies are and must always be essentially different, no matter what system may prevail. Thus, a complaint for mandate must plead a state of facts radically different from those required in an ordinary action for a breach of contract. Even in actions of the same general class

¹ In *Myers v. Field*, 37 Mo. 434, 441, it was said: "The distinction between law and equity has not been abolished by the new code of practice. Equitable rights are still to be determined according to the doctrine of equity jurisprudence, and in the peculiar modes which are sometimes required in such cases, and legal rights are to be ascertained and adjudged upon principles of law; and the rules of proceeding at law are in many respects very different from those which are applied to equity cases. Pleadings should be drawn up with ref-

erence to these distinctions, though in the form prescribed by statute. Where the petition is framed for legal redress, the plaintiff can not be allowed to prove his equitable rights, though the facts be stated to some extent in his petition. If he seeks equitable relief, the facts must be stated in such manner as to show that he is entitled to the relief prayed for under the former practice. If he claims redress at law the essential elements of his cause of action must be stated with reasonable certainty and clearness."

there must be some definite theory to which the facts pleaded are applicable and relevant, for without such a theory no definite and distinct issue could be framed, and without such an issue no case can be properly tried. It would be impossible to determine whether evidence is relevant or whether a judgment is within the issues unless there is a definite theory outlined in the pleadings so that it is rightly held, as it has often been, that a pleading must proceed upon a definite theory.¹

§ 656. **Election of Remedies—Waiver of Torts**—The long established principle that a party may elect to waive a right to sue in tort and sue in contract exists under the code system.² It is, indeed, difficult to conceive how the substantive principle can be abrogated without producing injustice. As long as the right to elect exists, that long the question of what theory shall be adopted will be an important one, exerting a very material influence upon the choice of remedies. This conclusion must be inexorably true, for the manifest reason that in no other way can the waiver be indicated than by the theory of the pleading,

¹ Illinois, etc., *Co. v. Slatton*, 54 Ill. 133; Michigan, etc., *Co. v. McDonough*, 21 Mich. 165, S. C. 4 Am. Rep. 466; Lake Shore, etc., *Co. v. Perkins*, 25 Mich. 329; Lockwood *v. Quackenbush*, 83 N. Y. 607; *Judy v. Gilbert*, 77 Ind. 96, S. C. 40 Am. Rep. 289; *Mes- call v. Tully*, 91 Ind. 96, and cases cited; *Moorman v. Wood*, 117 Ind. 144, 147, and cases cited; *Pearson v. Pearson*, 125 Ind. 341, 344, and cases cited; Chicago, etc., *Co. v. Bills*, 104 Ind. 13; *Trentman v. Neff*, 124 Ind. 503; *Bingham v. Stage*, 123 Ind. 281, 285; *First National Bank v. Root*, 107 Ind. 224; *Cottrell v. Ætna Life Ins. Co.*, 97 Ind. 311; Toledo, etc., *Co. v. Levy*, 127 Ind. 168, 170, and cases cited; Louisville, etc., *Co. v. Reynolds*, 118 Ind. 170; *Harris v. Hannibal, etc., Co.*, 37 Mo. 307; *Batterson v. Chicago, etc., Co.*, 49 Mich. 184, 8 Am. & Eng.

R. R. Cases, 123; *Waldhier v. Hannibal, etc., Co.*, 71 Mo. 514.

² *Shelly v. Vanarsdoll*, 23 Ind. 543; *Adams v. Sage*, 28 N. Y. 103; *Wilmot v. Richardson*, 2 Keyes (N. Y.), 519; *Bixbie v. Wood*, 24 N. Y. 607; *Union Bank v. Mott*, 27 N. Y. 633; *McKnight v. Dunlap*, 4 Barb. 36, 42; *Hinds v. Tweedle*, 7 How. Pr. R. 278, 281; *Harpending v. Shoemaker*, 37 Barb. 270; *Chambers v. Lewis*, 2 Hilt (N. Y.), 591; *Leach v. Leach*, 2 T. & C. (N. Y.) 657; *Tryon v. Baker*, 7 Lans. 511, 514; *Roberts v. Evans*, 43 Cal. 380; *Gordon v. Bruner*, 49 Mo. 570, 571; *Putnam v. Wise*, 1 Hill, 234, 240; *Berly v. Taylor*, 5 Hill, 577, 584; *Norden v. Jones*, 33 Wis. 600, 604; *Campbell v. Perkins*, 8 N. Y. 430; *Wallace v. Morss*, 5 Hill, 391; *Roth v. Palmer*, 27 Barb. 652; *Wigand v. Sichel*, 3 Keys (N. Y.), 120; *Morris v. Rexford*, 18 N. Y. 552.

since names go for nothing, as there is but one form of action, and the prayer does not give character to the pleading. Its character is to be determined from its general tenor and scope.¹ The election to waive the tort may exert a controlling influence upon the question of parties, inasmuch as where the action is *ex delicto* parties may be severally liable, whereas in an action *ex contractu* the liability may be joint.² So, the mode of stating the facts may change the character of a case so as to require more or different evidence, although the case may, however the facts may be stated, belong to the class of actions *ex delicto*. Thus, in a reported case, a plaintiff sued for injury done by a sow of the defendants which went upon the plaintiff's land and injured his cow, but as he did not sue, as he might have done, for the trespass, laying the injury to the sow as a matter of aggravation, he lost his case because of a failure to prove the vicious propensity of the sow, although he would have gained it had he sued for damages resulting from the trespass.³ A mistake in the election of a remedy may bring disaster in cases of a different class from those mentioned. Thus, where an infant is sued in contract instead of in tort, the plea of infancy may enable him to avoid liability, although if sued in tort the plea would not have availed him.⁴ The remedy sometimes

¹ Over *v.* Schiffing, 102 Ind. 191; City of North Vernon *v.* Voegler, 103 Ind. 314; Louisville, etc., Co. *v.* Schmidt, 106 Ind. 73; First National Bank *v.* Root, 107 Ind. 224; Houck *v.* Graham, 106 Ind. 195; Neidefer *v.* Chastain, 71 Ind. 363; S. C. 36 Am. Rep. 198; Reynolds *v.* Copeland, 71 Ind. 422; Ivens *v.* Cincinnati, etc., Co., 103 Ind. 27; State *v.* Wenzel, 77 Ind. 428.

² The rule as to contracts is stated in the cases of Bledsoe *v.* Irvin, 35 Ind. 293; Gilbert *v.* Allen, 57 Ind. 524; Boorum *v.* Ray, 72 Ind. 151. The rule in cases of torts is shown in the cases of Brady *v.* Ball, 14 Ind. 317; American Express Co. *v.* Patterson, 73 Ind. 430; Fleming *v.* McDonald, 50 Ind. 278;

Hunt *v.* Lane, 9 Ind. 248; Silvers *v.* Nerdlinger, 30 Ind. 53.

³ Van Leuven *v.* Lyke, 1 N. Y. 515. See, for an illustration of the consequences of mistaking the remedy, Campbell *v.* Stakes, 2 Wend. 137. As illustrating the extent to which the law goes in allowing incidental damages in cases of trespass *quare clausum fregit*, see Bennett *v.* McIntyre, 121 Ind. 231, 233; Rasor *v.* Qualls, 4 Blackf. 286; Taylor *v.* Cole, 3 Term R. 292; Davenport *v.* Russell, 5 Day, 145; Bennett *v.* Allcott, 2 Term. R. 166.

⁴ Campbell *v.* Stakes, 2 Wend. 137; Studwell *v.* Shapter, 54 N. Y. 249; Fish *v.* Ferris, 5 Duer. 49; Wallace *v.* Morss, 5 Hill, 391; Walker *v.* Davis, 1 Gray, 506. See, generally, Vasec *v.*

exerts an important influence upon the defense of the statute of limitations, for it may be prejudicial error to apply a statute governing one class of actions to actions of a different class.¹ Thus, a party sued as a trustee may be unable to make the statute of limitations available, whereas if sued upon a promise the plea of the statute would be good.² A defense founded upon a discharge in bankruptcy may be good in an action *ex contractu* and yet not available in an action *ex delicto*. But where the relationship is shown to be a fiduciary one, the nature of the remedy is not controlling. A right to a set-off may exist where the action is in contract, but not where the action is in tort.³ Where a party elects to waive the tort and sue upon the contract he may let in the claim of the defendant, whereas he might by an action in tort have recovered a judgment against which the right of exemption could not be made available.⁴ If an election is once effectively made it is irrevocable, and a judgment rendered is conclusive upon the same facts against the plaintiff, but this rule does not always apply to a plaintiff who suffers defeat solely upon the ground that he did not pursue the appropriate remedy.⁵

§ 657. **Ordinary and Extraordinary Remedies**—The rule that where an ordinary remedy will afford full and complete relief

Smith, 6 Cranch. 225, 230; Elwell v. Martin, 32 Vt. 217; Towne v. Wiley, 23 Vt. 354; Root v. Stevenson, 24 Ind. 115; Carpenter v. Carpenter, 45 Ind. 142; Rice v. Boyer, 108 Ind. 472.

¹ Huffman v. Hughlett, 11 Lea (Tenn.), 549; McCombs v. Guild, 9 Lea, 81. See, generally, Lane v. Boicourt, 128 Ind. 420.

² Wilson v. Brookshire, 126 Ind. 497; Cunningham v. McKindley, 22 Ind. 149; Albert v. State, 65 Ind. 413; Raymond v. Simonson, 4 Blackf. 77; Smith v. Calloway, 7 Blackf. 86; Churchman v. City of Indianapolis, 110 Ind. 259.

³ Allen v. Randolph, 48 Ind. 496; Chambers v. Lewis, 11 Abb. Pr. 206.

⁴ Davis v. Henson, 29 Ga. 345; War-

ner v. Cammack, 37 Iowa, 642; Schouton v. Kilmer, 8 How. Pr. 527. In Nowling v. McIntosh, 89 Ind. 593, the doctrine stated in the text is recognized, but it was held that the tort was not waived. The court cited the cases of Patterson v. Crawford, 12 Ind. 241; Patterson v. Prior, 18 Ind. 440; Jones v. Gregg, 17 Ind. 84; Morford v. White, 53 Ind. 547; Cooper v. Helsabeck, 5 Blackf. 14.

⁵ Bulkley v. Morgan, 46 Conn. 393; Bailey v. Hervey, 135 Mass. 172; Moller v. Tuska, 87 N. Y. 166; Dibblee v. Sheldon, 10 Blatch. 178; Farwell v. Myers, 59 Mich. 179; Voorhees v. Earl, 2 Hill, 288; Goss v. Mather, 2 Lans. 283; Strong v. Strong, 102 N. Y. 69, 73.

resort can not be made to an extraordinary one is almost as potent under the code procedure as it was under the old common law and chancery systems. A party who states a cause of action entitling him to only ordinary relief can not, upon that cause of action, obtain extraordinary relief.¹ Where the ordinary remedy is adequate and efficacious that remedy must be pursued.² The general doctrine stated is, perhaps, more frequently applied in cases where injunctions are sought than in any other class of cases, and it is uniformly held that where an ordinary remedy will afford complete and prompt relief an injunction will not be awarded.³ The redress by in-

¹ We are not speaking of legal and equitable remedies, we may say, to prevent possible misconception, but of ordinary and extraordinary remedies.

² "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity." By the court in *Watson v. Sutherland*, 5 Wall. 74. This doctrine has been adopted and enforced by our own and other courts. *English v. Smock*, 34 Ind. 115, 124, S. C. 7 Am. Rep. 215; *Elson v. O'Dowd*, 40 Ind. 300, 302; *Clark v. Jeffersonville, etc., Co.*, 44 Ind. 248; *Thatcher v. Humble*, 67 Ind. 444; *Spicer v. Hoop*, 51 Ind. 365, 370; *Bonnell v. Allen*, 53 Ind. 130; *Bishop v. Moorman*, 98 Ind. 1, 4; *Denny v. Denny*, 113 Ind. 22, 26; *City of Hartford v. Chipman*, 21 Conn. 488; *Scott v. Scott*, 33 Ga. 102; *Bunce v. Gallagher*, 5 Blatchf. 481; *Hunt v. Danforth*, 2 Curt. (C. C.) 592; *Witter v. Arnett*, 8 Ark. 57; *McDaniel v. Lee*, 37 Mo. 204; *Morris v. Thomas*, 17 Ill. 112. The Supreme Court of Pennsylvania holds a very liberal doctrine upon the general subject, for it has adjudged that it is sufficient to authorize the employment of an equitable remedy where it appears to be the more convenient one. *Bierbowers' Appeal*, 107 Pa. St. 14; *Kirk-*

patrick v. M'Donald, 11 Pa. St. 387; *Appeal of the Brush Electric Co.*, 114 Pa. St. 574, 585. The authorities to which we have referred are generally directed to the question of the right to resort to an ordinary equitable remedy where there is some legal remedy, but they all have an important bearing upon the general question of the right to resort to an extraordinary remedy where the ordinary remedy is inadequate or inefficacious.

³ *Sparling v. Dwenger*, 60 Ind. 72; *McQuarrie v. Hildebrand*, 23 Ind. 122; *White Water Valley, etc., Co. v. Comegys*, 2 Ind. 469; *Laughlin v. City of Lamasco*, 6 Ind. 223; *Indianapolis, etc., Co. v. City of Indianapolis*, 29 Ind. 245; *Centreville, etc., Co. v. Barnett*, 2 Ind. 536; *Bolster v. Catterlin*, 10 Ind. 117; *Hartman v. Heady*, 57 Ind. 545; *Smith v. Goodknight*, 121 Ind. 312; *Caskey v. City of Greensburgh*, 78 Ind. 233; *Ricketts v. Spraker*, 77 Ind. 371; *Hendricks v. Gilchrist*, 76 Ind. 369; *Bass v. City of Fort Wayne*, 121 Ind. 389; *Marshall v. Gill*, 77 Ind. 402, and cases cited. *Sims v. City of Frankfort*, 79 Ind. 446, and cases cited. *Littleton v. Smith*, 119 Ind. 230; *Terre Haute, etc., Co. v. Soice*, 128 Ind. 105, and cases cited. *Pearson v. Pierson*, 128 Ind. 479; *Cooper v. Hamilton*, 8 Blackf. 377; *Thatcher v. Humble*, 67 Ind. 444; *Bar-*

junction is of an extraordinary character, and because it is such, and not simply because it is an equitable remedy, resort to it is forbidden where an ordinary remedy properly pursued would yield all the relief the party is entitled to either in a court of conscience or a court of law. Some of the cases, we venture to say, go rather too far in the direction of holding that the line between suits in equity and actions at law is as broad as it was before the adoption of the code system, for where the facts are well and fully stated the court will apply the proper remedy, by administering either legal or equitable rules as the facts stated may require, but this does not imply that a party can plead facts entitling him to a remedy of one class and secure a remedy of a radically different class.¹ He can not make a case of one class and secure relief grantable in a case belonging to a class altogether different. Thus, a party who states facts entitling him to sue for a breach of contract does not state a cause of action entitling him to relief by injunction.² It happens not unfrequently that parties fall into fatal error by instituting proceedings for a writ of mandate where the appropriate remedy is an ordinary action for damages resulting from a breach of contract.³ Parties mistake

agree *v.* Cronkhite, 33 Ind. 192; Schwab *v.* City of Madison, 49 Ind. 329; Duncan *v.* Hollidaysburgh, etc., Co., 136 Pa. St. 478; Hagerty *v.* Lee (N. J.), 21 Atl. Rep. 933; Turner *v.* Norton, 31 Ill. App. 423; Shepherd *v.* Groff, 34 W. Va. 123, 11 S. E. Rep. 997; Spitz *v.* Kerfoot, 42 Mo. App. 77; Steinau *v.* Cincinnati, etc., Co. (Ohio), 27 N. E. Rep. 545; Saltsburg Gas Co. *v.* Borough, etc., 138 Pa. St. 250, 20 Atl. Rep. 844; Hemsley *v.* Myers, 45 Fed. Rep. 283; Thompson *v.* Weeks, 32 Ill. App. 642; Thomas *v.* Musical, etc., Union, 121 N. Y. 45; Bodman *v.* Lake Fork, etc., Co., 132 Ill. 439; Diffendal *v.* Virginia, etc., Co., 86 Va. 459. We have cited these cases not so much for the purpose of supporting our statement of the general rule (for that is so firmly settled as to need no support from decided cases) as

for the purpose of showing the various applications of the rule.

¹ Morgan *v.* Lake Shore, etc., Co. (Ind.), 28 N. E. Rep. 548.

² Ricketts *v.* Spraker, 77 Ind. 371.

³ State *v.* Trustees, etc., 114 Ind. 389; Marshall *v.* State, 1 Ind. 72; Harrison School Tp. *v.* McGregor, 96 Ind. 185; Board *v.* Hicks, 2 Ind. 527; Board *v.* State, 11 Ind. 205; Louisville, etc., Co. *v.* State, 25 Ind. 177; State *v.* Board, 63 Ind. 497; Board *v.* State, 38 Ind. 193, 196; State *v.* Board, 45 Ind. 501; Shelby Tp. *v.* Randles, 57 Ind. 390; Holliday *v.* Henderson, 67 Ind. 103; State *v.* Snodgrass, 98 Ind. 546; State *v.* Zanesville, etc., Co., 16 Ohio St. 308; State *v.* Patterson, etc., Co., 43 N. J. L. 505; State *v.* Republican River, etc., Co., 20 Kan. 404; People *v.* Dulaney, 96 Ill. 503; Collett *v.* Allison (Ok.), 25 Pac. Rep.

their remedy in some instances by selecting the wrong remedy although both remedies are extraordinary ones. Thus, a party claiming an office mistakes his remedy when he seeks possession or control of the office by a suit for injunction instead of by an information in the nature of a *quo warranto*.¹ In a similar class of cases, that of attacks upon corporate existence, parties mistake their remedy by attacking the existence of the corporation collaterally, or by adopting some other remedy than *quo warranto*, which is in all such cases the appropriate remedy.² On the other hand, fatal mistakes are sometimes made by proceeding by information in the nature of a *quo warranto*, in cases where the appropriate remedy is an ordinary action to recover damages for injury resulting from an invasion of a mere private right, as, for instance, in the case of a trespass upon land.³

516; *People v. Board*, 60 Hun. 486, 584, 15 N.Y. Supp. 308. Where there is an adequate remedy by appeal a party can not have a writ of mandamus. *White v. Burkett*, 119 Ind. 431; *State v. Board*, 45 Ind. 501. As illustrating the difference between actions for a breach of contract and an action to compel the specific performance of duty by an officer having money in his hands due the petitioner, see *Ingerman v. State*, 128 Ind. 225.

¹ *Beal v. Ray*, 17 Ind. 554; *Case v. State*, 69 Ind. 46; *McGee v. State*, 103 Ind. 444; *Reynolds v. State*, 61 Ind. 392; *Gass v. State*, 34 Ind. 425; *Griebel v. State*, 111 Ind. 369, 12 N.E. Rep. 700; *Osborne v. State*, 128 Ind. 129, and cases cited. *Williams v. State*, 69 Texas, 368, 6 S.W. Rep. 845; *State v. Owens*, 63 Texas, 261; *State v. Meehan*, 45 N.J. Law, 189; *Davidson v. State*, 20 Fla. 784; *Osgood v. Jones*, 60 N.H. 543; *French v. Cowan*, 79 Me. 426; *Tarbox v. Sughrue*, 36 Kan. 225; *State v. Board*, 39 Kan. 85, 19 Pac. Rep. 2; *Collins v. Huff*, 63 Ga. 207; *People v. Waite*, 70 Ill. 25; *Territory v. Haxhurst*, 3 Dak. 205; *State v. Stein*, 13 Neb. 529; *Farrington v. Turner*, 53

Mich. 72, S.C. 51 Am. Rep. 88; *Frey v. Michie*, 68 Mich. 323.

² *Bateman v. Florida*, etc., 26 Fla. 423, 8 So. Rep. 51; *State v. Bailey*, 16 Ind. 46; *Danville, etc., Co. v. State*, 16 Ind. 456; *State v. Town of Tipton*, 109 Ind. 73; *Albert v. State*, 65 Ind. 413; *Brookville & Greensburgh Turnpike, etc., Co. v. McCarty*, 8 Ind. 392; *Baker v. Neff*, 73 Ind. 68; *Logan v. Vernon, etc., Co.*, 90 Ind. 552; *State v. Woodward*, 89 Ind. 110; *State v. Beck*, 81 Ind. 500; *North v. State*, 107 Ind. 356; *Barren Creek, etc., Co. v. Beck*, 99 Ind. 247; *Western, etc., Co. v. Central, etc., Co.*, 116 Ind. 229; *Cincinnati, etc., Co. v. Clifford*, 113 Ind. 460; *Jussen v. Board*, 95 Ind. 567; *White v. State*, 69 Ind. 273; *Covington, etc., Plank Road Co. v. Moore*, 3 Ind. 510; *State v. Trustees, etc.*, 5 Ind. 77; *Stoops v. Greensburgh, etc., Co.*, 10 Ind. 47; *President, etc., v. Hamilton*, 34 Ind. 506; *John v. Farmers, etc., Bank*, 2 Blackf. 367, S.C. 20 Am. Dec. 119; *Williams v. Citizens Ry. Co. (Ind.)*, 29 N.E. Rep. 408.

³ *State v. Kill Buck Turnpike Co.*, 38 Ind. 71; *People v. Hillsdale, etc., Co.*, 2 Johns. 190.

§ 658. **Consequences of Mistaking the Remedy—Making the Error Available**—It seems quite clear that where there is a radical mistake in electing a remedy, there is an influential error affecting the final decision in the particular case. We suppose, however, that a mistake in the remedy is not always available as error unless the question is properly made and saved in the trial court. This conclusion is in harmony with the general principle that where parties proceed upon a definite theory in the court below they will be held to that theory on appeal,¹ and it is also in strict and close harmony with the general rule that questions not presented to the trial court will be deemed waived.² The doctrine we state has been applied to a case wherein no objection was made to the remedy.³ The rule under the old system, where the line was closely drawn between the jurisdiction of the courts of chancery and the courts of law and each inch of borderland as stoutly fought for as was ever a disputed borderland between hostile tribes, was that if no objection was made in the court of original jurisdiction none could be successfully made on appeal,⁴ and certainly the rule should

¹ *Ante*, Chapter XXIV, "Holding parties to trial court theories."

² *Ante*, Chapter XXIII, "Questions that may be first made on appeal."

³ In the case of *Town of Mentz v. Cook*, 108 N.Y. 504, 15 N.E. R. 541, the plaintiff filed a complaint for an injunction, the appellant did not by answer or demurrer challenge his right to an injunction in the trial court, but he did challenge it on appeal, and the court held that the appellant's position was untenable, saying: "The answer admitted the authority of the chosen forum to determine the issues presented and made no efforts to withdraw them from that tribunal. It appears to be settled by a very general concurrence of authority that a defendant can not when sued in equity avail himself of the defense that an adequate remedy at law exists unless he pleads it in his answer. *Grardin v. Le Roy*, 2 Paige, 509; *Le Roy v. Platt*, 4 Paige, 77; *Truscott v.*

King, 6 N. Y. 147; *Cox v. James*, 45 N. Y. 557; *Green v. Milbank*, 3 Abb. New Cases, 138; *Pam v. Vilmar*, 54 How. Pr. 235. The rule proceeds upon the basis that parties may by their mutual assent litigate their differences in a court of equity, where the assent of the defendant if withheld might induce the court to refrain from the exercise of its jurisdiction." The case from which we have quoted is approved in the case of *Buffalo, etc., Co. v. Delaware, etc., Co.* (N. Y.), 29 N. E. Rep. 121, and its doctrine extended to a case where the defendant failed to object in the trial court to the remedy of mandamus adopted by the plaintiff. It was said: "The objection not having been taken by answer or on the trial is not available in this court."

⁴ *Amis v. Myers*, 16 How. (U. S.), 492, 493; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Cummings v. Mayor*, 11 Paige, 596; *Creeley v. Bay State*,

be no less liberal in favor of the rightful exercise of jurisdiction under the code system which goes so far towards breaking down all distinctions. It is, as we believe, safe to say that the general rule is, that where the wrong remedy is chosen and no objection is interposed in the trial court at any stage of the proceedings, the presumption is that the parties assented to the theory that the remedy adopted was the appropriate one. This general rule can not, however, apply where there is no general jurisdiction of the subject of the controversy, or no right in any case to administer the remedy selected. If, for instance, a court has no right in any case to entertain jurisdiction in *quo warranto* proceedings, silence would not preclude a party from successfully making the objection on appeal. This general doctrine would also be controlling where a court is expressly inhibited from entertaining jurisdiction in cases where constitutional questions are involved, and in cases where actions of a designated class are expressly and imperatively excluded from its jurisdiction. It would not, however, prevail where there is general jurisdiction of the subject and the only error or irregularity is in the election of one of several of the remedies which the court has jurisdiction to administer.

§ 659. **Parties to the Action—Necessary and Proper**—The subject of parties to actions is one of such wide extent that we can

etc., Co., 103 Mass. 514; *Sexton v. Pike*, 13 Ark. 193. See, also, *Parker v. Winnipiseogee Co.*, 2 Black (U. S.), 545, 551; *Hipp v. Babin*, 19 How. (U. S.), 271, 277, 278. In *Sexton v. Pike*, *supra*, it was said: "The objection here that there was full, adequate and complete remedy at law, is made too late, as it does not appear to have been raised or insisted upon at any time in the court below, either upon demurrer, in the answer or otherwise at the hearing." The Supreme Court of Massachusetts, in *Creeley v. Bay State, etc., Co.*, *supra*, uses this language: "The objection that the plaintiff has a complete and adequate remedy at common law, even if well founded, comes too late. An ob-

jection of this kind should have been made on demurrer, or at least should have been specially relied upon in the answer, and not raised for the first time at the hearing upon pleadings which suggest no such defense." In *Cumming v. Mayor*, *supra*, Chancellor Walworth said: "I am inclined to think the complainants could have recovered at law upon this contract, and that if that objection had been taken at the proper time it would have been fatal. It was too late, however, to ask the court to turn them around to a new suit at the hearing, after the defendants had suffered them to go to the expense of taking proofs without objection."

not give it a very full discussion, nor is it to be expected that such a subject will be fully discussed in a work of this character, but it is nevertheless necessary to give it some consideration inasmuch as one great source of prejudicial error would otherwise be unnoticed. In what follows upon the subject of parties we are to be understood as referring to parties in the court of original jurisdiction, for we have elsewhere discussed the subject of parties in the appellate tribunal.¹ It may be said at the outset that where a necessary party is not brought into the case, and the question is properly made,² the failure to bring in such a party is generally such an error as will require a reversal of the judgment. There is, however, a difference between necessary and proper parties, and this difference is a radical one exerting a very important influence in procedure. Necessary parties must, whenever their presence is appropriately requested, be brought into court, and when not in court an objection founded upon their absence will generally prevail, but it is seldom prejudicial error to refuse to sustain an objection because of the absence of proper parties, although it is sometimes prejudicial error to deny a request to make proper parties. It is never error to join proper parties, since one of the great objects of the code is to secure a complete adjudication of all controversies relating to the same subject in one action or suit in all cases where it can be appropriately or properly accomplished.³ That necessary parties must be made, and

¹ *Ante*, Chapter VII, "Parties."

² It is to be observed that the objection that the necessary parties are not before the court must be made in the mode prescribed by law or it will be waived. There are few, if any, subjects upon which the doctrine of waiver exerts a greater influence.

³ It has been held in many cases that the code adopts the chancery rule, and it is also held that it somewhat enlarges the rule. The reports abound in cases upon the subject, and we have collected a few showing the various applications that have been made of the doctrine. *Adair v. Mergentheim*, 114 Ind. 303;

Masters v. Templeton, 92 Ind. 447; *Searle v. Whipperman*, 79 Ind. 424; *Hampson v. Fall*, 64 Ind. 382; *Quill v. Gallivan*, 108 Ind. 235; *Bundy v. Cunningham*, 107 Ind. 360; *Stockwell v. State*, 101 Ind. 1, and cases cited; *Hoes v. Boyer*, 108 Ind. 494; *Ulrich v. Drischell*, 88 Ind. 354, and authorities cited; *Roberts v. Abbott*, 127 Ind. 83; *Horn v. Indianapolis, etc., Bank*, 125 Ind. 381, 396; *Woodworth v. Zimmerman*, 92 Ind. 349, and cases cited; *Ballew v. Roller*, 124 Ind. 557, 558, and cases cited; *McCaffrey v. Corrigan*, 49 Ind. 175. See, generally, upon the subject of settling a controversy in one suit,

that proper parties may be made, is a general rule easily stated, but it is not easily applied in actual practice. The difficulty is in determining who are and who are not necessary parties. It may be said in a general way that if no judgment or decree can be rendered without the presence of designated persons they are necessary parties to the suit or action,¹ but that when some judgment or decree can be rendered complete and effective as to the parties in court, other persons, although they may be proper parties,² are not necessary parties to the suit or action. Thus, a mortgagor who has sold his equity of redemption is a proper but not a necessary party to the suit to foreclose the mortgage where no personal judgment is sought.³

Griffin v. Hodshire, 119 Ind. 235, 243; *Henderson v. Henderson*, 3 Hare's Ch. 100, 115; *Bramblett v. McVey* (Ky.), 15 S. W. Rep. 49; *Hausmelt v. Patterson*, 124 N. Y. 349, 26 N. E. Rep. 937; *Albere v. Kingsland*, 13 N. Y. Supp. 794; *Weaver v. Van Akin*, 77 Mich. 588, 43 N. W. Rep. 1081; *First Nat. Bank v. Hummel*, 14 Col. 259, 23 Pac. Rep. 986; *Cape Girardeau, etc., Co. v. Hatton*, 102 Mo. 45; *Myers v. Duabenbiss*, 84 Cal. 1, 23 Pac. Rep. 1027; *Stallings v. Barrett*, 26 So. Car. 474, 2 S. E. Rep. 483; *Christian v. Atlantic, etc., Co.*, 133 U. S. 233; *Lieb v. Lichtenstein*, 121 Ind. 483.

¹ *Pattison v. Shaw*, 6 Ind. 377; *Mack v. Grover*, 12 Ind. 254; *Masters v. Templeton*, 92 Ind. 447, 451; *Wright v. Bundy*, 11 Ind. 398. In *Bittinger v. Bell*, 65 Ind. 445, 452, the court said: "The persons who ought to be and must be made defendants under the code, as we construe it, are the parties in interest adverse to the plaintiff, an interest involved in the issues, and who of necessity will be and must be affected by the judgment in the cause. So, also, any person, who is a necessary party to a complete determination or settlement of the issues involved, must by the letter of the statute be made a defendant to the action." The court cited *Newcomb v. Horton*, 18 Wis. 566.

² *Greenup v. Crooks*, 50 Ind. 410;

Martin v. Noble, 29 Ind. 216; *Davenport v. Barnett*, 51 Ind. 329; *Goodall v. Mopley*, 45 Ind. 355; *Trayser v. Trustees, etc.*, 39 Ind. 556; *McKernan v. Neff*, 43 Ind. 503; *Persons v. Alsip*, 2 Ind. 67; *West v. Shryer*, 29 Ind. 624; *Ætna Life Ins. Co. v. Finch*, 84 Ind. 301; *Fitzpatrick v. Papa*, 89 Ind. 17; *Hagan v. Walker*, 14 How. (U. S.) 29; *Williams v. Banhead*, 19 Wall. 563; *Shellenbarger v. Biser*, 5 Neb. 195; *Chambers v. Nicholson*, 30 Ind. 349; *Meredith v. Lackey*, 14 Ind. 529; *Sumner v. Coleman*, 20 Ind. 486; *Wright v. Field*, 7 Ind. 376; *Crawford v. Crockett*, 55 Ind. 220; *Crouse v. Holman*, 19 Ind. 30.

³ *Burkham v. Beaver*, 17 Ind. 367; *Petry v. Ambroscher*, 100 Ind. 510, 512; *Shaw v. Hoadley*, 8 Blackf. 165; *Brown v. Stead*, 5 Simons, 535; *Swift v. Edson*, 5 Conn. 153; *Stevens v. Campbell*, 21 Ind. 471; *Davis v. Hardy*, 76 Ind. 272; *West v. Miller*, 125 Ind. 70, citing *Bennett v. Mattingly*, 110 Ind. 197; *Watts v. Julian*, 122 Ind. 124; *Hammons v. Bigelow*, 115 Ind. 363; *Gaskell v. Viquesney*, 122 Ind. 244, 250; *Dailey v. Kinsler* (Neb.), 47 N. W. Rep. 1045; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. Rep. 858; *DeForest v. Thompson*, 40 Fed. Rep. 375; *Cline v. Inlow*, 14 Ind. 419.

§ 660. **Necessary Parties—Illustrative Cases**—In the preceding paragraph we roughly outlined the difference between necessary and proper parties, but the outline given is hardly distinct and full enough to answer our purpose or convey an adequate conception of the subject of prejudicial errors committed in rulings respecting parties. To fill out the outline it seems necessary to refer to the decisions somewhat in detail. It may be said, in the beginning, that the real party or parties in interest must be before the court either as plaintiffs or as defendants; when parties in interest will not join as plaintiffs they may be made defendants.¹ The general rule upon the subject of the real party in interest may be said to be this: The person entitled to receive the money or property recovered in the action or suit is the real party in interest. There are exceptions to this general rule, notably that created by the rule that the trustee of an express trust may sue in his own name.² But where the ordinary relation of principal and agent exists the former is the real party in interest and must sue; the agent is not the trustee of an express trust within the meaning of the code.³

¹ *Hill v. Marsh*, 46 Ind. 218; *Wall v. Galvin*, 80 Ind. 447; *Shoemaker v. Board*, 36 Ind. 175; *Sourse v. Marshall*, 23 Ind. 194; *Blair v. Shelby Co. Association*, 28 Ind. 175. As to who is to be regarded as a real party in interest, see *Jamison v. Jarrett*, 4 Ind. 187; *Bird v. Lanus*, 7 Ind. 615; *Devol v. McIntosh*, 23 Ind. 529; *Cross v. Tuesdale*, 28 Ind. 44; *David v. Calloway*, 30 Ind. 112; *Matthews v. Ritenour*, 31 Ind. 31; *Miller v. Billingsly*, 41 Ind. 489; *Potter v. Smith*, 36 Ind. 231, 236; *Frenzel v. Miller*, 37 Ind. 1; *Durham v. Hall*, 67 Ind. 123; *Board v. Jameson*, 86 Ind. 154; *Pixley v. Van Nostern*, 100 Ind. 34; *Smock v. Brush*, 62 Ind. 156; *Rawlings v. Fuller*, 31 Ind. 255; *Peck v. Sims*, 120 Ind. 345; *Morningstar v. Cunningham*, 110 Ind. 328; *Bostwick v. Bryant*, 113 Ind. 448; *Lane v. Duchac*, 73 Wis. 646, 41 N. W. Rep. 962; *Herron v. Cole*, 25 Neb. 692, 41 N. W. Rep. 765; *Barger v. Hoover*, 120 Ind. 193, 21 N.

E. Rep. 888; *Anderson v. Wyant*, 77 Iowa, 498, 42 N. W. Rep. 382; *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541, 5 So. Rep. 870; *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. Rep. 60; *Hewitt v. Young (Iowa)*, 47 N. W. Rep. 1084; *Filley v. Walker*, 27 Neb. 506, 44 N. W. Rep. 737; *Stuckey v. Fritsche*, 77 Wis. 327, 46 N. W. Rep. 59; *Goodsell v. Western Union Tel. Co.*, 9 N. Y. Supp. 425; *Millani v. Togrini*, 19 Nev. 133, 7 Pac. Rep. 279.

² *Wolcott v. Standley*, 62 Ind. 198; *Holmes v. Boyd*, 90 Ind. 332; *Rinker v. Bissell*, 90 Ind. 375; *Waddle v. Harbeck*, 33 Ind. 231; *Dix v. Akers*, 30 Ind. 431; *Weaver v. Trustee, etc.*, 28 Ind. 112; *Musselman v. Cravens*, 47 Ind. 1; *Landwerlen v. Wheeler*, 106 Ind. 523, 526; *Heavenridge v. Monday*, 34 Ind. 28; *Ætna Ins. Co. v. Baker*, 71 Ind. 102.

³ *Rawlins v. Fuller*, 31 Ind. 255; *Minturn v. Farmers, etc., Co.*, 3 Seld.

The rule that an agent can not sue upon a contract made by him in his representative capacity does not apply where he has accounted to his principal for the claim and satisfied all demands of the principal growing out of the transaction, for the reason that in such a case the agent becomes the equitable owner of the claim.¹ An apparent exception to the general rule that the action must be prosecuted in the name of the real party in interest is found in the cases which hold that a person who has possession of property under a contract to answer to the owner for all injury it may sustain while in his possession, may maintain an action against the wrong-doer who injures it; but this is an apparent and not a real exception, inasmuch as the custodian of property in such a case is the person primarily and directly injured, and, as such, he is truly the real party in interest.² Upon the same general principle which requires that an action be prosecuted in the name of the real party in interest, it must be held that all who have adverse interests in the subject of the controversy that may be injuriously affected by the judgment, must be before the court. This is true whether the subject of the controversy is money, personal property or land.³ The rule is that where a decree is sought against land the owner of the land at the time the suit is commenced is a necessary party. Thus, the owner of the property is a necessary party to a suit to foreclose a mechanics' lien,⁴ and so, also, is the owner of the equity of redemption a necessary party to a suit to foreclose a mortgage.⁵ So, in proceedings in parti-

498; *Grinnel v. Schmidt*, 2 Sandf. (N. Y.) 706.

¹ *Fuller v. Curtis*, 100 Ind. 237.

² *New York, etc., Co. v. Auer*, 106 Ind. 219; *Chicago, etc., Co. v. Linard*, 94 Ind. 319, S. C. 48 Am. Rep. 155, and authorities cited. The general principle enforced by the cases referred to is illustrated by the decisions which declare that parties having a special interest in personal property may maintain replevin. *Walpole v. Smith*, 4 Blackf. 304; *Bradley v. Michael*, 1 Ind. 551; *Dunkin v. McKee*, 23 Ind. 447.

³ *Durham v. Bischof*, 47 Ind. 211; *Winslow v. Winslow*, 52 Ind. 8.

⁴ *Holland v. Jones*, 9 Ind. 495; *Marvin v. Taylor*, 27 Ind. 73, 76, citing *Brown v. Wyncoop*, 2 Blackf. 230; *Shaw v. Hoadley*, 8 Blackf. 165; *Simonds v. Buford*, 18 Ind. 176. But if the land has been sold the vendor is not a necessary party where no personal judgment is sought. *Kellenberger v. Boyer*, 37 Ind. 188.

⁵ In *Daugherty v. Deardorf*, 107 Ind. 527, 528, it was said: "This decree was void as to the owners of the land, for it is a well established rule that if the

tion all who have an estate in the land sought to be partitioned are necessary parties where the proceedings affect the entire property.¹ But where the action for recovery of land affects only the several and distinct rights of the claimant, it is not always necessary to make others parties.² The general doctrine first stated applies to suits to enforce the specific performance of contracts for the conveyance of land.³ One who has conveyed land may be joined as a plaintiff in a suit to enjoin the collection of judgments against him which are paid, but not entered satisfied of record.⁴ It has often been held, as the provisions of the code require it should be, that the assignor of a contract or chose in action in cases where the assignment is not in writing, is a necessary party, and the failure or refusal to so rule where the question is properly presented is prejudicial error.⁵ A case of a different class is that wherein it was held that the pledgor

owners of the mortgaged premises are not made parties to the suit the decree is void as to them." *Day v. Patterson*, 18 Ind. 114; *Pauley v. Cauthorn*, 101 Ind. 91; *Shirk v. Andrews*, 92 Ind. 509; *Mark v. Murphy*, 76 Ind. 534; *Searle v. Whipperman*, 79 Ind. 424; *Griffin v. Hodshire*, 119 Ind. 235; *Curtis v. Gooding*, 99 Ind. 45; *Abbott v. Union, etc.*, Co., 127 Ind. 70, 75.

¹ *Harlan v. Stout*, 22 Ind. 488; *Milligan v. Poole*, 35 Ind. 64, 68; *Clark v. Stephenson*, 73 Ind. 489; *Taylor v. King*, 32 Mich. 42; *Poree's Succession*, 27 La. Ann. 463; *Pearson v. Carlton*, 18 So. Car. 47; *Kester v. Stark*, 19 Ill. 328; *Batterton v. Chiles*, 12 B. Monr. 348, S. C. 54 Am. Dec. 539. The decisions referred to in the note which follows come very near trenching upon true principle, at all events the broad statements made are of doubtful soundness. It is certainly true that where there are undivided estates in land held as owners by different parties all are necessary parties to a suit or action affecting the whole property.

² *Nelson v. Davis*, 35 Ind. 474; *Bethell v. McCool*, 46 Ind. 303; *Chesround v.*

Cunningham, 3 Blackf. 82. The general doctrine stated in the text applies to proceedings to secure the assignment of dower. *Galbreath v. Gray*, 20 Ind. 290.

³ *Indiana Pottery Co. v. Bates*, 14 Ind. 8. Purchasers at a sheriff's sale are necessary parties to an action to set it aside. *Nelson v. Brown*, 20 Ind. 74. See, generally, *Overly v. Tipton*, 68 Ind. 410; *Huston v. Neil*, 41 Ind. 504; *Merritt v. Wells*, 18 Ind. 171; *Meridian, etc., Bank v. Brandt*, 51 Ind. 56; *Roy v. Haviland*, 12 Ind. 364.

⁴ *McCulloch v. Hollingsworth*, 27 Ind. 115.

⁵ *Gordon v. Carter*, 79 Ind. 386; *Scobey v. Finton*, 39 Ind. 275; *Reed v. Garr*, 59 Ind. 299; *Reed v. Finton*, 63 Ind. 288; *Holdridge v. Sweet*, 23 Ind. 118; *Bray v. Black*, 57 Ind. 417; *Hubbell v. Skiles*, 16 Ind. 138; *Elderkin v. Shultz*, 2 Blackf. 345; *Strong v. Downing*, 34 Ind. 300; *Keller v. Williams*, 49 Ind. 504; *Barcus v. Evans*, 14 Ind. 381. See, generally, *Treadway v. Cobb*, 18 Ind. 36; *Connard v. Christie*, 16 Ind. 427; *Riley v. Schawacker*, 50 Ind. 592.

of shares of the capital stock of a corporation was a necessary party to an action against the corporation to compel a transfer of the stock.¹

§ 661. **A Criterion for Determining who are Necessary Parties—** The case last referred to suggests one test, at least, for determining whether parties are necessary or simply proper, in this, that it clearly indicates that a defendant has a right to have brought before the court all persons whose presence is required to fully settle or determine the particular controversy or whose presence is required in order to enable the court to render such a judgment or decree as shall fully protect his rights. Where a controversy can not be finally adjudicated without the presence of all interested the defendant has a right, upon proper motion or request, to insist that they be brought into the case for the reason that their presence is essential to prevent him from being vexed by suits or actions concerning the same subject. Where the controversy concerns property he has a right to have all the parties before the court for the reason that it is just that his interest or estate, if any he has, should be finally adjudicated as against all claimants, or if he has no interest that he should be protected against further litigation. In cases where a defendant is liable with others, it is his right to have them brought into court, so that if he subsequently seeks to compel contribution he may do so without again litigating the question of the joint liability of all to the creditor who sues. It will be found upon an analysis of the cases which proceed on solid principle that the test we have suggested is one of practical importance and utility. The doctrine we have outlined is asserted and enforced in many of the decided cases, and in a great variety of forms and phases. It would occupy much more space than we can give the topic to consider the

¹ *Indiana and Illinois Central Ry. Co. v. McKernan*, 24 Ind. 62. In the case cited it was said, in speaking of the necessity of making the pledgor a party: "Under the facts in this case, Drake was a necessary party; he had an interest in the subject-matter of the litigation, and was a necessary party for complete relief. The railroad company had a right to insist upon his being made a party for the protection of its rights."

cases in detail or even to cite them all, so that all that we can do is to refer to some of the many cases upon the subject.¹

¹ Cases in which it was held that parties were necessary. *Murphy v. Tilly*, 11 Ind. 511; *Luark v. Malone*, 34 Ind. 444; *Duck v. Abbott*, 24 Ind. 349; *Mandlove v. Lewis*, 9 Ind. 194; *Hardy v. Blazer*, 29 Ind. 226; *Elliott v. Stevenson*, 21 Ind. 359; *McCammack v. Clark*, 16 Ind. 320; *Reed v. Finton*, 63 Ind. 288; *Clough v. Thomas*, 53 Ind. 24; *Brady v. Black*, 57 Ind. 417; *Harvey v. Brishbin*, 50 Hun. 376; *Howell v. Foster*, 25 Ill. App. 42; *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 At. Rep. 222; *Prentiss v. Paisley*, 25 Fla. 927, 7 So. Rep. 56; *Tichenor v. Tichenor*, 45 N. J. Eq. 664, 18 Atl. Rep. 301; *Moore v. Gentry*, 25 So. Car. 334; *McMekin v. Richards*, 81 Ga. 192, 6 S. E. Rep. 185; *Hill v. Lewis*, 45 Kan. 162, 25 Pac. Rep. 589; *Tarkington v. Link*, 27 Neb. 826, 44 N. W. Rep. 35; *Masterson v. Little*, 75 Texas, 682, 13 S. W. Rep. 154; *Atchison, etc., Co. v. Benton*, 42 Kan. 698, 22 Pac. Rep. 698; *Wood v. Wheeler*, 106 N. C. 512, 11 S. E. Rep. 590. As illustrative of peculiar phases of the question we cite the following cases: A judgment debtor is a necessary party to a suit by a receiver to reach his equitable interest in a fund. *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190. So is a judgment debtor in a suit by an attorney to enforce a lien against the judgment for professional services. *Adams v. Fox*, 40 N. Y. 577. It has been held that the assignor is a necessary party to a suit to avoid the assignment. *Wilson v. Scott*, 3 Lans. 308; *Hammond v. Hudson River, etc., Co. v.* 20 Barb. 378. Where a creditor has assigned collateral securities to a third person, the former is a necessary party to a suit by the debtor for an accounting. *Lewis v. Varnum*, 12 Abbott Pr. 305. Creditors, it has been held, are necessary parties to a suit against a debtor who has transferred a mortgage which the holder seeks to enforce, although the debtor has made an assignment. *Bard v. Poole*, 12 N. Y. 495. As to who are necessary parties in actions against corporations by stockholders, see *Dismore v. Atlantic, etc., Co.*, 46 How. Pr. 193; *Greaves v. George*, 49 How. Pr. R. 79; *Greaves v. George*, 52 How. Pr. 58, S. C. 16 Abb. Pr. R. (N. S.), 377, S. C. 69 N. Y. 154; *Hand v. Atlantic, etc., Bank*, 55 How. Pr. 231; *Davis v. Trustees, etc.*, 65 N. Y. 278. Several creditors who have been induced to execute a release are necessary parties in a suit to annul it. *Smith v. Schuting*, 14 Hun. 52. As to the interest which makes a party necessary. *Vallette v. Whitewater, etc., Co.*, 4 McLean, 192. In a suit to set aside a fraudulent conveyance the grantor is a necessary party. *Gaylords v. Kilshaw*, 1 Wall. 81, see *Vose v. Philbrook*, 3 Story, C. C. 335. Cases adjudging parties not necessary. *Ridenour v. Wherritt*, 30 Ind. 485; *Scobey v. Finton*, 39 Ind. 275; *Cassaday v. Detrich*, 63 Ind. 485; *Henson v. Ott*, 7 Ind. 512; *Way v. Fravel*, 61 Ind. 162; *Frear v. Bryan*, 12 Ind. 343; *Kaukauna, etc., Co. v. Green Bay, etc., Co.*, 75 Wis. 385, 44 N. W. Rep. 638; *Hart v. Burch*, 130 Ill. 426, 6 Law. Rep. Anno. 371; *Fritch v. Klausing (Ky.)*, 13 S. W. Rep. 241; *People v. Mayor, etc.*, 32 Barb. 35; *Thompson v. Erie, etc., Co.*, 45 N. Y. 468; *Coe v. Beckwith*, 31 Barb. 339; *Spicer v. Hunter*, 14 Abb. Pr. 4; *Van Nest v. Latson*, 19 Barb. 604; *St. Mark, etc., Co. v. Harris*, 13 How. Pr. 95; *Patterson v. Copeland*, 52 How. Pr. 460; *Venable v. Bank*, 2 Pet. 107; *Van Reimsdyk v. Kane*, 1 Gall. 371, 630; *Heath v. Erie, etc., Co.*, 8 Blatch. 347; *Railroad Co. v. Howard*, 7 Wall. 392; *French v. Shoemaker*, 14 Wall. 314; *Carey v. Brown*, 92 U. S. 171.

§ 662. Who should be Plaintiffs and who Defendants—General Rule—A person whose legal rights have been invaded is ordinarily the proper party to institute an action, but if others are united with him in a joint interest they must join with him, or if they will not join, then, under the code, they may, as we have seen, be brought into court as defendants. Joint parties must be plaintiffs for the reason, as the old cases assign¹ that the defendant did not contract with one of them but with all, and he can not be made to answer to a number less than the whole except in some particular cases which form exceptions to the general rule. Under the code system a right may be invaded by a wrongful claim or assertion, as well as by a positive wrongful act. A claim may constitute an actionable wrong, as, for instance, a claim of ownership founded upon a void judicial or official sale. We may, therefore, assert as a general rule that one whose rights are invaded by a tortious act or a wrongful claim which may do him harm is the necessary and proper plaintiff in a suit or action to vindicate the right or redress the wrong. Thus, the owner of land is ordinarily the proper plaintiff in an action to recover damages to the land caused by the wrong. So, in a suit to quiet title the owner is the proper plaintiff, since he has a right to have his land freed from unfounded claims. The person, it may be said generally, who wrongfully invades the plaintiff's rights, is the party against whom the suit or action should be brought. It is in general true that any person who violates the right of another may be sued, whether the right be one of person or of property. If it be true that one person has infringed the rights of another the wrong-doer is liable for the injury inflicted, whether the injury results from a breach of contract or from a tort. Ordinarily, the answer to the question, who violated the plaintiff's rights determines who should be parties defendant. But in cases of torts or of several contracts the injured party, as is well known, is not bound to sue all of the wrong-doers.

¹ *Wetherill v. Langston*, 1 Exch. 644; *Doremus v. Selden*, 19 Johns. 213; *Cabell v. Vaughan*, 1 Wm. Saunders, 1; *Moody v. Sewall*, 14 Me. 295; *Hansel* 291 *i.* 291 *k.*; *Lucas v. Beale*, 10 C. B. 1; *Morris*, 1 Blackf. 307; *Ellis v. Mc-* 739; *Baker v. Jewell*, 6 Mass. 460; *Lemoor*, 1 Bailly L. (So. Car.). 13.

§ 663. **Joinder of Parties**—Prejudicial error may arise out of rulings respecting the joinder of parties, although there is much less liability that error will occur under the code system than under the common law. The common law rules are, however, not abrogated for they still prevail to some extent,¹ although in some instances changed by the code, and in others abrogated. It is in general true that all who are jointly liable to the plaintiff must, as at common law, be made defendants to the action, but, as shown by the cases cited in the note, the common law rule is somewhat modified. The consequence of an error in joining persons as defendants who ought not to be joined is much changed by the code, inasmuch as it provides for judgment in favor of the plaintiff as to those against whom he shows a right to a judgment,² although as to others he may fail. It is always proper, and generally necessary, to make defendants all persons who have jointly invaded the rights of the plaintiff to his injury, or whose presence is required in order to enable the court to pronounce a judgment or decree that will finally and effectively settle the particular controversy.³ Where there is a joint right to a money recovery or to the recovery of per-

¹ *Erwin v. Scotten*, 40 Ind. 389; *Archer v. Heiman*, 21 Ind. 29; *Stockton v. Stockton*, 40 Ind. 225; *State v. Roberts*, 40 Ind. 451; *Rose v. Comstock*, 17 Ind. 1; *Lawrence v. Beecher*, 116 Ind. 312, 314; *Holman v. Langtree*, 40 Ind. 349. See, generally, *Taylor v. Claypool*, 5 Blackf. 557; *Nicklaus v. Roach*, 3 Ind. 78; *Lingenfelter v. Simon*, 49 Ind. 82; *Kennard v. Carter*, 64 Ind. 31; *Robinson v. Snyder*, 74 Ind. 110.

² R. S. 1881, §§ 366, 568; *Hubbell v. Woolf*, 15 Ind. 204; *Fitzgerald v. Genter*, 26 Ind. 238; *Stafford v. Nutt*, 51 Ind. 535; *Carmien v. Whitaker*, 36 Ind. 509; *Graham v. Henderson*, 35 Ind. 195; *Terwilliger v. Murphy*, 104 Ind. 32; *Richardson v. Jones*, 58 Ind. 240; *Wilson v. Buell*, 117 Ind. 315; *Lower v. Franks*, 115 Ind. 334; *Murray v. Ebright*, 50 Ind. 362; *Moyer v. Brand*, 102 Ind. 301,

306; *Stafford v. Nutt*, 51 Ind. 535; *Scotton v. Mann*, 89 Ind. 404; *Blodgett v. Morris*, 14 N.Y. 482; *O'Shea v. Kirker*, 8 Abb. Pr. 69.

³ *Luark v. Malone*, 34 Ind. 444; *Merritt v. Wells*, 18 Ind. 171; *Scobey v. Finton*, 39 Ind. 275; *Mack v. Grover*, 12 Ind. 254; *Wright v. Field*, 7 Ind. 376; *Bragg v. Wetzel*, 5 Blackf. 95; *Wilson v. State*, 6 Blackf. 212; *Rose v. Comstock*, 17 Ind. 1; *Stockton v. Stockton*, 40 Ind. 225; *Erwin v. Scotten*, 40 Ind. 389; *Hall v. Suitt*, 39 Ind. 316; *State v. Roberts*, 40 Ind. 451; *Norvell v. Hittle*, 23 Ind. 346; *Boorum v. Ray*, 72 Ind. 151; *Gilbert v. Allen*, 57 Ind. 524; *McCollum v. Uhl*, 128 Ind. 304; *Bledsoe v. Irvin*, 35 Ind. 293. As a general rule a plaintiff need only look to the records to ascertain who has or who claims to have an interest in land. *Bell v. Cox*, 122 Ind. 153.

sonal or real property the general rule is that all in whom the joint estate, right, or interest exists should unite as plaintiffs.¹ Persons not jointly interested should not be joined as plaintiffs.² Persons having a right to a common relief may in some instances join as plaintiffs.³

§ 664. **Right of Action must exist in all who join in a Complaint**—It has long been the established rule in this jurisdiction that a complaint must state facts showing a cause of action in all who unite in it as plaintiffs. If it does not show a cause of action in all who join in it a demurrer assigning as a cause, "that the complaint does not state facts sufficient to constitute a cause of action" will prevail against it.⁴ The theory seems to be that there is no cause of action, not that there is a defect of parties.

§ 665. **Pleadings, Motions to make Specific**—Under our system the usual remedy for an uncertainty in a pleading is by motion to make more certain or specific and not by demurrer,⁵ so that

¹ *McArthur v. Lane*, 15 Me. 245; *Smoot v. Wathen*, 8 Mo. 522; *Jellison v. Lafonta*, 19 Pick. 244; *Clark v. Vaughan*, 3 Conn. 191; *Gent v. Lynch*, 23 Md. 58; *Sayre v. Sayre*, 17 N. J. Eq. 349; *Braintree v. Southworth*, 4 Gray, 304; *Russell v. Clark*, 7 Cranch. 69; *Prentice v. Kimball*, 19 Ill. 319; *Mandeville v. Riggs*, 2 Pet. 482; *Northern Indiana, etc., Co. v. Michigan Central, etc., Co.*, 5 McLean, 444; *Wilson v. Castro*, 31 Cal. 420; *Brasher v. Van Cortland*, 2 John. Ch. 242; *Park v. Balentine*, 6 Blackf. 223; *Fletcher v. Mansur*, 5 Ind. 267; *Gilbert v. Allen*, 57 Ind. 524; *Tate v. Ohio, etc., Co.*, 10 Ind. 174; *Roberts v. Abbott*, 127 Ind. 83; *Renihan v. Wright*, 125 Ind. 536.

² *Jones v. Cardwell*, 98 Ind. 331.

³ *Field v. Holzman*, 93 Ind. 205; *Town of Sullivan v. Phillips*, 110 Ind. 320.

⁴ *Sims v. Hurst*, 44 Ind. 579; *Maple v. Beach*, 43 Ind. 51; *Neal v. State*, 49 Ind. 51; *Berkshire v. Shultz*, 25 Ind. 523; *Goodnight v. Goar*, 30 Ind. 418;

Debolt v. Carter, 31 Ind. 355; *Fatman v. Leet*, 41 Ind. 133; *Yater v. State*, 58 Ind. 299; *Parker v. Small*, 58 Ind. 349; *Lipperd v. Edwards*, 39 Ind. 165; *Strange v. Lowe*, 8 Blackf. 243; *Griffin v. Kemp*, 46 Ind. 172; *Nave v. Hadley*, 74 Ind. 155; *Peters v. Guthrie*, 119 Ind. 44; *Traders Ins. Co. v. Newman*, 120 Ind. 554, 556; *Kelley v. Adams*, 120 Ind. 340, 342; *Evans v. Schafer*, 119 Ind. 49; *Brumfield v. Drook*, 101 Ind. 190; *Brown v. Critchell*, 110 Ind. 31; *Mann v. Marsh*, 35 Barb. 68; *Dunderdale v. Grymes*, 16 How. Pr. 195. See, generally, *Ritchmyer v. Ritchmyer*, 50 Barb. 55; *Palmer v. Davis*, 28 N. Y. 242; *Simar v. Canaday*, 53 N. Y. 298, 301. As to the common law doctrine, see *Staley v. Barhite*, 2 Caines, 221. *Lewis v. Babcock*, 18 Johns. 443; *Lillard v. Ruckers*, 9 Yerg. 64.

⁵ Among the great number of cases asserting this doctrine are: *Fultz v. Wycoff*, 25 Ind. 321; *Cleveland, etc., Co. v. Wynant*, 119 Ind. 539; *Pennsylvania Co. v. Dean*, 92 Ind. 459; *Falley*

if a party appropriately moves to make a pleading definite and certain it will be prejudicial error to overrule his motion if it is well founded, and the defect pointed out is a material one.¹ It is evident that it is not every instance where a wrong ruling upon a motion to make more specific is made that prejudicial error arises, inasmuch as there may be cases where it would be proper to sustain the motion and yet no substantial injury arise from overruling it.² But, as a party is entitled to reasonably full and clear information of what is alleged against him, and as issues must be definite and certain, there are many instances where certainty and precision are material, and in all such instances it would be harmful error to overrule a motion to make more specific addressed to a complaint materially defective in certainty.

§ 666. **Rulings on Demurrer**—Where a demurrer is overruled to a bad paragraph of a complaint consisting of several paragraphs, there is prejudicial error unless the record affirmatively shows that the judgment rests on a good paragraph or paragraphs. If the record proper clearly shows that the judgment rests on the good paragraph or paragraphs there is no available error, since the court can see from an inspection of the record that no harm was done the complaining party. But it is otherwise where there is no such affirmative showing, and the presumption that the error was prejudicial will be given full effect.³

v. Gribbling, 128 Ind. 110; *Jones v. State*, 112 Ind. 193. "It is only where the pleading is so indefinite and uncertain as to entirely fail to state a cause of action that a demurrer will lie." *Williams v. Board*, 121 Ind. 239, 240; *Snowden v. Wilas*, 19 Ind. 10; *Lewis v. Edwards*, 44 Ind. 333.

¹ *Goodwin v. Walls*, 52 Ind. 268; *Starkweather v. Kittle*, 17 Wend. 20; *Harding v. Griffin*, 7 Blackf. 462. The ruling in *Louisville, etc., Co. v. Henly*, 88 Ind. 535, is so obscure that it is difficult to determine its effect. If it means that a motion to make more specific is not an appropriate one it is clearly wrong.

² *Alleman v. Wheeler*, 101 Ind. 141. In the case cited it was said: "It is quite evident that the facts relied on for a recovery in this action were not as directly and certainly charged as the rules of good pleading required, and that the complaint might, with great propriety, have been ordered to be made more specific." It was, however, held that there was no available error in overruling the motion, but it is questionable whether the decision is defensible. If a party can not secure certainty by a motion he is remediless.

³ *Wolf v. Schofield*, 38 Ind. 175; *Peery v. Greensburgh, etc., Co.*, 43 Ind. 321; *Cook v. Hopkins*, 66 Ind. 208; *Evans-*

It is by no means every erroneous ruling upon the pleadings that may be rendered harmless by other rulings of the court. If, for instance, a demurrer is erroneously sustained to an answer, the defendant may be precluded from availing himself of a valid defense, and it is obvious that where this is so the error is not rendered harmless by a special finding or a special verdict.¹

§ 667. **A Wrong Ruling which operates to Exclude Material Facts is Prejudicial**—It is sometimes said that if the facts as they appear in the record repel the inference of prejudice from an adverse ruling, the ruling, although wrong, can not be made available for the reversal of the judgment. This statement is misleading and requires qualification. It is true, as said in the opening paragraph of this chapter, that the court will examine the entire record to ascertain whether the error was or was not prejudicial, but this does not imply that the court will adjudge the error harmless solely upon the facts appearing in the record; on the contrary, the court will inquire and ascertain whether the complaining party has been precluded from giving material and influential evidence that he was entitled to have considered, and if it finds that the effect of a wrong ruling was to deprive him of the right to give such evidence it will adjudge the error to be prejudicial. There are many cases where a

ville, etc., *Co. v. Wildman*, 63 Ind. 370; *Schafer v. State*, 49 Ind. 460; *Hawley v. Smith*, 45 Ind. 183; *Bailey v. Troxell*, 43 Ind. 432; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Ethell v. Batchelder*, 90 Ind. 520; *Lang v. Oppenheim*, 96 Ind. 47; *City of Logansport v. La Rose*, 99 Ind. 117; *Rowe v. Peabody*, 102 Ind. 198; *Walker v. Heller*, 104 Ind. 327; *Weir v. State*, 96 Ind. 311; *Belt Railroad, etc., Co. v. Mann*, 107 Ind. 89; *Ryan v. Hurley*, 119 Ind. 115.

¹ In *Moyer v. Brand*, 102 Ind. 301, an answer was filed by one of several defendants which was available to all, and the court held that the error in sustaining a demurrer to it might be made

available by a defendant who had not joined in it. The court said: "We can not look to this special finding of facts to pronounce the error harmless, on the ground that the case has been disposed of upon its merits. If the answer had been allowed to stand, the evidence might have been different, and hence the special finding might have been different. Nor can we say from an inspection of the paragraph or answer, and the record before us that the error should be disregarded because the answer embodied a sham defense. There is nothing upon the face of either which would justify such a conclusion."

ruling is prejudicial because it operates to exclude facts, and it is, of course, perfectly clear that in such a case, the facts actually in the record can not be held to show the error to be without prejudice.¹

§ 668. **Error once Effectively Saved upon Demurrer is Sufficient**—Where an adverse ruling upon a demurrer so operates as to wrongfully deprive a party of the right to introduce evidence establishing a cause of action or a defense, a proper exception duly entered is sufficient to fully present the ruling for review on appeal. No further decision or ruling need be requested in any form. As we have elsewhere shown, the presumption is that the court adheres to the theory declared, either expressly or impliedly, in its rulings upon the pleadings.² A party who presents a question fully and fairly upon the pleadings has a right to presume that the trial court will abide by the decision throughout the case, and hence is not bound to again present the question. Thus, if a party should plead that there was fraud in obtaining a contract and the court should sustain a demurrer to his answer, he is under no duty to offer evidence under the overthrown answer in order to make the error available. Courts have, in more instances than one, censured counsel for repeated attempts to present a question once fully and effectively disposed of by the ruling or decision of the court. It is obvious that it would completely nullify the elementary rule that the evidence must be confined to the issues to hold that in order to make the error available a party must offer evidence in support of the cause of action or defense asserted in the complaint or answer held bad upon demurrer, since, without some pleading tendering the proper issue he could not give any such evidence. The court in ruling the pleading insufficient declares that it is useless and vain to offer such evidence, and in the face of such a declaration the party is not bound to offer evidence, for he can not be required or expected to do a vain and fruitless thing. He has, in strictness, no right to do so, in view of the decision of the court

¹ *Moyer v. Brand*, *supra*.

court adheres to a declared or indicated

² *Ante*, § 591. "Presumption that the theory."

which it is his duty to respect. It is quite clear that the expressions in some of the cases are erroneous, and that the decisions which assert that regard will be had only to the pleadings where the effect of the ruling is to cut off a substantial right are correct.¹

§ 669. The Difference between Overruling a Demurrer and Sustaining a Demurrer to one of Several paragraphs of a Pleading—Confusion frequently results from applying the settled rule, that a ruling sustaining a demurrer to one of several paragraphs of a pleading is harmless in a case where there are other paragraphs of a pleading under which all of the facts can be proved, to a case where a demurrer is overruled to one of several paragraphs.² The cases are radically different. It can not possibly do the party whose demurrer is overruled any good to hold that there are other paragraphs under which all the evidence is admissible, although it may do his adversary a vast deal of good to so hold. It is no benefit to the party who demurs that his adver-

¹ *Johnson v. Breedlove*, 72 Ind. 368; *Friddle v. Crane*, 68 Ind. 583; *Fleetwood v. Brown*, 109 Ind. 567, 570; *Wilson v. Town of Monticello*, 85 Ind. 10, 21; *Rush v. Thompson*, 112 Ind. 158, 163; *Moyer v. Brand*, 102 Ind. 301; *Ryan v. Hurley*, 119 Ind. 115. In *Rout v. King*, 103 Ind. 555, it was said: "The court can not examine the evidence to determine a question presented by demurrer, for the demurrer presents the question fully and the question presented must be decided according to the record." In *Abell v. Riddle*, 75 Ind. 345, 348, the court said: "The exception having been saved to the ruling on the demurrer, the pleading can not be aided by reference to the verdict or the evidence." In the case of *New v. Walker*, 108 Ind. 365, 376, it was said: "It can not be legally possible that if a party's reply, presenting facts which completely avoid and nullify the answer of his adversary, is held to be insufficient, the special finding can cure the

error. If his pleading is overthrown, he is not entitled to give evidence in support of the theory which it asserts, and he is, therefore, necessarily and materially injured by the ruling striking it down. Where a party duly excepts to a ruling on demurrer which overthrows a valid pleading, he does not waive any rights by proceeding to trial, nor is he bound to offer evidence upon the subject covered by the pleading, for his exception to the ruling on the demurrer effectually asserts and preserves his rights."

² The courts have fallen into the error in several instances, as the overruled cases show. *McGee v. Robbins*, 58 Ind. 463; *Johnson v. D'Heur*, 71 Ind. 199; *Thomas v. Hamilton*, 71 Ind. 277; *Webster v. Bebinger*, 70 Ind. 9; *De Armond v. Stoneman*, 63 Ind. 386. These cases are expressly denied in *Over v. Shannon*, 75 Ind. 352, and are in conflict with many other cases.

sary may give evidence under other paragraphs, although to the adversary the benefit may be very great. In holding a defective paragraph good the court adjudges that if the party by whom it is pleaded proves it he will be entitled to recover. No such thing is adjudged where a demurrer is sustained to one paragraph of several. It is true that it is adjudged that the paragraph is insufficient, but no harm can result from such a ruling, if, in fact, no competent evidence is excluded, and it is not excluded if other paragraphs are left standing which entitle it to admission. It is far otherwise where an insufficient paragraph is adjudged sufficient, for there is nothing to aid the party who demurs. All that he can do is to except to the ruling.¹ He has a right to test the pleading by demurrer, and if it is held good when it should have been held bad he can not call to his aid other pleadings. He has, also, a right to assume that the court will adhere to the theory declared or indicated by its

¹ *Scott v. Stetler*, 128 Ind. 385, 386; *Messick v. Midland R. Co.*, 128 Ind. 81, 84; *Hormann v. Hartmetz*, 128 Ind. 354, 355; *Thompson v. Lowe*, 111 Ind. 272; *Epperson v. Hostetter*, 95 Ind. 583; *McComas v. Haas*, 93 Ind. 276, 281; *Eve v. Louis*, 91 Ind. 457, 463; *Wilson v. Town of Monticello*, 85 Ind. 10, 21; *Sims v. City of Frankfort*, 79 Ind. 446, 449; *Over v. Shannon*, 75 Ind. 352; *Conyers v. Mericles*, 75 Ind. 443, 446; *Weir v. State*, 96 Ind. 311, 315; *Kernodle v. Caldwell*, 46 Ind. 153. In the case of *Pittsburgh, etc., Co. v. Van Houten*, 48 Ind. 90, 96, the court, answering the argument of counsel, said: "But counsel seek to apply a wrong rule. The rule is applicable when a demurrer has been sustained to a pleading and the same matter is admissible under another pleading which remains." In *Booker v. Goldsborough*, 44 Ind. 490, 500, it was said: "But it is insisted that the appellants were not injured by the action of the court in overruling the demurrer, as the same facts were admissible under the second paragraph. Where a demurrer is sustained to a good special answer, the error will be harmless if the same facts are admissible under some other paragraphs, but the rule is otherwise where a demurrer is overruled to a bad special answer. In the case first supposed the defendant can offer his evidence under the other paragraph and may avail himself of any question of law arising therein by instruction or otherwise. In the latter case a plaintiff has no mode of availing himself of the objections to the answer but by demurrer, and that being overruled, if the answer is true in fact, his case is at an end." The court said in the case of *Abdil v. Abdil*, 33 Ind. 460, 464: "But where special answers are held good it is not perceived that the plaintiff is in any way benefited by the general denial being in. He has no mode of availing himself of the objections to the answer but by demurrer, and that being overruled, if the answer is true in point of fact, his case is at an end."

ruling and to conduct the case until the end upon that assumption.¹

§ 670. **Rulings in Admitting and Excluding Evidence**—Prejudicial error is often committed, as is sufficiently obvious, in rulings made in admitting and excluding evidence. A violation of the established rules of evidence is always error, but, as we have shown in a former chapter, it is not always prejudicial error, that is, it is not always available for a reversal of the judgment.² It may not be prejudicial in legal contemplation for three reasons: First, it may have been invited;³ second it may not be material;⁴ third, it may not exert any influence upon the ultimate decision of the case.⁵ Where there is a conflict of evidence a party is entitled to all legitimate evidence in his favor, and to the exclusion of all incompetent evidence against him. Our statement outlines, at least, a rule which no one will challenge, but how it shall be applied is a question full of difficulty. Some of the courts indicate that it is proper to examine and weigh the evidence and if it is found to clearly and decidedly preponderate in favor of the successful party to treat the ruling admitting or rejecting evidence as harmless.⁶

¹ *Ante*, § 591.

² *Ante*, § 632. "Error without prejudice." See, also, *People v. Collins*, 75 Cal. 411, 17 Pac. Rep. 430; *Cowles v. Robinson*, 11 Col. 587, 19 Pac. Rep. 654; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. Rep. 498; *Norwich, etc., Co. v. Worcester*, 147 Mass. 518; *Hamilton v. Ross*, 23 Neb. 630, 37 N. W. Rep. 467; *Hoar v. Leaman (Pa.)*, 15 Atl. Rep. 716; *Riggs v. Wilson*, 30 So. Car. 172, 8 S. E. Rep. 848; *Rorer Iron Works v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285; *State v. Shoemaker*, 101 N. C. 690, 8 S. E. Rep. 332; *Brown v. Owen*, 94 Ind. 31; *Gossard v. Woods*, 98 Ind. 195; *Lake Erie, etc., v. Griffin*, 107 Ind. 464; *Newcomer v. Hutchings*, 96 Ind. 119.

³ *Ante*, Chapter III, Part II. "Invited Error." *Nitche v. Earle*, 117 Ind. 270, 19 N. E. Rep. 749; *Robinson v. Shank*, 118 Ind. 121, 133; *Howell v.*

Graff, 25 Neb. 130, 41 N. W. Rep. 142; *Dale v. See*, 51 N. J. L. 378, 18 Atl. Rep. 306.

⁴ *Wagner v. State*, 116 Ind. 181, 18 N. E. Rep. 833; *Couts v. Neer*, 70 Texas, 468, 9 S. W. Rep. 40; *Pearce v. Pettit*, 85 Tenn. 724, 4 S. W. Rep. 526; *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. Rep. 201; *Duncan v. Kohler*, 37 Minn. 379, 34 N. W. Rep. 594; *McIlvain v. State*, 80 Ind. 60; *Hessin v. Heck*, 88 Ind. 449; *Mills v. Winter*, 94 Ind. 329; *Lovinger v. First National Bank*, 81 Ind. 354.

⁵ *Ante*, § 590. "The ultimate ruling is decisive." See, generally, *Giffin v. Barr*, 60 Vt. 599, 15 Atl. Rep. 190; *Turner v. White*, 77 Cal. 392, 19 Pac. Rep. 683; *Rea v. Scully*, 76 Iowa, 343, 41 N. W. Rep. 36.

⁶ *Holstein v. Adams*, 72 Tex. 485, 10 S. W. Rep. 560; *Hooker v. Brandon*, 75

We can not, we say with deference as becomes us in view of the many decisions upon the question, give our adherence to this doctrine. The scale may be turned against a party by the exclusion of evidence seemingly of no great weight, yet because of the conduct, demeanor and situation of a witness, really of controlling weight, while, on the other hand, it may be inclined against him by the admission of incompetent evidence apparently unimportant, but, in fact, of great influence. Testimony from a living witness carries a very different influence from testimony reduced to writing and appearing on the pages of a lifeless record. It is, as we believe, an indefensible departure from principle for an appellate tribunal to assume the functions of a jury and weigh the evidence for the purpose of determining on which side it preponderates. Where there is no conflict of evidence, or where the conflict is so slight as to be undeserving of serious consideration, then there is no reason why the appellate tribunal may not say from an examination of the record that no harm was done by the wrong ruling letting in the incompetent evidence or keeping out the competent, but it is far otherwise where the evidence is conflicting and requires study and analysis in order to ascertain on which side it preponderates. Where the evidence admitted or excluded is

Wis. 8, 43 N. W. Rep. 741; *Roe v. Kansas City, etc., Co.*, 100 Mo. 190, 13 S. W. Rep. 404; *State v. Severson*, 78 Iowa, 653, 43 N. W. Rep. 533; *Clem v. Commonwealth (Ky.)*, 13 S. W. Rep. 102; *Kuh v. Metropolitan Ry. Co.*, 26 J. & S. (N. Y.) 138, 9 N. Y. Supp. 710; *Young v. Hudson*, 99 Mo. 102; *Ganson v. Madigan*, 15 Wis. 144, S. C. 82 Am. Dec. 659, 666. In the case of *Barton v. Kane*, 17 Wis. 38, S. C. 84 Am. Dec. 728, the court said: "No doubt merely irrelevant evidence—that which has no tendency to influence a verdict either way—does not vitiate. It must appear that the party objecting was, or may have been, injuriously affected." The court cited *Dunlay v. Edwards*, 29 Miss. 41; *Routh v. Agricultural Bank*, 12 Smedes & M. 161; *Lobb v. Lobb*, 26 Pa.

St. 327, 331; *Morris v. Runnels*, 12 Tex. 178; *Manny v. Glendinning*, 15 Wis. 50. The statement of the general rule is correct, although indefinite and incomplete. It is no doubt true that there are many cases where the court can determine without weighing the evidence whether the particular evidence was or was not likely to have influenced the verdict. Where the court can declare without weighing conflicting evidence that the particular evidence excluded or admitted did not influence the verdict, then a wrong ruling may well be regarded as harmless, but the case is very different where the effect of the particular evidence can not be determined without considering and weighing conflicting evidence.

clearly immaterial there can seldom be any difficulty, for, ordinarily, such evidence can not exert any influence, but, even immaterial evidence, if given undue prominence by repetition, may work injury.¹ It is impossible to formulate any general rule that will be satisfactory and free from exceptions, but we think it safe to say that the decided weight of authority warrants this statement: Where the wrong ruling is not invited and the evidence admitted or excluded is material, the error will be available for the reversal of the judgment, unless the appellate tribunal can ascertain from the record without assuming the functions of the triers of the facts by weighing conflicting evidence, that the wrong ruling did not prejudice the substantial rights of the complaining party.² Where the evidence is of

¹ *Orr v. Miller*, 98 Ind. 436; *Winkley v. Foye*, 33 N. H. 171, S. C. 66 Am. Dec. 715. The Supreme Court of New Hampshire, in discussing this phase of the subject in the case of *Winkley v. Foye*, 28 N. H. 513, said: "Evidence which has no legitimate bearing may still have an unfavorable influence upon a claim or defense. It may be calculated to excite prejudices, or raise false impressions, and in such cases its admission may furnish good grounds to set aside the verdict." In the case between the same parties cited in this note this doctrine was re-asserted. It seems to us to be the sound rule, and that expressions found in some of the cases indicating a different doctrine are erroneous. Much must, of course, depend upon the particular case, but it seems to us that where a party gives incompetent evidence over the objection of his adversary that has a tendency to divert the minds of the jurors from the real issue or to inflame their passions or excite their prejudices the appellate tribunal should reverse the judgment, unless the record shows conclusively that no injury could have resulted from the wrong ruling. It, certainly, does the complaining party in such a case scant justice to dispose of

the question by saying that the evidence was irrelevant.

² *Daley v. American, etc., Co.*, 150 Mass. 77, 22 N. E. Rep. 439. *In re Eysaman's Will*, 113 N. Y. 62, 20 N. E. Rep. 613. *In re Carpenters Estate*, 79 Cal. 382, 21 Pac. Rep. 835; *Brown v. Klock*, 117 N. Y. 340, 22 N. E. Rep. 944; *Tollen v. Read*, 32 N. Y. Supr. 46; *Maxwell v. State*, 89 Ala. 150, 7 So. Rep. 824; *Skeels v. Starrett*, 57 Mich. 350, 24 N. W. Rep. 98; *State v. Ezekiel*, 33 So. Car. 115, 11 S. E. Rep. 635; *State v. Olds*, 19 Ore. 397, 24 Pac. Rep. 394; *Drew v. State*, 124 Ind. 9, 23 N. E. Rep. 1008; *Spanagel v. Dellinger*, 38 Cal. 278; *Sweeney v. Reiley*, 42 Cal. 402; *Starr v. Cass*, 23 Ind. 458; *Rohlfing v. Lightbody*, 36 Kan. 500, 13 Pac. Rep. 836; *Marsh v. Wade*, 1 Wash. 120, 153, 20 Pac. Rep. 578; *Farris v. People*, 129 Ill. 521, 21 N. E. Rep. 821, S. C. 4 Law. Rep. Anno. 582; *Biemel v. State*, 71 Wis. 444, 37 N. W. Rep. 244; *Varnum v. Hart*, 47 Hun. 18; *People v. Hillhouse*, 80 Mich. 580, 45 N. W. Rep. 484; *Fort Worth, etc., Co. v. Thompson*, 75 Texas, 501, 12 S. W. Rep. 742; *Gurney v. Brown*, 27 Ill. App. 640. Some of the courts discriminate between the admission and the exclusion of incompetent testimony. Thus, in *Estate of Toomes*, 54 Cal. 509, 516, it

such a character that it is likely to turn the scale, then, whatever the elements that impress upon it that character, whether because they are such as arouse prejudice or tend to produce conviction, it should be regarded as material, and a wrong ruling respecting it should be deemed prejudicial, if the case is not entirely clear upon the evidence or record.¹ If the evidence is of such a character as to be likely to mislead the jury, turn their minds in the wrong direction and into improper channels, leading to a wrong result, the error in admitting it is presumptively harmful, and unless the presumption is satisfactorily rebutted the judgment will be reversed.²

was said: "But whatever may be the rule upon this point when improper evidence has been introduced not changing the result, it seems to be well settled that the exclusion of proper evidence is ground of reversal." In the case of *Arthurs v. Hart*, 17 How. (U. S.) 6, the court said: "The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it, and lead to a determination of it upon principles wholly inapplicable in case the evidence had been admitted." It is to be observed of the cases from which we have quoted that the courts were speaking of cases where the trial was by the judge. Our cases do not recognize the distinction. *Baker v. Dessauer*, 49 Ind. 28, 32; *Weik v. Pugh*, 92 Ind. 382, 387. The case last cited states the rule respecting immaterial evidence much stronger than principle or authority warrants. The case of *King v. Enterprise Ins. Co.*, 45 Ind. 43, does not hold that a judgment will be reversed for the admission of immaterial evidence, for in that case the incompetent evidence was of a material character. It was there said in substance that there was a conflict of evidence upon material points and that the evidence admitted had an important bearing upon those points. It was also said: "In

such case we are bound to presume that the court took into consideration all the evidence which had a bearing upon the issue, but such presumption would not be indulged where wholly immaterial and irrelevant evidence had been admitted."

¹ In *Mays v. Hedges*, 79 Ind. 288, 293, it was said: "The testimony was calculated to make an impression upon the minds of the jurors favorable to the appellee. We can not say that it did not influence the minds of the jury. Where it is clear that irrelevant testimony could not have influenced the jury adversely to the party against whom it is admitted, it may be said to be harmless, but not otherwise."

² *Barnett v. Leonard*, 66 Ind. 422, 427; *Memphis, etc., Co. v. McCool*, 83 Ind. 392, 397; *Orr v. Miller*, 98 Ind. 436. In *Morgan v. State*, 31 Ind. 193, the court said: "The error having occurred, did it harm the appellant? The presumption is that it did, and unless it clearly appears that it did not we must reverse the judgment." This general doctrine is well supported. *Belden v. Nicolay*, 4 E. D. Smith, 14; *Thompson v. Wilson*, 34 Ind. 94, 97; *Baker v. Dessauer*, 49 Ind. 28; *Bellefontaine, etc., Co. v. Hunter*, 33 Ind. 335; *Vandivere v. Dolins*, 49 Ind. 216; *King v. Enterprise Ins. Co.*, 45 Ind. 43; *Simmons v. Spratt*, 26 Fla. 449, S. C. 9 Law. Rep. Anno.

§ 671. **Conduct of the Trial**—The questions which it is our purpose to consider in this paragraph are such as arise upon the rulings directing the conduct of the trial, excluding as far as possible questions relating to the evidence, the instructions and the like, and gathering up miscellaneous matters of practice. It is convenient and not altogether inappropriate to use the term "conduct of the trial" in the restricted sense in which we here employ it, although it is often employed in a much more comprehensive sense. Without further preface we direct attention to the fact that prejudicial error may often be alleged upon wrong rulings regarding the right to open and close the case. Some of the courts hold that the question as to who shall open and close the case is one of discretion, but our courts and the great majority of the courts hold that the question is not one of discretion. If the trial court denies a party entitled to the open and close that right, the error, if properly saved and presented on appeal, is available for the reversal of the judgment.¹ The party on whom the burden of proof rests has a right to the open and close, and where the burden of proof rests is to be determined from the issue made by the pleadings.² In general the plaintiff has the right to the open and close, but

343; *Terre Haute, etc., Co. v. Teel*, 20 Ind. 131; *Fordyce v. McCants*, 51 Ark. 509, S. C. 4 Law. Rep. Anno. 296; *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Deery v. Cray*, 5 Wall. 795; *Moore v. National Bank*, 104 U. S. 625, 630; *Gilmer v. Higley*, 110 U. S. 47, 50. See *Ante*, § 594. "Presumption of prejudice from erroneous rulings."

¹ *Ashing v. Miles*, 16 Ind. 329; *White v. Carlton*, 52 Ind. 371; *White Water, etc., Co. v. McClure*, 29 Ind. § 336; *Haines v. Kent*, 11 Ind. 126; *Kirkpatrick v. Armstrong*, 79 Ind. 384; *Kinney v. Dodge*, 101 Ind. 573; *McCormick, etc., Co. v. Gray*, 100 Ind. 285; *Whitesides v. Hunt*, 97 Ind. 191; *Bannister v. Jett*, 83 Ind. 129; *Clarkson v. Meyer*, 14 N. Y. Supp. 144; *Edwards v. Hushing*, 31 Ill. App. 223; *Lake, etc., Bank v. Judson*, 122 N. Y. 278, 25 N. E. Rep. 367.

² *Heilman v. Shanklin*, 60 Ind. 424, 444; *Gaul v. Fleming*, 10 Ind. 253; *Hamlyn v. Nesbit*, 37 Ind. 284; *Lynam v. Buckner*, 60 Ind. 402, 409; *Camp v. Brown*, 48 Ind. 575. In *Lynam v. Buckner*, *supra*, it was said: "The rule is well settled in civil actions that the party upon whom the burden rests is entitled to open and close the case on the trial thereof." See, also, *Fetters v. Muncie National Bank*, 34 Ind. 251; *Judah v. Trustees, etc.*, 23 Ind. 272; *McLees v. Felt*, 11 Ind. 218; *Hyatt v. Clements*, 65 Ind. 12; *Tull v. David*, 27 Ind. 377; *Love v. Dickerson*, 85 N. C. 5; *Rolf v. Pillond*, 16 Neb. 21, 19 N. W. Rep. 615; *Fry v. Bennett*, 28 N. Y. 324; *McConnell v. Kitchens*, 20 So. Car. 430; *Perkins v. Ermel*, 2 Kan. 325; *Johnson v. Josephs*, 75 Me. 544.

this is by no means invariably true, for the defendant may often have the right to open and close the case. Where the plaintiff is required to produce evidence to sustain the issue tendered by him he has the right to open and close,¹ and this is true where there are several issues, if the burden is upon the plaintiff to prove any one of them.² Where there are several defendants the plaintiff may open and close the case as to all if he has that right as against one of them.³ The defendant may, by fully confessing all the material allegations of the plaintiff's complaint, obtain the right to open and close the case,⁴ but all of the material allegations must be confessed, for if any are denied, whether by a direct or by an argumentative denial, the right will be in the plaintiff.⁵ It is not necessary that immaterial allegations be confessed, it is enough if all the material allegations are admitted.⁶ If the defendant concedes to the plaintiff a *prima facie* case, the right to open and close belongs

¹ Osborne v. Kline, 18 Neb. 344, 25 N.W. Rep. 360; Lexington, etc., Co. v. Paver, 16 Ohio, 324, 330; Mizer v. Bristol, 30 Neb. 138, 46 N.W. Rep. 293; Johnson v. Josephs, 75 Me. 544; Dille v. Lovell, 37 Ohio St. 415; Swafford v. Whipple, 3 G. Greene, 261, S.C. 54 Am. Dec. 498; Baltimore, etc., Co. v. McWhinney, 36 Ind. 436; Mercer v. Whall, 5 Ad. & El. (N. S.) 447; Cunningham v. Gallagher, 61 Wis. 170; Camp v. Brown, 48 Ind. 575; Rahm v. Deig, 121 Ind. 283; Turner v. Cool, 23 Ind. 56; Hyatt v. Clements, 65 Ind. 12; Burckhalter v. Coward, 16 So. Car. 435; Bertrand v. Taylor, 32 Ark. 470.

² Johnson v. Maxwell, 87 N. C. 18; Jackson v. Hesketh, 2 Stark R. 454; Bowen v. Spears, 20 Ind. 146; Jackson v. Pittsford, 8 Blackf. 194; Montgomery v. Swindler, 32 Ohio St. 224, 226; Davidson v. Henop, 1 Cranch. C. C. 280; Churchill v. Lee, 77 N. C. 341; Zehner v. Kepler, 16 Ind. 290; Bowen v. Spears, 20 Ind. 146; Buzzell v. Snell, 25 N. H. 474; Viele v. Germania Ins. Co., 26 Ia. 9; Ridgway v. Ewbank, 2 Moody &

Rob. 217; Rials v. Powell (Ga.), 9 S. E. Rep. 613.

³ Clodfelter v. Hulett, 92 Ind. 426; Sodousky v. McGee, 4 J. J. Marsh. 267; Central Bank v. St. John, 17 Wis. 157.

⁴ Thurston v. Kennett, 22 N. H. 151; Huntington v. Conkey, 33 Barb. 218; McCormick, etc., Co. v. Gray, 100 Ind. 285; City of Aurora v. Cobb, 21 Ind. 493; Campbell v. Roberts, 66 Ga. 733; Conselyea v. Swift, 103 N.Y. 604; Seckel v. Norman, 78 Iowa, 254, 43 N. W. Rep. 190; Parks v. Young, 75 Texas, 278; Firemans Ins. Co. v. Schwing (Ky.), 11 S. W. Rep. 14; Stith v. Fullinwieder, 40 Kan. 73, 19 Pac. Rep. 314.

⁵ Robbins v. Spencer, 121 Ind. 594, 22 N. E. Rep. 660; Rothrock v. Perkinson, 61 Ind. 39; Bradley v. Clark, 1 Cush. 293; Turner v. Cool, 23 Ind. 56; Shulse v. McWilliams, 104 Ind. 512; Stayner v. Joyce, 120 Ind. 99, 22 N. E. Rep. 89.

⁶ Millerd v. Thorn, 56 N. Y. 402; List v. Kortepeter, 26 Ind. 27; McLees v. Felt, 11 Ind. 218.

to him.¹ Perhaps as good a general test as can be suggested is supplied by the answer to the question, who must **do the acts** or give the evidence required to change the existing state of things? If the defendant is the actor and must **give evidence** to alter the state of things shown by the pleadings **to exist** he has the burden, and with the burden possesses the **correlative** right to open and close the case, for the right generally vests in the party who has the burden.² It may be prejudicial error

¹ *Shank v. Fleming*, 9 Ind. 189; *Judah v. Trustees, etc.*, 23 Ind. 272; *Goodrich v. Friedersdorff*, 27 Ind. 308; *State, etc., Board v. Gray*, 54 Ind. 91. Where the defendant pleads a counter-claim he has the open and close. *Schee v. McQuillken*, 59 Ind. 269; *McCormick, etc., Co. v. Gray*, 100 Ind. 285. In the case last cited it was said: "Under the pleadings the plaintiff was entitled to recover its whole demand without any evidence, unless the defendant by his evidence established his counter-claim. The defendant, therefore, was entitled to open and close." But the right to open and close the case has been held not to extend in all cases to the right to open and close the argument. Thus, where the plaintiff has the burden on some issues and the defendant the burden on others, and the plaintiff offers no evidence whatever upon the issues on which he has the burden, the defendant is entitled to open and close the argument. *Reynolds v. Baldwin*, 93 Ind. 57, 59; *Zehner v. Kepler*, 16 Ind. 290; *Williams v. Allen*, 40 Ind. 295. In *Zehner v. Kepler*, *supra*, the court said: "In such case upon the close of the evidence, the plaintiff having offered no evidence in support of the issue resting upon him, it would seem to be eminently proper for the court to award the opening and closing of the argument to the defendant. If any evidence at all is given to the jury having a tendency to support the issue devolving

upon the plaintiff, he would, of course, be entitled to have it passed upon by the court, and to open and close the argument. Otherwise not, and this may properly be determined by the court. *Crookshank v. Kellogg*, 8 Blackf. 256." So admissions on the trial may control the question. *Hall v. Weare*, 92 U. S. 728, 738; *Love v. Dickerson*, 85 N. C. 5; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Mann v. Scott*, 32 Ark. 593, 596; *Richards v. Nixon*, 20 Pa. St. 19; *Cross v. Pearson*, 17 Ind. 612. Error in refusing a party the right to open and close is not cured by permitting the party claiming it the right to open the argument. *Penhryn Slate Co. v. Meyer*, 8 Daly, 61. In an appeal from proceedings to appropriate lands the landowner is entitled to the open and close. *Indiana, etc., Co. v. Cook*, 102 Ind. 133; *Burt v. Wigglesworth*, 117 Mass. 302; *Minnesota, etc., Co. v. Doran*, 17 Minn. 188; *Oregon, etc., Co. v. Barlow*, 3 Ore. 311; *Connecticut, etc., Co. v. Clapp*, 1 Cush. 559, *Peed v. Brenneman*, 89 Ind. 252.

² *Chesley v. Chesley*, 37 N. H. 229; *Daviess v. Arbuckle*, 1 Dana. 525; *Huntington v. Conkey*, 33 Barb. 218, 228; *Boyce v. Lake*, 17 So. Car. Rep. 481; *Kennedy v. Moore*, 17 So. Car. 464; *Camp v. Brown*, 48 Ind. 575; *Littlejohn v. Greeley*, 13 Abb. Pr. 41, 45; *Young v. Highland*, 9 Gratt. 16; *Wright v. Abbott*, 85 Ind. 154; *Sanders v. Sanders*, 30 So. Car. 207, 9 S. E. Rep. 94.

to permit counsel in the opening statement to the jury to introduce matters that can not be allowed to go in evidence.¹ It is proper for the court to refuse to permit counsel to argue questions of law at length to the jury in the opening statement,² but it is proper to permit counsel to state to the jury the case both as to the law and the evidence.³ It is, however, not prejudicial error for the court to impose a reasonable limitation upon counsel.⁴ While it is proper for counsel to state in general the facts of the case, yet they can not successfully insist upon the right to rehearse the evidence in minute detail, for in this regard the rule as to the opening statement is different from the rule applicable to arguments made after the delivery of the evidence.⁵ On the other hand, counsel can not be compelled to state the items of evidence in the opening statement.⁶ There is much conflict among the decisions as to whether the party can be so bound by his opening statement as to authorize the court to direct a verdict against him in cases where no cause of action is shown.⁷ It seems to us that no general rule can be formulated that will fit all cases, since much must depend upon the peculiar circumstances of the particular case. Where counsel have a right to use an instrument of evidence for the purpose of enabling the jury to comprehend the facts, it is prejudicial error for the court to deny them that right.⁸ It would unjustly

¹ *Duncombe v. Daniell*, 8 Carr & P. 222; *Hennies v. Vogel*, 87 Ill. 242; *McLain v. State*, 18 Neb. 154, 24 N. W. Rep. 720; *Stevens v. Webb*, 7 Carr & P. 60; *People v. Montague*, 71 Mich. 447; *Scripps v. Reilly*, 35 Mich. 371, S. C. 24 Am. Rep. 575. Pollock are interesting and instructive.

² *People v. Carty*, 77 Cal. 213, 19 Pac. Rep. 490. See, generally, *People v. Goldenson*, 76 Cal. 328.

³ *People v. Chalmers*, 5 Utah, 201, 14 Pac. Rep. 131; *Campbell v. City of Kalamazoo*, 80 Mich. 655. See, generally, *People v. Wilson*, 55 Mich. 506, 513; *Holmes v. Jones*, 121 N. Y. 461; *The Work of the Advocate*, 209, and authorities cited in note 1; *Darby v. Ouseley*, 36 Eng. L. & Eq. 518 525. In the case last cited the observations of Baron

⁴ *Porter v. Throop*, 47 Mich. 313, 11 N. W. Rep. 174; *Ayrault v. Chamberlain*, 33 Barb. 229; *Anderson v. State*, 104 Ind. 467, 4 N. E. Rep. 63; *Walsh v. People*, 88 N. Y. 458; *Fraser v. Jennison*, 42 Mich. 206.

⁵ *Scripps v. Reilly*, 35 Mich. 371, 392; *Kelly v. Troy, etc., Co.*, 3 Wis. 254.

⁶ *Scripps v. Reilly*, 35 Mich. 371.

⁷ *Clews v. Bank*, 105 N. Y. 398; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Ward v. Jewett*, 4 Robt. 714; *Smith v. Commonwealth, etc., Co.*, 49 Wis. 322, 5 N. W. Rep. 804. See *Nearing v. Bell*, 5 Hill, 291; *Sawyer v. Chambers*, 43 Barb. 622; *Willey v. State*, 52 Ind. 421.

⁸ *Battishill v. Humphrey*, 64 Mich. 494, 513, 31 N. W. Rep. 894. In the

narrow the scope of the opening statement to deny counsel the privilege of making it full and clear enough to enable the jury to understand just what they were called upon to try, and, on the other hand, it would be a useless waste of time and a means of producing confusion to allow counsel to give minute and specific details of the case. Remarks made by the judge during the progress of the trial, if material and improper, may, when properly excepted to and brought into the record, constitute prejudicial and available error, although they may not, in strictness, be instructions as to the law of the case.¹ It is obvious that jurors may be influenced as effectively by the remarks of the judge during the progress of the trial as by formal instructions, and where such remarks are likely to exert a prejudicial influence upon the jury they may be made available for the reversal of the judgment, but where the remarks are not likely to have that effect there is no available error, although the statements of the court were improper.² It has been held that error in making an improper remark may be cured by instructing the jury to disregard it,³ but it is doubtful whether this doctrine is sound; at all events, it is one to be carefully limited. It is proper for the court to reinstruct the jury when necessary,⁴ but it is prejudicial error to go into the jury room

case cited it was held prejudicial error to refuse to permit counsel in an opening statement for the defense to make use of a diagram that was afterwards properly admitted in evidence.

¹ *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. Rep. 592; *Chesapeake, etc., Co. v. Barlow*, 86 Tenn. 537, 8 S. W. Rep. 147; *Phenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. Rep. 108; *Whitelaw v. Whitelaw*, 83 Va. 40, 1 S. E. Rep. 407; *State v. Tickel*, 13 Nev. 502, 508; *People v. Bonds*, 1 Nev. 33, 36; *State v. Ah Tong*, 7 Nev. 148, 152; *McMinn v. Whelan*, 27 Cal. 300; *Sparks v. State*, 59 Ala. 82, 87; *Terre Haute, etc., Co. v. Jackson*, 81 Ind. 19.

² *Bushnell v. Crooke, etc., Co.*, 12 Col. 247, 21 Pac. Rep. 931; *Favors v. Johnson*, 79 Ga. 553, 4 S. E. Rep. 925. It is the

duty of the court to suppress any demonstration that may work harm to a party. *Woolfolk v. State*, 81 Ga. 551, 8 S. E. Rep. 724. If a party by misconduct calls forth a remark that injures him he can not complain. *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. Rep. 342. *Krapp v. Hauer*, 38 Kan. 430, 16 Pac. Rep. 702; *Chicago, etc., Co. v. Holland*, 122 Ill. 461, 13 N. E. Rep. 145.

³ *People v. Northey*, 77 Cal. 618, 19 Pac. Rep. 865.

⁴ *Hogg v. State*, 7 Ind. 551; *Columbus, etc., Co. v. Powell*, 40 Ind. 37; *Farley v. State*, 57 Ind. 331; *Philips v. New York, etc., Co.*, 53 Hun. 634, 6 N. Y. Supp. 621; *Wilkinson v. St. Louis, etc., Co.*, 102 Mo. 130, 14 S. W. Rep. 177. Communications between court and jury should

and there read instructions in the absence of parties and counsel.¹ In this State the general rule is that it is prejudicial error to permit the jury to take instruments of evidence with them when they retire for deliberation,² but elsewhere there is much diversity of opinion upon the question.³ It has, however, been held that the rule does not apply to the pleadings in the case, nor to instruments forming necessary and proper exhibits to the pleadings,⁴ nor does the rule apply where it affirmatively appears that the jury did not make any use of the papers taken by them to their consultation room.⁵ The general rule is that it is improper to permit jurors to hold communications with parties or third persons,⁶ and that it is error to allow an officer to

be in presence of parties or counsel. *Sargent v. Roberts*, 1 Pick. 337; *Hoberg v. State*, 3 Minn. 262; *Watertown Bank v. Mix*, 51 N. Y. 558; *Read v. Cambridge*, 124 Mass. 567; *State v. Patterson*, 45 Vt. 308. Where parties consent to sending instructions to the jury room there is no error. See *Parmalee v. Sloan*, 37 Ind. 469; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. Rep. 467.

¹ *Fish v. Smith*, 12 Ind. 563; *Smith v. McMillen*, 19 Ind. 391; *Reilly v. Bader*, 46 Minn. 212, 48 N. W. Rep. 909; *Hall v. State*, 8 Ind. 439; *Moody v. Pomeroy*, 4 Denio, 115; *Taylor v. Betsford*, 13 Johns. 487; *Kirk v. State*, 14 Ohio, 511; *Benson v. Clark*, 1 Cow. 258; *O'Connor v. Guthrie*, 11 Iowa, 80; *Crabtree v. Hagenbaugh*, 23 Ill. 349; *State v. Garrand*, 5 Ore. 216; *Bunn v. Croule*, 10 Johns. 239.

² *Chance v. Indianapolis, etc., Co.*, 32 Ind. 472; *Eden v. Lingenfelter*, 39 Ind. 19; *Lotz v. Briggs*, 50 Ind. 346, 348; *Nichols v. State*, 65 Ind. 512, 521. In the case last cited it was said: "We regard it as settled law in this State that it is error to permit, over the objections and exceptions of the opposite party, items of documentary evidence to be taken to their consultation room by the jury." See *Cheek v. State*, 35 Ind. 492; *Newkirk v. State*, 27 Ind. 1.

³ *Tabor v. Judd*, 62 N. H. 288; *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. Rep. 947; *Bulen v. Granger*, 63 Mich. 311, 29 N. W. Rep. 718; *Farnum v. Pitcher*, 151 Mass. 470, 24 N. E. Rep. 590; *Leonard v. Armstrong*, 73 Mich. 577; *State v. Tompkins*, 71 Mo. 613; *Mullen v. Morris*, 2 Pa. St. 85; *Williams v. Thomas*, 78 N. C. 47; *Burton v. Wilkes*, 66 N. C. 604; *Kalamazoo, etc., Co. v. McAlister*, 36 Mich. 327; *Rainforth v. People*, 61 Ill. 365; *Watson v. Walker*, 23 N. H. 471, 497; *O'Neill v. Calhoun*, 67 Ill. 219; *Harriman v. Wilkins*, 20 Me. 93; *Jessup v. Eldridge*, *Coxe* (N. J.), 401; *People v. Page*, 1 Idaho, 102, 189; *In re Foster's Will*, 34 Mich. 21; *Moore v. McDonald*, 68 Md. 321, 12 Atl. Rep. 117; *Cavanaugh v. Buehler*, 120 Pa. St. 441, 14 Atl. Rep. 391; *Summers v. Greathouse*, 87 Ind. 205, 207.

⁴ *Snyder v. Braden*, 58 Ind. 143; *Col-lins v. Frost*, 54 Ind. 242; *Shulse v. McWilliams*, 104 Ind. 512.

⁵ *Beresch v. State*, 13 Ind. 434. See *Achey v. State*, 64 Ind. 56, 63; *Matlock v. Todd*, 19 Ind. 130, 132; *Bell v. Carley*, 3 Ind. 577.

⁶ *Barlow v. State*, 2 Blackf. 114; *Cat-lerlin v. City of Frankfort*, 87 Ind. 45; *Priest v. State*, 68 Ind. 569; *Dower v. Church*, 21 W. Va. 23, 55; *March v. State*, 44 Texas, 64, 82; *People v. Boggs*,

remain in the consultation room during the deliberations of the jury,¹ but the error is not always available for the reversal of the judgment, for it may be that it was made to appear that no harm resulted to the party from the wrongful conduct of the jurors, officers or third persons.² In a former paragraph³ we stated the general rule to be that unless it affirmatively appears that the misconduct was probably prejudicial there is no available error, and that is the general rule, but the effect of the misconduct may be inferred from the character of the acts.⁴

§ 672. **Misconduct of Parties and Counsel**—One of the sources of prejudicial error is found in the behavior of counsel and

20 Cal. 432; *Epps v. State*, 19 Ga. 102; *Martin v. People*, 54 Ill. 225; *Poole v. Chicago, etc., Co.*, 2 McCrary, 251; *Hamilton v. Pease*, 38 Conn. 115; *Caw v. People*, 3 Neb. 357; *Hager v. Hager*, 38 Barb. 92; *McKenzie v. State*, 26 Ark. 334; *Hill v. State*, 64 Ga. 453; *State v. Circuit*, 31 N. J. L. 249; *Louisville, etc., Co. v. Hendricks*, 128 Ind. 462, 28 N. E. Rep. 58; *Kennedy v. Holladay*, 105 Mo. 24, 16 S. W. Rep. 688.

¹ *Houk v. Allen*, 126 Ind. 568; *Rickard v. State*, 74 Ind. 275; *Fitzgerald v. Goff*, 99 Ind. 28; *Clayton v. State*, 100 Ind. 201; *McClary v. State*, 75 Ind. 260. In *Doles v. State*, 97 Ind. 555, 564, it is held that counter affidavits may show that no harm resulted to the complaining party.

² *Doles v. State*, 97 Ind. 555; *Fitzgerald v. Goff*, 99 Ind. 28; *Clayton v. State*, 100 Ind. 201; *De Hart v. Etnire*, 121 Ind. 242; *Cooper v. State*, 120 Ind. 377. In *Waterman v. State*, 116 Ind. 51, 52, it was said: "Ordinarily, the unexplained presence of the bailiff in the jury room during the deliberations of the jury is such misconduct as vitiates their verdict. In the present case the affidavit of appellants' counsel discloses the fact that counsel saw the bailiff go into the jury room without any invitation or signal from within

and that this was repeated again and again in his presence without protest or objection, although the counsel was present in court at the time. Misconduct of any one connected with the trial, which is known to and acquiesced in without objection by the party or his counsel, even though it be of a character which might otherwise vitiate the verdict, can not afterwards be made available for the purpose of setting aside the verdict." *Hill v. Corcoran*, 15 Col. 270, 25 Pac. Rep. 171; *Bledsoe v. Bledsoe (Ky.)*, 1 S. W. Rep. 10; *Kaul v. Brown (R. I.)*, 20 Atl. Rep. 10; *St. Paul, etc., Co. v. Kelly*, 43 Kan. 741, 23 Pac. Rep. 1046; *Dozenback v. Raymer*, 13 Col. 451, 22 Pac. Rep. 787.

³ *Ante*, § 594.

⁴ *Atchison, etc., Co. v. Bayes*, 42 Kan. 609, 22 Pac. Rep. 741; *Johnson v. Tyler*, 1 Ind. App. 387, 27 N. E. Rep. 643; *Welch v. Taverner*, 78 Iowa, 207, 42 N. W. Rep. 650; *Vose v. Muller*, 23 Neb. 171, 36 N. W. Rep. 583; *Griffin v. Harriman*, 74 Iowa, 436, 38 N. W. Rep. 139; *Repath v. Walker*, 13 Col. 109, 21 Pac. Rep. 917; *Kruidener v. Shields*, 77 Iowa, 504, 42 N. W. Rep. 432; *Cottle v. Cottle*, 6 Greenl. 140. S. C. 19 Am. Dec. 200; *Phillipsburgh Bank v. Fulmer*, 2 Vroom (N. J.), 52, S. C. 86 Am. Dec. 193.

parties. The misconduct of a party or his counsel may be such as to require a reversal of the judgment. It is not, however, every departure from the rules of propriety that will constitute available error, for two things must concur—misconduct and probable injury to the opposite party. The misconduct may, of course, be such as to authorize the inference that injury resulted, and where this is so, injury will be presumed. Where parties attempt to unduly influence the jury or a juror, error of a prejudicial nature is generally inferred, and rightly so, for the long established rule is that “presumptions go against the wrong-doer.”¹ A party is guilty of misconduct constituting prejudicial error if he employs illegal means to gain an advantage in the selection of jurors.² Tampering with witnesses is such a wrong as constitutes available error wherever it appears that there was any corrupt or illegal means employed to influence the testimony of the witness.³ Miscon-

¹ *Hilton v. Southwick*, 17 Me. 303, S. C. 35 Am. Dec. 253. In the case cited it was said: “If there appeared the least attempt of the plaintiff to seek and influence the juror, the verdict would be set aside.” Other courts express the general doctrine thus: “For any, even the least intermeddling with a juror, the verdict will always be set aside.” *Knight v. Freeport*, 13 Mass. 218; *Amherst v. Hadley*, 1 Pick. 38; *Allen v. Aldrich*, 29 N. H. 63; *Tucker v. South Kingstown*, 5 R. I. 558; *Cottle v. Cottle*, 6 Greenl. 140, S. C. 19 Am. Dec. 200; *Walker v. Walker*, 11 Ga. 203; *Mad-den v. State*, 1 Kan. 340; *Studley v. Hall*, 22 Me. 198; *Perry v. Bailey*, 12 Kan. 539; *Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 52; *Pittsburgh, etc., Co. v. Porter*, 32 Ohio St. 328; *Pelham v. Page*, 6 Ark. 535. In *Huston v. Vail*, 51 Ind. 299, 304, the court said: “The authorities are not uniform where the alleged misconduct is on the part of the persons not parties to the suit, as to whether it must be further shown that the verdict was thereby affected, but where the misconduct is on the

part of the prevailing party there is no conflict in the authorities. In such cases the court will set aside the verdict without any inquiry as to what effect the misconduct had upon the jury. It should be firmly held by the courts and known to all litigants as an inflexible rule of law, that no party to a suit can profit by his own misconduct, and that a verdict rendered under such circumstances will be instantly set aside.” The court cited *Davis v. State*, 35 Ind. 496. See, upon the general subject, *Johnson v. Hobart*, 45 Fed. Rep. 542; *Tabor v. Judd*, 62 N. H. 288.

² *Boyce v. Aubuchon*, 34 Mo. App. 315, 322, distinguishing *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257; *State v. Gleason*, 88 Mo. 582.

³ The general rule is recognized in *Beeks v. Odom*, 70 Texas, 183, 7 S. W. Rep. 702, but it was there held that if it clearly appeared that the verdict was right the judgment would not be reversed, the court saying: “We are of the opinion, however, where a witness testifies under such an agreement, and it is not made known to the court and jury

duct of a party in suppressing evidence, or in preventing the attendance of a witness by trickery or by other illegal means, may constitute prejudicial error.¹ The misconduct of counsel in the management of a particular case is as to that case the misconduct of the client. If counsel's violation of the rules of law or procedure is of such a material character as to probably operate to the injury of the opposite party error may be successfully alleged in cases where an objection is appropriately saved and presented. If counsel go entirely outside of the evidence in argument and bring into the case improper matters of a clearly prejudicial nature, the error may be made available for a reversal of the judgment.² But errors of inference either as to matters of law or of fact are not such as will be available for the reversal of the judgment from which the appeal is prosecuted.³ Where the opposite counsel provokes the misconduct

trying the case, that a new trial should be granted, unless, in view of all the other evidence in the cause, no other verdict than that found could have been legally reached. Such agreements are likely to lead to corruption, are contrary to public policy, and must meet the condemnation of all fair minded men, whether the agreement relates to evidence to be given as an expert or not." In so far as the case from which we have quoted states the general rule, we believe it correct, but we think it wrong in holding that the appellate tribunal will look to the evidence to ascertain whether injury resulted. Where there is a corrupt agreement with a witness as to a material point there should not be, as we believe, any scrutiny of the other evidence.

¹ *Davis v. Daveril*, 11 Mod. 141; *Montesson v. Randle*, Buller, N. P. 328.

² *Schlotter v. State*, 127 Ind. 493; *Rudolph v. Vandwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Bessette v. State*, 101 Ind. 85; *Brow v. State*, 103 Ind. 133; *Campbell v. Maher*, 105 Ind. 383; *Nelson v. Welch*, 115 Ind. 270; *Troyer v. State*, 115 Ind.

331; *Staser v. Hogan*, 120 Ind. 207; *Kinnaman v. Kinnaman*, 71 Ind. 417; *St. Louis, etc., Co. v. Myrtle*, 51 Ind. 566; *Fletcher v. State*, 49 Ind. 124; *Ferguson v. State*, 49 Ind. 33; *Tucker v. Henniker*, 41 N. H. 317; *Nalley v. State*, 28 Texas App. 387, 13 S.W. Rep. 670; *Cook v. Doud*, 14 Col. 483, 23 Pac. Rep. 906; *Perkins v. Burley*, 64 N. H. 524, 15 Atl. Rep. 21; *Henry v. Sioux City, etc., Co.*, 70 Ia. 233, 30 N.W. Rep. 630; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 So. Rep. 202; *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. Rep. 870. If counsel comment upon the fact that a change of venue has been taken and the court, where timely objection is interposed, declines to interfere there is prejudicial error. *Farman v. Lauman*, 73 Ind. 568; *Paulman v. Claycomb*, 75 Ind. 64; *Worley v. Moore*, 97 Ind. 15.

³ *Sage v. State*, 127 Ind. 15, 29; *Warner v. State*, 114 Ind. 137; *Proctor v. DeCamp*, 83 Ind. 559; *Combs v. State*, 75 Ind. 215; *Goff v. Scbtt*, 126 Ind. 200; *Mosier v. Stoll*, 115 Ind. 244; *Brower v. Goodyer*, 88 Ind. 572; *Carter v. Carter*, 101 Ind. 450. Mere immaterial remarks will not constitute prejudicial

of his adversary and opens the door to improper argument he can not, as a general rule, successfully complain of the error which he himself invited.¹ If, however, the counsel should go further than the wrong of the opposite party invited him to go it is probable that, if his misconduct is material and prejudicial, the court would feel bound to set aside the verdict. Where the court promptly and decisively calls counsel to order and fully and clearly instructs the jury to disregard the improper remarks there is ordinarily no available error,² but counsel must be promptly checked and the effect of the improper statements effectively dissipated.³ Permitting counsel in civil cases, over the objection of the opposite party, to read from legal treatises is, in general, prejudicial error.⁴ Improper remarks by counsel may, if objection is appropriately interposed and exception properly reserved, be available for the reversal of the judgment in cases where they are material and probably injurious to the complaining party.⁵

§ 673. **Interrogatories to the Jury**—It is the duty of the trial court to submit to the jury interrogatories that are properly

error. *City of La Fayette v. Weaver*, 119 Ill. 445, 10 N. E. Rep. 16; *Little* 92 Ind. 477; *Buscher v. Scully*, 107 Ind. 246; *Boyle v. State*, 105 Ind. 469; *Shular v. State*, 105 Ind. 289; *Epps v. State*, 102 Ind. 539; *Anderson v. State*, 104 Ind. 467; *Morrison v. State*, 76 Ind. 335; *Chicago, etc., Co. v. Sullivan (Ill.)*, 17 N. E. Rep. 460.

¹ *Miner v. Louman*, 66 Mich. 530, 33 N. W. Rep. 836; *Willis v. McNatt* 75 Tex. 69, 12 S. W. Rep. 478. See, generally, *Watson v. St. Paul, etc., Co.* 42 Minn. 46, 43 N. W. Rep. 904; *Galveston, etc., Co. v. Cooper*, 70 Texas, 67; *Jackson v. Harby*, 70 Texas, 410; *George v. Swafford*, 75 Iowa, 491; *Chicago, etc., Co. v. Fietsam*, 123 Ill. 518; *Drew v. State*, 124 Ind. 9, 23 N. E. Rep. 1098; *Huckshold v. St. Louis, etc., Co.*, 90 Mo. 548, 2 S. W. Rep. 794.

² *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. Rep. 664; *City of Evansville v. Wilter*, 86 Ind. 414; *People v. Scharnweber*,

119 Ill. 445, 10 N. E. Rep. 16; *Little Rock, etc., Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. Rep. 505; *Fredericks v. Judah*, 73 Cal. 604, 15 Pac. Rep. 305; *Jackson v. Harby*, 70 Tex. 410, 8 S. W. Rep. 71.

³ *Hunt v. State*, 28 Texas App. 149, 12 S. W. Rep. 737; *State v. Tennon*, 42 Kan. 330, 22 Pac. Rep. 429; *Augusta, etc., Co. v. Randall*, 85 Ga. 297, 11 S. E. Rep. 706.

⁴ *Porter v. Choen*, 60 Ind. 338; *Johnson v. Culver*, 116 Ind. 278; *House v. McKinney*, 54 Ind. 240; *Scott v. Scott*, 124 Ind. 66; *Berry v. State*, 10 Ga. 511; *Wightman v. City of Providence*, 1 Clifford C. C. 524; *Rolfe v. Rumford*, 66 Me. 564; *People v. Anderson*, 44 Cal. 65. See *Work of the Advocate*, 500-505.

⁵ *Baldwin v. Grand Trunk Ry. Co.*, 64 N. H. 596, 15 Atl. Rep. 411; *Shorb v. Kinzie*, 100 Ind. 429.

framed, requested at the proper time and in the appropriate mode.¹ A refusal to submit such interrogatories is generally prejudicial error, but there is no material error unless the interrogatories are properly framed and their submission opportunistically and appropriately requested.² The court can not withdraw from the jury proper and material interrogatories which have been duly submitted,³ but it may withdraw improper interrogatories.⁴ If interrogatories are withdrawn and the record does not affirmatively show that they were such as the party had a right to have answered, the presumption on appeal will be that they were such interrogatories as might rightfully be

¹ *Boots v. Griffiths*, 97 Ind. 241; *Williamson v. Yingling*, 80 Ind. 379; *Miller v. White River School Tp.*, 101 Ind. 503; *Clegg v. Waterbury*, 88 Ind. 21; *Buntin v. Rose*, 16 Ind. 209; *Sage v. Brown*, 34 Ind. 464; *Maxwell v. Boyne*, 36 Ind. 120; *Reeves v. Plough*, 41 Ind. 204; *Summers v. Greathouse*, 87 Ind. 205; *American Central Ins. Co. v. Hathaway*, 43 Kan. 399, 23 Pac. Rep. 428; *Wichita, etc., Co. v. Fecheimer*, 36 Kan. 45, 12 Pac. Rep. 362; *Clark v. Missouri, etc., Co.*, 35 Kan. 350, 11 Pac. Rep. 134; *City of Wyandotte v. Gibson*, 25 Kan. 236; *Farnsworth v. Coots*, 46 Mich. 117. Where the statute makes it discretionary with the court to submit or refuse to submit interrogatories the rule stated in the text does not apply. *Lufkins v. Collins (Idaho)*, 10 Pac. Rep. 300; *McLean v. Burbank*, 12 Minn. 530; *Swift v. Mulkey*, 14 Oregon, 59, 12 Pac. Rep. 76; *Cole v. Crawford*, 69 Texas, 124, 5 S. W. Rep. 646.

² See "Request for the submission of special interrogatories to the jury," and "Special interrogatories to jury—What rulings are harmless although erroneous." See, also, *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. Rep. 1027. As to when objection must be made, see *Brooker v. Weber*, 41 Ind. 426; *Richardson v. Weare*, 62 N. H. 80. What interroga-

tories may be refused: *Thomas v. Schae*, 80 Ia. 237, 49 N. W. Rep. 539; *Jackson v. German Ins. Co.*, 27 Mo. App. 62; *Murdock v. Clarke*, 90 Cal. 427, 24 Pac. Rep. 272; *Des Moines, etc., Co. v. Polk County, etc., Co. (Iowa)*, 45 N. W. Rep. 773; *Chicago, etc., Co. v. Dunleavy*, 27 Ill. App. 438, S. C. 129 Ill. 132, 22 N. E. Rep. 151. See, generally, *Waymire v. Lank*, 121 Ind. 1; *Bowen v. Swander*, 121 Ind. 164; *Seekell v. Norman*, 78 Iowa, 254; *Cleveland, etc., Co. v. Asbury*, 120 Ind. 289; *Toledo, etc., Co. v. Rathmann*, 78 Iowa, 288; *Chicago, etc., Co. v. Burger*, 124 Ind. 275, 279, 24 N. E. Rep. 981. Where objection is made to part of the interrogatories it will be presumed on appeal that the submission was by consent. *Fisk v. Chicago, etc., Co. (Iowa)*, 48 N. W. Rep. 1081; *Fitch v. Armour*, 14 N. Y. Supp. 319.

³ *Summers v. Greathouse*, 87 Ind. 205; *Duestenberg v. State*, 116 Ind. 141, citing, among others, the following cases: *Wood v. Ostram*, 29 Ind. 177; *Noakes v. Morey*, 30 Ind. 103; *Otter Creek, etc., Co. v. Raney*, 34 Ind. 329; *Maxwell v. Boyne*, 36 Ind. 120; *Peters v. Lane*, 55 Ind. 391.

⁴ *Continental Ins. Co. v. Yung*, 113 Ind. 159; *Groscap v. Rainier*, 111 Ind. 361; *Dawson v. Shirk*, 102 Ind. 184, 188.

withdrawn.¹ It is error to instruct the jury that answers need not be returned to the interrogatories in the event that a general verdict is rendered in favor of the party by whom the interrogatories are asked, for it is the imperative duty of the court, when proper interrogatories are duly asked, to instruct the jury to answer them in the event that they return a general verdict.² In cases where the court, as of right, ultimately decides all questions, both of law and fact, as in suits in equity, the matter of submitting interrogatories to the jury is necessarily one of discretion, inasmuch as the findings of the jury in such instances are merely advisory, and may be adopted or rejected as the court sees fit. No prejudicial error can in such cases arise out of rulings in submitting or refusing to submit interrogatories to the jury,³ although material error may, of

¹ *Groscap v. Rainier*, 111 Ind. 361, 368, citing *Myers v. Murphy*, 60 Ind. 282; *Foster v. Ward*, 75 Ind. 594; *Frank v. Grimes*, 105 Ind. 346.

² *Pitzer v. Indianapolis, etc., Co.*, 80 Ind. 569; *Lake Erie, etc., Co. v. Fix*, 88 Ind. 381, 383; *Ogle v. Dill*, 61 Ind. 438, 443. The object of the statute providing for the submission of interrogatories to the jury is well stated by Cassoday, J., in *Ryan v. Rockford Ins. Co.*, 77 Wis. 611, 615. We quote from the opinion in that case the following: "The purpose of thus submitting particular controverted questions of fact is to secure a direct answer free from any bias or prejudice in favor of or against either party. It is a wise provision in certain cases when properly administered. It has often been demonstrated in the trial of causes that the non-expert jurymen is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias or prejudice, and hence, it is common practice for courts in the submission of such particular questions and special verdicts to charge the jury,

in effect, that they have nothing to do with, and must not consider, the effect which their answers may have upon the controversy or the parties." In *Morrow v. Commissioners*, 21 Kan. 484, 503, the court said: "The main object of the law is to bring out the various facts separately in order to enable the court to apply the law correctly and to guard against any misapplication of the law by the jury. It is a matter of common knowledge, that a jury, influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly where at the same time it will not find a certain fact to have been proved, which in law is an insuperable barrier to a recovery in accord with the general verdict." Much to the same effect are the cases of *Buntin v. Rose*, 16 Ind. 209; *Davis v. Town of Farmington*, 42 Wis. 425; *Durfee v. Abbott*, 50 Mich. 479; *Hendrickson v. Walker*, 32 Mich. 68. See *Partridge v. Gilbert*, 3 Duer, 184; *Dempsey v. Mayor*, 10 Daly, 417.

³ *Ikerd v. Beavers*, 106 Ind. 483; *Platter v. Board*, 103 Ind. 360; *Koons v. Blanton* (Ind.), 27 N. E. Rep. 334; *Rariden v. Rariden* (Ind.), 28 N. E. Rep. 701; *Jennings v. Durham*, 101 Ind. 391;

course, exist if the ultimate decision is rendered erroneous by the action of the court in finally determining questions of fact or law. There is, we may say in concluding this topic, conflict upon the question whether it is competent for the jury to answer that there is no evidence, our court holding that they may do so,¹ but other courts hold a different doctrine.²

Pence v. Garrison, 93 Ind. 345; *Swales v. Grubbs*, 126 Ind. 106; *Sheets v. Bray*, 125 Ind. 33; *Prilliman v. Mendenhall*, 120 Ind. 279; *Martin v. Martin*, 118 Ind. 227; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515; *Israel v. Jackson*, 93 Ind. 543; *Towns v. Smith*, 115 Ind. 480; *Taylor v. Collins*, 51 Wis. 123; *Will of Carroll*, 50 Wis. 437.

¹ *Dockerty v. Hutson*, 125 Ind. 102; *Cleveland, etc., Co. v. Asbury*, 120 Ind. 289; *Mitchell v. Robinson*, 80 Ind. 281, S. C. 41 Am. Rep. 812; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442; *Maxwell v. Boyne*, 36 Ind. 120; *Gulick v. Connely*, 42 Ind. 134; *Rowell v. Klein*, 44 Ind. 290, S. C. 15 Am. Rep. 235; *Williamson v. Yingling*, 80 Ind. 379; *Terre Haute, etc., Co. v. Barr*, 31 Ill. App. 57.

² *Union, etc., Co. v. Fray*, 35 Kan.

700, 12 Pac. Rep. 98. If there is evidence upon a material point it is, of course, error for the jury to evade an answer, and our decisions are addressed to cases where there was no evidence. It is difficult to sustain a decision holding that the court may coerce a jury into answering a question contrary to their belief that there is no evidence upon the point, since such a course can not be pursued without invading the province of the jury. To coerce a verdict in such a case, would, in effect, be for the court to make the verdict. There can be no doubt of the power to prevent injustice resulting from the failure or refusal of jurors to do their duty, but the remedy is not, as we believe, by coercing the jury to find one way or the other where they are convinced that there is no evidence.

CHAPTER VI.

WAIVER.

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| 674. Available error does not exist where there is an effective waiver. | § 685. Demurrer to the evidence—Waiver of right to jury. |
| 675. The doctrine of waiver. | 686. Introducing evidence after demurring—Effect of. |
| 676. A party does not waive a defect or irregularity of which he is excusably ignorant. | 687. Motion for direction to jury to return a verdict in favor of moving party—Effect of subsequently giving evidence. |
| 677. Appearance—Effect of. | 688. Waiver of objections to pleadings by demurring to the evidence. |
| 678. Special or qualified appearance. | 689. Effect of a demurrer upon the right to make rulings upon the evidence available. |
| 679. Waiver of objections to the remedy. | 690. Waiver as affecting the mode of trial. |
| 680. Waiving objections to pleadings. | 691. Rulings respecting procedure on the trial—Illustrative cases. |
| 681. Failure to demur. | 692. Rulings on the trial—General doctrine. |
| 682. Failure to demand a decision upon demurrer. | |
| 683. Waiver of objections to decisions on demurrer. | |
| 684. Instances of the waiver of preliminary objections. | |

§ 674. **Available Error does not Exist where there is an Effective Waiver**—A party may always relinquish a right by a voluntary affirmative act, and so he may by silence and inaction, where action is required. If there is silence and inaction where a positive act or speech is required there is a waiver, and where there is a waiver there can be no available error. It is a general rule of wide sweep broken by very few exceptions, that action is required of parties in court, for silence and inaction are, in the very great majority of cases, regarded as waiving objections. And objections waived in the trial court are completely lost, for they can not be first made on appeal save in very rare cases.¹

¹ *Ante*, § 489. See, also, Louisville, Rep. 1010; Bradwell v. Pittsburgh, etc., etc., Co. v. Rush, 127 Ind. 545, 26 N. E. Co., 139 Pa. St. 404, 20 Atl. Rep. 1046;

§ 675. **The Doctrine of Waiver**—We have often referred in former pages to the doctrine of waiver, but it is of such practical importance in trial practice as an incident to appeals and in appellate practice that it requires specific consideration. It may be said that the rule is that what is not well objected to in the trial court and well saved by a proper exception is waived. As to errors relating to the trial it is to be further said that they are waived unless the rulings in which they exist are appropriately brought before the trial court for review.¹ But errors may be well saved and well presented to the trial court and yet waived on appeal by a failure to present them as the law or the rules of the court require.²

§ 676. **A party does not Waive a Defect or Irregularity of which he is Excusably Ignorant**—As a waiver is the voluntary relinquishment of a right it is essential that the party against whom a waiver is sought to be made available should have knowledge of the defects or irregularities which it is alleged were waived by him.³ But it is obvious that this rule can have only a very

Hormann v. Hartmetz, 128 Ind. 353, 27 N. E. Rep. 731; *Montana Ry. Co. v. Warren*, 137 U. S. 348; *Fisk v. Chicago, etc., Co.*, 74 Ia. 424, 46 N.W. Rep. 998; *Tibbetts v. Penley*, 83 Me. 118, 21 Atl. Rep. 838; *Williams v. Thomas*, 3 New Mex. 324, 9 Pac. Rep. 356; *Chicago, etc., Co. v. Graney (Ill.)*, 25 N. E. Rep. 798; *Bliley v. Taylor*, 84 Ga. 154, 163, 13 S. E. Rep. 283; *Connelly v. Shamrock, etc., Society*, 43 Mo. App. 283; *Ridenhour v. Kansas City, etc., Co.*, 102 Mo. 270, 283, 14 S.W. Rep. 760.

¹ *Peabody v. Sweet*, 3 Ind. 514; *New Albany, etc., Co. v. Callow*, 8 Ind. 471; *Church v. Drummond*, 7 Ind. 17; *Manly v. Hubbard*, 9 Ind. 230; *Lindley v. Dakin*, 13 Ind. 388; *Fowler v. Burget*, 16 Ind. 341; *Voltz v. Newbert*, 17 Ind. 187; *Potter v. Owens*, 18 Ind. 383; *Deacon v. Schwartz*, 18 Ind. 285; *Harderle v. City of LaFayette*, 20 Ind. 234; *Hobbs v. Cowden*, 20 Ind. 310; *Andre v. Frybarger*, 70 Ind. 280; *Makepeace v. Davis*, 27 Ind. 352; *State v. Blanch*, 70 Ind. 204;

Chaplin v. Sullivan, 128 Ind. 50, 5, 27 N. E. Rep. 425; *J. Oberman Brewing Co. v. Ohlerking*, 33 Ill. App. 26; *Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. Rep. 713; *Ridenhour v. Kansas City, etc., Co.*, 102 Mo. 270, 283, 14 S.W. Rep. 760. *Hintz v. Graupner (Ill.)*, 27 N. E. Rep. 935; *Duigenan v. Claus*, 46 Kan. 275, 27 Pac. Rep. 699; *Memory v. Niepert*, 33 Ill. App. 131.

² *Tharp v. Jarrell*, 66 Ind. 52; *Lackey v. Hernby*, 9 Ind. 536; *Mumford v. Thomas*, 10 Ind. 167; *Witt v. King*, 5th Ind. 72. In *Summerson v. Hicks*, 134 Pa. 566, 21 Atl. Rep. 875, it was held that if parties on appeal proceed upon the theory that the questions are saved by objections in the trial court they will be held to that theory, and to have waived the right to allege that objections were not properly saved below.

³ *Giles v. Caines*, 3 Caines (N. Y.) 107; *Newbery v. Furnival*, 56 N. Y. 638; *Wolford v. Oakley*, 1 Sheldon (N. Y.), 261.

narrow scope and limited application in procedure, either trial or appellate, inasmuch as a party in court, or who ought to be there, is bound to take notice of all that occurs in the cause, except matters of a very extraordinary nature. He must, of course, take notice of matters of law, and within such matters the included rules of procedure and practice. He must use the means of knowledge open to him, for if he is put upon inquiry he is chargeable with knowledge of the facts to which such an inquiry reasonably and diligently pursued would lead. Having the means of knowledge is equivalent to knowledge." The doctrine expressed in the maxim quoted is peculiarly applicable to matters of procedure, for if a party has means of knowledge he must actively and diligently employ such means, and he will be in no situation to defeat a waiver. While there are very few instances in matters of procedure where a party pleads ignorance to escape a waiver there are, nevertheless, some where he may successfully do so. The presumption is, in almost every instance, necessarily that a party summoned into court, or who comes there voluntarily, has notice of all that occurs, and if he seeks to escape a waiver he must overcome the presumption. This he can not do unless he makes a strong and clear case, showing excusable ignorance of the facts. If he has knowledge of the facts, or is chargeable with such knowledge, then he is held to know the legal consequences that flow from the facts.¹

677. Appearance—Effect of—It has long been established that a party who fully appears to the action or suit waives objections to the jurisdiction of the court over his person. If a party desires to object to process he must enter a special appearance for that purpose, for a general appearance waives objections to the writ or its service. It is not material how or in what manner notice is issued or served if it fully accomplishes its purpose by bringing the party into court and afford-

the principle stated in the text applies to him is itself a warning that he must be on estoppels, and there is stronger evidence for applying it to matters of law than to ordinary cases, for not be unless he informs himself as to the law. *Dodge v. Pope*, 93 Ind. 480; *Krug v. Davis*, 101 Ind. 75, 76.

ing him an opportunity to answer the complaint or declaration and this it is held to do whenever there is a full appearance. It is in general true that any act done in a case not accompanied by an express qualification or restriction limiting the appearance to what is called by some of the courts a "special appearance" and by others "a qualified appearance," is regarded as a general appearance. Thus, the filing of a demurrer assigning any other ground than one assailing the jurisdiction is such an appearance as waives purely preliminary motions or objections.² Appearing to a motion and arguing the merits is a general appearance.³ If a party joins with objections to the jurisdiction, objections or defenses going to the

¹ *Clark v. Lilliebridge* (Kan.), 26 Pac. Rep. 43; *In re Bingham*, 127 N.Y. 296, 27 N. E. Rep. 1055; *St. Louis, etc., Co. v. McBride*, 141 U. S. 127; *Mason, etc., Drainage District v. Griffin*, 134 Ill. 330; *Hazard v. Wason*, 152 Mass. 268, 25 N. E. Rep. 465; *Granville County, etc., Board v. State Board, etc.*, 106 N. C. 81; *Bishop v. Silver Lake, etc., Co.*, 62 N. H. 455; *Railroad Co. v. Morey*, 47 Ohio, 207, 7 Law. Rep. Anno. 701, 24 N. E. Rep. 269; *Moore v. Gamgee L. R.*, 25 Q. B. 244; *Dikeman v. Struck*, 76 Wis. 332, 45 N. W. Rep. 118; *City of Crawfordsville v. Hays*, 42 Ind. 200; *Albertson v. Williams*, 23 Ind. 612; *Platt v. Manning*, 34 Fed. Rep. 817; *Louisville, etc., Co. v. Nicholson*, 60 Ind. 158; *Moulton v. Baer*, 78 Ga. 215, 2 S. E. Rep. 471; *Colorado, etc., Co. v. Caldwell*, 11 Col. 545, 19 Pac. Rep. 542; *Reed v. Cates*, 11 Col. 527, 19 Pac. Rep. 464. An entry of appearance in the Federal Court is a waiver of the objection that the party was not served in the district where he resides. *Foote v. Massachusetts, etc., Association*, 39 Fed. Rep. 23; *Blackburn v. Selma, etc., Co.*, 2 Flip-pin, 525; *Harkness v. Hyde*, 98 U. S. 476.

² *Singleton v. O'Brien*, 125 Ind. 151,

25 N. E. Rep. 154; *Knight v. Low*, 15 Ind. 374; *City of Crawfordsville v. Hays*, 42 Ind. 200; *Slaute v. Hollowell*, 90 Ind. 286; *Gilbert v. Hall*, 115 Ind. 549; *Ex parte Henderson*, 84 Ala. 36, 4 So. Rep. 284; *Ford v. Ford*, 110 Ind. 89; *Sunier v. Miller*, 105 Ind. 393; *Green v. Elliott*, 86 Ind. 53; *Schmied v. Keeney*, 72 Ind. 309; *Neff v. Reed*, 98 Ind. 341; *St. Louis, etc., Co. v. McBride*, 141 U. S. 127; *Donnelly v. Woolsey*, 59 Hun. 618; *Nashua Savings Bank v. Lovejoy*, 1 N. Dak. 211, 46 N. W. Rep. 411; *Kegg v. Welden*, 10 Ind. 550; *Lewis v. Brackenridge*, 1 Blackf. 112; *Vermilya v. Davis*, 7 Blackf. 158; *Dudley v. Fisher*, 7 Blackf. 553; *Cleveland v. Obenchain*, 107 Ind. 591; *Robinson v. Rippey*, 111 Ind. 112.

³ *Cincinnati, etc., Co. v. Belle Centre (Ohio)*, 27 N. E. Rep. 464. See generally, *White v. Morris*, 107 N. C. 92; *Hall v. Craig*, 125 Ind. 523, 25 N. E. Rep. 538; *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98; *Lane v. Fox*, 8 Blackf. 58; *Bush v. Bush*, 46 Ind. 70; *Harvey v. Donnellan*, 36 Ind. 501; *Wiseman v. Risinger*, 14 Ind. 461; *Dickerson v. Hays*, 4 Blackf. 44; *College Corner, etc., Co. v. Moss*, 77 Ind. 139.

merits there is, as a general rule, full appearance.¹ If a party appropriately and seasonably objects to the jurisdiction of his person he is not, according to what seems to us the better opinion, to be regarded as waiving the objection by answering to the merits after his objection is overruled and due exception reserved. Having done all in his power at the proper time, to present his objection, subsequently contesting the case is in no just sense a waiver. A party can not be held to relinquish a right which he asserts as the law requires, nor is he bound to constantly repeat his objections. It would be unjust to hold that he must surrender his right to contest the case upon the merits or yield a right he has done his best to preserve and assert.² It is held to be within the discretion of the court to per-

¹ *Kaw Valley Life Association v. Lemke*, 40 Kan. 142, 19 Pac. Rep. 337. See *Walker v. Turner*, 27 Neb. 103, 42 N. W. Rep. 918.

² In discussing the general subject the Supreme Court of the United States by one of its ablest members, Mr. Justice Harlan, said: "But the inferior State court having ruled that the right of removal did not exist and that it had jurisdiction to proceed, the company was not bound to desert the case and leave the opposite party to take judgment by default. It was at liberty, its right of removal being ignored by the State court, to make defense in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing in the slightest degree, its right to a trial in the court to which the action had been transferred, or without affecting to any extent the authority of the latter to proceed." *Steamship Co. v. Tugman*, 106 U. S. 118. The court cited as sustaining the doctrine declared the cases of *Railroad Co. v. Koontz*, 104 U. S. 5; *Railroad Co. v. Mississippi*, 102 U. S. 135; *Kern v. Huiderkoper*, 103 U. S. 485; *Insurance Co. v. Dunn*, 19 Wall. 214. In *Jones v. Jones*, 108 N. Y. 415, it was

said: "The principle has been applied in a great variety of cases and there is substantial uniformity in the decisions to the effect that a party not served with process so as to give the court jurisdiction of his person, does not waive the objection nor confer jurisdiction by answering over and going to trial on the merits after he has ineffectually objected to jurisdiction and his objection has been overruled." This doctrine is supported by the weight of authority. *Walling v. Beers*, 120 Mass. 548, 550; *Avery v. Slack*, 17 Wend. 85; *Harkness v. Hyde*, 98 U. S. 476; *Dewey v. Greene*, 4 Denio, 93; *Warren v. Crane*, 50 Mich. 300, 15 N. W. Rep. 465. In the case last cited it was said: "Waiver is a voluntary act and implies an election by a party to dispense with something of value or to forego some advantage which he might at his option have demanded or insisted upon." This principle is, as we believe, the controlling one, and leads to the conclusion asserted in the text, inasmuch as a party who opposes, actively and properly, jurisdiction over his person can not be held to voluntarily submit by answering over to the merits. He acts under coercion and not voluntarily.

mit a party who has voluntarily appeared to withdraw his appearance in a cause where there has been no service of process,¹ but the court is not bound to allow a withdrawal as a matter of right.² As indicated in the first note to the preceding sentence we think that where the court simply permits the withdrawal of appearance and subsequently renders judgment, the defendant can not overturn the judgment without bringing into the record facts showing that there was not due notice,³ and our reason for this conclusion is that after appearance the presumption is that jurisdiction existed. To infer that there was no jurisdiction where there is an appearance and judgment in a case where the record is silent would be to violate the rule that all reasonable presumptions will be indulged in favor of the action of the trial court. General appearance after a discontinuance operates as a waiver,⁴ and such an appearance waives a dismissal.⁵

§ 678. **Special or Qualified Appearance**—There is some diversity of opinion upon the question of the right of a party to so limit his appearance as to prevent a surrender of objections to jurisdiction over his person. The doctrine supported by principle and the overwhelming weight of authority is that a special or qualified appearance may be entered in such a mode as to avoid

¹ *McArthur v. Lefler*, 110 Ind. 526; *Young v. Dickey*, 63 Ind. 31. The decision in the case last cited seems to us to be wrong. If there is an appearance and nothing more is shown, the presumption is that jurisdiction existed and this, of course, implies that there was service of process. The decision is opposed to an elementary rule long settled. The case of *Coffin v. Evansville, etc., Co.*, 7 Ind. 413, is certainly against the doctrine of the case under mention. *Carver v. Williams*, 10 Ind. 267, does not support that case, nor does *Smith v. Foster*, 59 Ind. 595. In these cases it was held that the court properly rendered judgment and this excludes the conclusion that there was

no jurisdiction. As the case of *McArthur v. Lefler*, *supra*, rests entirely on *Young v. Dickey*, *supra*, what is said of the latter cases applies to the former.

² *New Albany, etc., Co. v. Combs*, 13 Ind. 490.

³ The code declares that the transcript shall not include "a summons for the defendant in cases where all persons named in it have appeared to the action." R. S. 1881, § 650.

⁴ *Breese v. Allen*, 12 Ind. 426; *McDougle v. Gates*, 21 Ind. 65; *Clark v. State*, 4 Ind. 268; *Humble v. Bland*. 6 Term R. 255.

⁵ *Mahon v. Mahon*, 19 Ind. 324; *Bosley v. Farquar*, 2 Blackf. 61; *Wilson v. Coles*, 2 Blackf. 402.

a surrender of the right to deny jurisdiction.¹ It is necessary to carefully guard and limit appearance to the single point of specially appearing for the purpose of assailing the jurisdiction of the court.² It has been declared by the Supreme Court of the United States that the court may, in its discretion, permit a general appearance to be withdrawn and a special appearance to be entered, but it is indicated that the party to whom the provision is granted can not move to dismiss the appeal and that there is a difference between the procedure in the appellate tribunal and that in the court of original jurisdiction.³ In a case decided by one of the Federal circuit courts it was held that a court of original jurisdiction might permit the amendment of an appearance by limiting a general appearance to a special one.⁴ It seems quite

¹ *Kinkade v. Myers*, 17 Ore. 470, 21 Pac. Rep. 557; *Chubbuck v. Cleveland*, 37 Minn. 466, S. C. 5 Am. St. Rep. 864; *Chesapeake, etc., Co. v. Heath*, 87 Ky. 651, 9 S. W. Rep. 832; *Paxton v. Daniell*, 1 Wash. 16, 23 Pac. Rep. 441; *Campbell v. Swasey*, 12 Ind. 70; *Baily v. Schrader*, 34 Ind. 260; *Carson v. Steamboat Talma*, 3 Ind. 194; *Collins v. Nichols*, 7 Ind. 447; *Cohen v. Trowbridge*, 6 Kan. 385; *Simcock v. Bank*, 14 Kan. 529; *Branner v. Chapman*, 11 Kan. 118; *Huff v. Shepard*, 58 Mo. 242; *Anderson v. Brown*, 9 Mo. 646; *Harkness v. Hyde*, 98 U. S. 476; *Mulhern v. Press, etc., Co.*, 53 N. J. Law. 150, 20 Atl. Rep. 760; *Brown v. Rice*, 30 Neb. 236, 46 N. W. Rep. 489. In *Brown v. Webber*, 6 Cush. 560, it was said by Shaw C. J.: "If the defendant would object to the irregularity or want of due service in this respect, he may do so by plea in abatement where it is necessary to plead any matter of fact on which his objection is founded, or by motion to dismiss where the objection is apparent on the face of the proceedings or the return of the officer; and in either case before pleading generally to the merits. And to enable him to do this he may appear specially for the pur-

pose of stating such objection without thereby waiving it. But if he will enter a general appearance, or plead to the merits, or lie by after he is aware of the matter of the objection to the jurisdiction, he thereby submits himself to the jurisdiction of the court."

² *Bucklin v. Strickler* (Neb.), 49 N. W. Rep. 371. See, generally, *Sealy v. California, etc., Co.*, 19 Ore. 94, 24 Pac. Rep. 197.

³ *United States v. Yates*, 6 How. 606, 607. It was said by the court in the case cited that: "The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in a court exercising original jurisdiction do not apply to an appellate court." See, generally, *Graham v. Spencer*, 14 Fed. Rep. 603, 606; *Carroll v. Dorsey*, 20 How. (U. S.), 204, 207; *Creighton v. Kerr*, 20 Wall. 12; *Habich v. Folger*, 20 Wall. 1, 7; *Rhode Island v. Massachusetts*, 13 Pet. 23.

⁴ *Hohorst v. Hamburg-American Packet Co.*, 38 Fed. Rep. 273. In the case cited the court said: "That the court has power to allow a general notice of appearance to be amended so as to make it a special appearance seems to be well settled."

clear that where there is fraud or mistake and no fault on the part of a party who enters a general appearance he may be relieved upon timely and sufficient application,¹ but we suppose it equally clear that a party can not insist upon a withdrawal of his appearance as of right and without cause shown.

§ 679. Waiver of objections to the Remedy—A party by silence and inaction may waive all questions as to the character of the remedy adopted. A striking illustration of the doctrine that objections to the remedy are waived by a failure to object is supplied by the cases which hold that if the objection that there is an adequate remedy at law is not properly made in a court of equity it will be waived.² If waived it can not, of course, be regained.³ The question of remedy partakes in no slight degree of the elements of jurisdiction of the subject, but objections to the remedy may, nevertheless, be waived. From this it seems that there is really a third class of jurisdiction and that the division of jurisdiction into two classes is not exhaustive. What the third class shall be denominated or what its nature and extent, it is foreign to our present purpose to inquire.

§ 680. Waiving objections to Pleadings—Where objections to pleadings are effective only when made in a designated mode they are waived unless made in that mode. Objections not made substantially as the law requires are ineffective. Thus, the failure to move to make a pleading more definite or certain waives an objection on the ground of uncertainty, unless the pleading is so wholly destitute of certainty as to be without effect.⁴ So, a motion to separate a pleading into paragraphs

¹ *Malin v. Kinney*, 1 Cain. Rep. 117; *Becker v. Lamont*, 13 How. Pr. Rep. 23; *Furnival v. Bogle*, 4 Russ. R. 142; *Hunt v. Brennan*, 1 Hun. 213; *Sullivan v. Frazee*, 4 Rob. (N.Y.), 616.

² *Clark v. Flint*, 22 Pick. 231; *First Congregational Society v. Trustees*, 23 Pick. 148; *Russell v. Loring*, 3 Allen, 121; *Tarbell v. Bowman*, 103 Mass. 341; *Jones v. Keen*, 115 Mass. 170.

³ *Matter of Cooper*, 93 N. Y. 507.

⁴ *Mills v. Rice*, 3 Neb. 76; *Trustees, etc., v. Odlin*, 8 Ohio St. 293, 294; *Myer v. Moon*, 45 Kan. 580, 26 Pac. Rep. 40; *Woodruff v. Jabine* (Ark.), 15 S. W. Rep. 830; *Copeland v. State*, 126 Ind. 51, 25 N. E. Rep. 866; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. Rep. 905; *Plunkett v. Minneapolis, etc., Co.*, 79 Wis. 222, 48 N. W. Rep. 519. See generally, as to motions addressed to pleadings, *Smith v. Summerfield*, 108 N. C.

must be opportunely made, or waiver will be enforced.¹ Under our decisions a single paragraph of answer or complaint should not be double, but if so the remedy is by motion.² If it states only one good cause of action or defense it will not be bad for duplicity, although there may be allegations attempting to set forth another defense or cause of action. In such a case the allegations not essential to the well alleged cause of action or defense may be regarded as surplusage.³ But one office can, as a general rule, be performed by a single paragraph of a pleading, thus, a paragraph of an answer can not be both a general denial and a plea in confession and avoidance,⁴ and the result is that the attempt to so blend the defenses waives one of them. Objection that a pleading is not verified must be made by motion or the objection will not be available on appeal.⁵ The rule we are here concerned with is strikingly illus-

284, 12 S. E. Rep. 997; *Citizens, etc., Co. v. Shenango Natural Gas Co.*, 138 Pa. St. 22, 20 Atl. Rep. 947; *Pavey v. Pavey*, 30 Ohio St. 600; *Plummer v. Mold*, 22 Minn. 15; *Turner v. First National Bank*, 26 Iowa, 562; *Hewitt v. Brown*, 21 Minn. 163.

¹ *McKinney v. McKinney*, 8 Ohio St. 423; *McCarthy v. Garraghty*, 10 Ohio St. 438; *Truitt v. Baird*, 12 Kan. 420; *Township of Hartford v. Bennett*, 10 Ohio St. 441; *Sentinel Co. v. Thomson*, 38 Wis. 489; *Bass v. Comstock*, 38 N. Y. 21; *Adams v. Secor*, 6 Kan. 542, 547. As to when a ruling on a motion to separate constitutes available error, see *Goldberg v. Utley*, 60 N. Y. 427; *Pierce v. Bicknell*, 11 Kan. 262.

² *Hendry v. Hendry*, 32 Ind. 349; *State v. Newlin*, 69 Ind. 108; *Barnes v. Stevens*, 62 Ind. 226; *Dennman v. McMakin*, 37 Ind. 241; *Jones v. Hathaway*, 77 Ind. 14; *Rogers v. Smith*, 17 Ind. 323; *Evans v. White*, 53 Ind. 1; *Rielay v. Whitcher*, 18 Ind. 458; *Spencer v. Chrisman*, 15 Ind. 215; *Johnson v. Crawfordsville, etc.*, 11 Ind. 280.

³ *Booher v. Goldsborough*, 44 Ind. 490; *Thompson v. Oskamp*, 19 Ind. 399; *Swinney v. Nave*, 22 Ind. 178; *Evans*

v. White, 53 Ind. 1; *Porter v. Brackenridge*, 2 Blackf. 385; *Hay v. State*, 58 Ind. 337.

⁴ *Campbell v. Routt*, 42 Ind. 410; *Indiana, etc., Board v. Gray*, 54 Ind. 91; *Kimble v. Christle*, 55 Ind. 140; *Nysegander v. Lowman*, 124 Ind. 584; *Petty v. Trustees, etc.*, 95 Ind. 278; *State v. Foulkes*, 94 Ind. 493, 498; *Richardson v. Snider*, 72 Ind. 425; *Neidefer v. Chastain*, 71 Ind. 363, S. C. 36 Am. Rep. 198; *Woollen v. Whitacre*, 73 Ind. 198; *Cronk v. Cole*, 10 Ind. 485.

⁵ *State v. Ruhlman*, 111 Ind. 17; *Toledo, etc., Works v. Work*, 70 Ind. 253; *Indianapolis, etc., Co. v. Summers*, 28 Ind. 521; *Bradley v. Bank*, 20 Ind. 528; *Beeson v. Howard*, 44 Ind. 413; *Vail v. Rinehart*, 105 Ind. 6; *Payne v. Flournoy*, 29 Ark. 500; *Moses v. Risdon*, 46 Iowa, 251; *Schwarz v. Oppold*, 74 N. Y. 307; *Hughes v. Feeter*, 18 Ia. 142; *Pudney v. Burkhart*, 62 Ind. 179; *Butler v. Church, etc.*, 14 Bush. 540; *State v. Ruth*, 21 Kan. 583. See, generally, *Fritz v. Barnes*, 6 Neb. 435; *Warner v. Warner*, 11 Kan. 121. As to right to amend by verifying, see *Jones v. United States Slate Co.*, 16 How. Pr. 129; *Bragg v. Bickford*, 4 How. Pr. 21.

trated in the familiar doctrine long held with respect to matters in abatement, for that doctrine, as is well known, is that such matters must be promptly and properly pleaded or they will be deemed waived. It can hardly be said that the rule is so strict regarding other matters as it is respecting matters in abatement, but it is quite safe to say that in all cases objections must be made in due form and proper order or no available error can be alleged on the decisions made upon them. Thus, if a party after answering should move to separate into paragraphs, or to make more certain, his motion would come too late, and no available error could be assigned upon the ruling denying it. The court may, in its discretion, allow a party to withdraw a pleading in order to make the motion which ought to have preceded the pleading, but it is not bound to do so, and hence its refusal can not be successfully assigned as error.

§ 681. **Failure to Demur**—The rule that pleadings are aided by a verdict rests in part, at least, upon the doctrine of waiver. The party who fails to interpose an objection available on demurrer voluntarily relinquishes a right which he can not regain.¹ The availability of objections in a case where a demurrer is interposed in due time and in an appropriate form assumes a very different phase from the one it wears where the objections are made by a motion in arrest or by a specification in the assignment of errors.² The cases to which we have re-

¹ As illustrating this general doctrine may be cited *St. Louis, etc., Co. v. Triplett* (Ark.), 11 Law. Rep. Anno. 773; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. Rep. 630; *Johnson v. Miller* (Iowa), 48 N. W. Rep. 1081; *Louisville, etc., Co. v. Harrington*, 92 Ind. 457; *Yeoman v. Davis*, 86 Ind. 189; *Jenkins v. Rice*, 84 Ind. 342; *DuSouchet v. Dutcher*, 113 Ind. 249; *Felger v. Etzell*, 75 Ind. 417; *Quirk v. Clark*, 7 Mont. 31, 14 Pac. Rep. 669; *Cribb v. Waycross, etc., Co.*, 82 Ga. 597, 9 S. E. Rep. 426; *Trebbly v. Simmons*, 38 Minn. 508, 38 N. W. Rep. 693. See, generally, *Peden v. Mail*, 118 Ind. 556, 20 N. E. Rep. 493; *Herron v. Cole*, 25 Neb. 692, 41 N. W. Rep. 765; *Meyer*

v. Lane, 40 Kan. 491, 20 Pac. Rep. 258; *Palmer v. Arthur*, 131 U. S. 60; *Johnson v. Ahrens*, 117 Ind. 600, 19 N. E. Rep. 335.

² *McFadin v. David*, 78 Ind. 445; *Johnson v. Breedlove*, 72 Ind. 368; *New v. Walker*, 108 Ind. 365; *Dowling v. Crapo*, 65 Ind. 209; *McMillen v. Terrell*, 23 Ind. 163; *Sharpe v. Clifford*, 44 Ind. 346; *Murphy v. Lambert*, 59 Ind. 477; *Jones v. Ahrens*, 116 Ind. 490; *Sims v. Dame*, 113 Ind. 127; *Stewart v. State*, 113 Ind. 505; *Matson v. Swanson*, 131 Ill. 255, 23 N. E. Rep. 595; *Geveke v. Grand Rapids, etc., Co.*, 57 Mich. 589; *Lenahen v. Desmond*, 150 Mass. 292, 22 N. E. Rep. 903; *Smith v. Heller*, 119 Ind. 212, 21 N. E. Rep. 657.

ferred in the note, and to which many more might easily be added, are sufficient to show (and that is all that our immediate purpose requires) that the failure to act in due time and in the appropriate mode is often construed to be a waiver.

§ 682. **Failure to Demand a Decision upon Demurrer**—A party has a right to have an issue of law disposed of before going to trial upon the facts, but if he goes to trial without objection he waives a decision. It is upon this general principle that it is held that if a party goes to trial without an issue he will be deemed to have relinquished all objections because of the failure to join issue.¹ Where a party whose demurrer is pending

¹ *Ante*, §§ 352, 470, 482. *Farmers, etc., Co. v. Canada, etc., Co.*, 127 Ind. 250; *Citizens' Bank v. Bolen*, 121 Ind. 301; *Purple v. Harrington*, 119 Ind. 164; *June v. Payne*, 107 Ind. 307, 313; *Buchanan v. Berkshire, etc., Co.*, 96 Ind. 510; *Locke v. Merchants' Nat. Bank*, 66 Ind. 353; *Casad v. Holdridge*, 50 Ind. 529; *Taylor v. Short*, 40 Ind. 506; *Train v. Gridley*, 36 Ind. 241; *Ringle v. Bicknell*, 32 Ind. 369; *Bender v. State*, 26 Ind. 285. Our rule is that an issue will be presumed to have been made and judgment can not be entered as by confession. In *June v. Payson, supra*, it was said: "Where without objection a party alleging affirmative matter in his pleading goes to trial without requiring an issue to be formed upon such pleading, he can not afterwards ask judgment in his favor as by confession." The cases of *Bass v. Smith*, 61 Ind. 72; *Lewis v. Bortsfeld*, 75 Ind. 390; *Felger v. Etzell*, 75 Ind. 417, and *Stribling v. Brougher*, 79 Ind. 328, were cited. In Colorado a different doctrine is held. That doctrine was declared in *Danielson v. Gude*, 11 Col. 87, 94, in this language: "The defendants, by entering upon and proceeding with such trial upon the merits without demanding a ruling upon the demurrer, thereby waived the same. *Anderson v. Sloan*, 1 Col. 484. The demurrer being waived

and no answer to the complaint being interposed, every material allegation of the complaint must, for the purposes of the action, be taken as true." It seems to us that the doctrine of the learned court in the case from which we have quoted is not the correct one. The submission of a case to the triers of the facts implies that there is some issue of fact to be tried, and this implication can not exist if the facts are confessed. The natural and reasonable inference is that parties waive the formation of regular issues and submit the case for trial without formal pleadings. There is in all cases where both parties voluntarily go to trial upon the facts a waiver by each party respectively. The one waives a right to demand a formal pleading, and the other waives a right to object because there are no pleadings making an issue of fact in due and regular form. The reasonable presumption is that the parties elect to treat all affirmative allegations as controverted. *Davis v. Pool*, 67 Ind. 425; *Cogswell v. State*, 65 Ind. 1; *Carriger v. Sicks*, 73 Ind. 76; *Dodds v. Vannoy*, 61 Ind. 89; *Brand v. Whelan*, 18 Ill. App. 186; *City of Chicago v. Wood*, 24 Ill. App. 40; *In re Doyle*, 73 Cal. 564; *Quimby v. Boyd*, 8 Col. 194, 342.

and undecided answers he waives the demurrer, inasmuch as by answering he informs the court that he relinquishes a right to a decision.¹

§ 683. **Waiver of Objections to Decisions on Demurrer**—If a party answers a complaint after a ruling on demurrer declaring it to be bad, he waives the demurrer.² Amending a pleading after a ruling on demurrer is a waiver of the right to make the ruling available on appeal.³ It is not necessary that there should be a direct and formal amendment in order to call into force the rule that an amendment waives objections and exceptions to a decision upon demurrer, for if another pleading is found in the record substantially the same as that held bad on demurrer it will be held that objections and exceptions to the ruling adjudging it bad are waived,⁴ but where an additional or new pleading is filed alleging matter essentially different from that contained in the pleading held bad, the rule does not apply.⁵

§ 684. **Instances of the Waiver of Preliminary Objections**—If a party appears and goes to trial upon the merits without objecting, in a case where an affidavit is required, he waives, as a general rule, the right to insist that no affidavit was filed.⁶

¹ *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Washburn v. Roberts*, 72 Ind. 213; *Beckner v. Riverside, etc., Co.*, 65 Ind. 468. See, generally, *Hiatt v. Renk*, 64 Ind. 590; *Locke v. Merchants, etc., Bank*, 66 Ind. 353; *Waugh v. Waugh*, 47 Ind. 580.

² *Grose v. Dickerson*, 53 Ind. 460; *Belle v. Hungate*, 13 Ind. 382. Where a demurrer is not insisted upon it is regarded as waived. *Dingle v. Swain*, 15 Col. 120, 24 Pac. Rep. 876; *Bonner v. Glenn*, 79 Texas, 531, 15 S. W. Rep. 572; *Elyton Land Co. v. Morgan*, 88 Ala. 434, 7 So. Rep. 249.

³ *Mitchel v. McCabe*, 10 Ohio, 405; *United States v. Boyd*, 5 How. (U. S.) 29, 51; *Sheppard v. Shelton*, 34 Ala. 652; *Wann v. McGoon*, 2 Scam. 74; *Johnson v. Conklin*, 119 Ind. 109, 21 N. E. Rep. 462; *Earp v. Commissioners*, 36 Ind. 470; *Hooker v. Brandon*, 66 Wis. 498; *Polleys v. Swope*, 4 Ind. 217; *St. John v. Hardwick*, 17 Ind. 180; *Jay v. Indianapolis, etc., Co.*, 17 Ind. 262; *Ham v. Carroll*, 17 Ind. 442; *Caldwell v. Bank of Salem*, 20 Ind. 294; *Aiken v. Bruen*, 21 Ind. 137; *Patrick v. Jones*, 21 Ind. 249; *Miles v. Buchanan*, 36 Ind. 490.

⁴ *Hargrove v. John*, 120 Ind. 285; *Hunter v. Pfelfer*, 108 Ind. 197; *Trisler v. Trisler*, 54 Ind. 172; *Jouchert v. Johnson*, 108 Ind. 436.

⁵ *Washburn v. Roberts*, 72 Ind. 213; *Williams v. West*, 2 Ohio St. 82, 90; *Ohio v. Cowles*, 5 Ohio St. 87; *Holbrook v. Connelly*, 6 Ohio St. 199; *Maxwell v. Campbell*, 8 Ohio St. 265.

⁶ *Richmond v. Tallmage*, 16 Johns. 307; *Taylor v. Adams*, 58 Mich. 187; *Baker v. Dubois*, 32 Mich. 92; *Brauna-*

Where a party has full opportunity to file a claim against a fund in the hands of the court he waives his right if he delays to file the claim until after the final judgment has been entered.¹ An objection that an action or suit is prematurely brought must be appropriately and opportunely interposed or it will be waived.² The objection that an appeal was prematurely taken may be waived in some cases,³ but not where the question of the time is essentially jurisdictional.⁴ Objections to appeal or supersedeas bonds are waived unless seasonably interposed.⁵ A party who relies upon a specific ground of objection in the trial court ordinarily waives all others.⁶ A motion for non-suit is waived by going on with the trial and offering evidence.⁷ Where the court orders that a case shall stand for trial by a struck jury and the party consents to the order and participates without objection in the selection of the jury under the order he is held to waive all irregularities in selecting the jury.⁸ It has been held that a party who appears and cross-examines a witness without objecting waives a right to challenge the order of the court directing the examination.⁹ Where a defendant is ordered to answer and he does answer without objection he can not afterwards question the validity of the order, although a timely objection might have been effective.¹⁰

dorf v. Felner, 69 Wis. 334, 34 N. W. Rep. 121. See, generally, *Johnson v. Inghram*, 1 Grant's Case (Pa.), 152; *Vandall v. Vandall*, 13 Iowa, 247; *Grows v. Maine, etc., Co.*, 69 Me. 412; *Wilson v. Roots*, 119 Ill. 379.

¹ *Glade v. Schmidt*, 15 Ill. App. 51.

² *New Home Life Association v. Hagler*, 23 Ill. App. 457; *Moore v. Sargent*, 112 Ind. 484.

³ *D'Ivernois v. Leavitt*, 8 Abb. Pr. 59; *Griffin v. Cranston*, 5 Bosw. 658.

⁴ *James v. Dexter*, 112 Ill. 489, 492.

⁵ *Stevenson v. Steinberg*, 32 Cal. 373; *Gopsill v. Decker*, 4 Hun. 625.

⁶ *Vantilburgh v. Shann*, 4 Zab. (N. J.) 740; *Allen v. Mason*, 17 Ill. App. 318.

⁷ *Brown v. Southern, etc., Co. (Utah)*, 26 Pac. Rep. 579; *Mackey v. Balti-*

more, etc., Co., 18 Wash. Law Rep. 767. See, generally, *Bitzer v. Wagar*, 83 Mich. 223, 47 N. W. Rep. 210. Consenting to a trial after unsuccessfully objecting may sometimes operate as a waiver. *Smith v. Burlingham*, 44 Kan. 487, 24 Pac. Rep. 947; *Munday v. Collier*, 52 Ark. 126, 12 S. W. Rep. 240. See, generally, *New York, etc., Co. v. Fifth National Bank*, 135 U. S. 432; *Marsh v. Wade*, 3 Wash. Ty. 477, 17 Pac. Rep. 886; *Corbett v. City of Troy*, 53 Hun. 228.

⁸ *Bennett v. Syndicate Insurance Co.*, 43 Minn. 45, 44 N. W. Rep. 794.

⁹ *King v. Barnes*, 113 N. Y. 476, 21 N. E. Rep. 182. See *Young v. Omohundro*, 69 Md. 424, 16 Atl. Rep. 120.

¹⁰ *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. Rep. 589. See, upon the general

§ 685. **Demurrer to the Evidence—Waiver of Right to Jury—** is settled by our decisions that a party, other than the one having the burden, may question the sufficiency of the evidence by a demurrer, although the statute does not make provision for such a proceeding.¹ If there is a joinder in demurrer there is, of course, a waiver of a right to have the main issue tried by a jury, inasmuch as the joinder in demurrer refers the case upon the main issue, that is, as to the right to recover, to the court for decision, thus taking it from the jury. But the joinder in demurrer does not of its own vigor necessarily take the ques-

subject, *Blackburn v. Blackburn* (Ky.), 11 S. W. Rep. 712; *Marx v. Crosian* 17 Ore. 393, 21 Pac. Rep. 310. It is held in accordance with the general doctrine that parties must adhere on appeal to the theories assumed in the trial court, that where parties act upon pleadings and by their action give the pleadings a definite construction, they must abide by that construction on appeal. *Clark v. City of Austin*, 38 Minn. 487, 38 N. W. Rep. 615; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. Rep. 386. See "Holding Parties to Trial Court Theories." *Ante*, Chapter XXIV.

¹ *Lindley v. Kelley*, 42 Ind. 294, and cases cited; *Lyons v. Terre Haute, etc., Co.*, 101 Ind. 419; *Lake Shore, etc., Co. v. Foster*, 104 Ind. 293. As to what a demurrer to the evidence admits, *Willcuts v. Northwestern, etc., Co.*, 81 Ind. 300, and authorities cited; *Palmer v. Pittsburgh, etc., Co.*, 112 Ind. 250; *Ruff v. Ruff*, 85 Ind. 431; *Ruddell v. Tyner*, 87 Ind. 529; *Talkington v. Parrish*, 89 Ind. 202; *Kincaid v. Nicely*, 90 Ind. 403; *Hagenbuck v. McClaskey*, 81 Ind. 577; *Nordyke, etc., Co. v. Van Sant*, 99 Ind. 188; *Trimble v. Pollock*, 77 Ind. 576; *Wright v. Julian*, 97 Ind. 109; *Indianapolis, etc., Co. v. McLin*, 82 Ind. 435; *Kansas, etc., Co. v. Couse*, 17 Kan. 571; *Wilson v. Board*, 63 Mo. 137; *Smith v. Hutchinson*, 83 Mo. 683, 690; *Smith v. Hannibal, etc., Co.*, 37

Mo. 287. A party who has the burden can not successfully demur to the evidence. *Fritz v. Clark*, 80 Ind. 591; *Standley v. Northwestern, etc., Co.*, 90 Ind. 254; *Lyons v. Terre Haute, etc., Co.*, 101 Ind. 419. Upon a demurrer to the evidence the evidence of the demurring party can not be considered. *Fritz v. Clark, supra*, overruling *Thomas v. Ruddell*, 66 Ind. 326; *Baker v. Baker*, 69 Ind. 399. See, also, *Ruff v. Ruff*, 85 Ind. 431; *Stockwell v. State*, 101 Ind. 1; *Palmer v. Pittsburgh, etc., Co.*, 112 Ind. 250; *Adams v. Slate*, 87 Ind. 573; *Bethell v. Bethell*, 92 Ind. 318; *Reynolds v. Baldwin*, 93 Ind. 57. Practice in cases of demurrer to the evidence. *Indianapolis, etc., Co. v. McLinn, supra*; *Plant v. Edwards*, 85 Ind. 588; *Griggs v. Seeley*, 8 Ind. 264; *Andrews v. Hammond*, 8 Blackf. 540; *Cole v. Driskell*, 1 Blackf. 16; *Shields v. Arnold*, 1 Blackf. 109; *Doe v. Rue*, 4 Blackf. 263; *Pawling v. United States*, 4 Cranch. 219; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Campbell v. New England Ins. Co.*, 22 Pick. 135; *Bulkeley v. Butler*, 2 B. & C. 434. The mode of saving a question upon a ruling on a demurrer to the evidence is to object to the ruling and to except to the overruling of the objection. *Lindley v. Kelley*, 42 Ind. 294; *Strough v. Gear*, 48 Ind. 100.

of the assessment of damages from the jury; on the contrary, the parties have a right to have the jury make the assessment, if they properly insist upon it. If, however, an assessment by the jury is not asked, or no objection is made to the assessment by the court, there is an effective waiver.¹

386. Introducing Evidence after Demurring—Effect of—If a defendant, after a decision upon the demurrer to the evidence proffered with the case without objection, by offering evidence he makes objections to the decision of the court overruling his demurrer.² In the case last instanced there was, in reality, a waiver by both parties, for it seems quite clear that if the defendant had appropriately objected to the admission of evidence after the decision on demurrer, the court could not rightfully have allowed the defendant to offer evidence to contradict what he had deliberately admitted by his demurrer. It is probably true that for cause shown the court might permit the defendant to amend his position on the position he deliberately chose to occupy in such a case,³ but, having made a deliberate election, he could not at

the case of *Trough v. Gear*, 48 Ind. 100, 105, the court said: "In the present case the defendant was discharged upon the filing of his demurrer and before a decision on the merits and the damages were assessed by the court after the demurrer was overruled, without objection on the part of the appellants. They might have asked for a jury, but having failed to do so, could be regarded as having waived a jury."

The Supreme Court of Illinois in the case of *Shields v. Co.*, 134 Ill. E. Rep. 1086, said: "Inasmuch as the demurrer admits all the facts stated to be true, and also admits the inferences which can be drawn from the facts, and merely claims that the law is not sufficient in law to entitle the plaintiff to maintain his action, the defendant necessarily withdraws his admissions when he neglects to amend his demurrer, after it is overruled, and proceeds to introduce

witnesses to contradict the very evidence which he has just admitted to be true. The action of the court in ruling upon the demurrer to the evidence is based on the defendant's admission that the facts established by the evidence are true. When the defendant no longer admits such facts to be true, but tries to prove that they are false, he ought to be held to have waived any error based upon the admissions thus withdrawn. By his demurrer he takes the case from the jury and submits it to the court to be decided as a question of law. By disputing the facts set up in the demurrer and appealing to the jury to determine the facts thus disputed he submits his case to a different tribunal and upon an entirely different theory."

¹ In *Hartford City, etc., Co. v. Love*, 125 Ind. 275, it was held that it was not error to permit a complaint to be amended after a demurrer to the evidence was filed, and that if the demur-

his own pleasure and over the objection of his adversary, take another different and inconsistent position. The acquiescence of the plaintiff in such a case as that under discussion is a waiver, complete and effectual, but if he had made an opportune and appropriate objection, the defendant could not, as we believe, have retraced his steps and recalled the case from the tribunal to which he had voluntarily submitted it. We think it safe to conclude that after a decision upon a demurrer to the evidence the demurring party can not, as of right, ask that the case be taken from the court and given to the jury, but that if the adverse party does not object, there is an effective waiver.

§ 687. Motion for Direction to Jury to return a Verdict in favor of Moving Party—Effect of subsequently giving Evidence—The principle stated in the preceding paragraph applies to cases where a party asks the court to direct the jury to return a verdict in his favor. If a defendant upon the close of the plaintiff's evidence moves the court to direct a verdict in his favor, he must stand upon his motion, for if he subsequently introduces evidence he waives his motion.¹ By moving for such an instruction, he asks the court to determine the case, thus withdrawing it from the jury, and when he recedes from his motion and introduces evidence he puts the case to the jury, thus effectively taking it from the court. The power of the court to withdraw the case from the jury where there is no conflict in the evidence is un-

ring party had asked leave to withdraw his demurrer it would have been the duty of the court to permit it to be withdrawn.

¹ *Joliet, etc., Co. v. Shields*, 134 Ill. 209, 26 N. E. Rep. 1086; *Geary v. Bangs* (Ill.), 27 N. E. Rep. 462; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700. In the case last cited it was said: "It is undoubtedly true that a case may be presented in which a refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment

in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but if he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment can not be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked."

doubted,¹ but, as defects or omissions in the evidence of the party who has the burden may be supplied by the evidence of the adverse party, the appellate tribunal can not say in the absence of that evidence that defects and omissions were not supplied; on the contrary, as the presumption is in favor of the judgment of the trial court, it must be inferred, in the absence of a countervailing showing, that defects and omissions were supplied or remedied. It follows, therefore, that where a party does not stand upon his motion, but goes on with the case as one for the jury, all the evidence must be before the court on appeal and the judgment in that court must rest upon the whole evidence, and not upon the evidence of one, only, of the parties.

§ 688. Waiver of Objections to Pleadings by Demurring to the Evidence—There is a seeming conflict in the cases upon the question whether a party waives objections to his adversary's pleadings by demurring to the evidence. The expressions in

¹ *Improvement Co. v. Munson*, 14 Wall. 442; *Commissioners v. Clark*, 94 U. S. 278, 284; *Chandler v. Von Roeder*, 24 How. (U. S.), 224; *Pleasants v. Fant*, 22 Wall. 116; *Mutual Life Ins. Co. v. Snyder*, 93 U. S. 393; *Klein v. Russell*, 19 Wall. 433, 465; *Gunther v. Liverpool, etc., Co.*, 134 U. S. 110; *Griggs v. Houston*, 104 U. S. 553; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Hall v. Durham*, 109 Ind. 434; *Wabash Ry. Co. v. Williamson*, 104 Ind. 154; *Carver v. Carver*, 97 Ind. 497; *Dodge v. Gaylord*, 53 Ind. 365, and cases cited; *Mosa v. Witness Printing Co.*, 64 Ind. 125; *Templeton v. Voshloe*, 72 Ind. 134; *Adams v. Kennedy*, 90 Ind. 318; *Tyson v. Rickard*, 3 Harr. & J. (Md.) 109; *Wheeler v. Schroeder*, 4 R. I. 383; *Burke v. Lee*, 76 Va. 386; *Jewell v. Parr*, 13 Com. B. 909, 915; *Claffin v. Meyer*, 75 N. Y. 260, 266; *Mobile, etc., R. Co. v. Ladd* (Ala.), 9 So. Rep. 169; *Williams v. Guile*, 117 N. Y. 343, S. C. 6 Law. Rep. Anno. 366. As to the *quantum* of evidence sufficient to make it the duty of the court to submit the case to the jury, see *Woods v. Wiman*, 122 N. Y. 445, 27 N. E. Rep. 919; *Griffith v. Baltimore, etc., Co.*, 44 Fed. Rep. 574; *Rauber v. Sundback* (S. Dak.), 46 N. W. Rep. 927; *Bunt v. Sierra, etc., Co.*, 138 U. S. 483; *Boyd v. Brown*, 120 Ind. 393, 22 N. E. Rep. 249; *Bowman v. Eppinger*, 1 N. Dak. 21, 44 N. W. Rep. 1000; *Robertson v. Edelhoff*, 132 U. S. 614; *Agnew v. Adams*, 26 So. Car. 101; *Carver v. Detroit, etc., Co.*, 61 Mich. 584, 28 N. W. Rep. 721; *Brownfield v. Hughes*, 128 Pa. St. 194, 18 Atl. Rep. 340; *Giermann v. St. Paul, etc., Co.*, 42 Minn. 5, 43 N. W. Rep. 483. As suggesting the test to determine whether the court may direct a verdict, see *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. Rep. 853; *Chase v. Alley*, 82 Me. 234, 19 Atl. Rep. 397; *Hall v. Stevens*, 116 N. Y. 201, 5 Law. Rep. Anno. 802; *Farnum v. Pitcher*, 151 Mass. 470, 24 N. E. Rep. 590; *Corning v. Troy, etc., Co.*, 44 N. Y. 577; *Morgan v. Durfee*, 69 Mo. 469; *Ensminger v. McIntire*, 23 Cal. 593.

some of the cases seem to indicate that such objections are waived.¹ But the direct and explicit decisions assert a different doctrine, for they declare that the objections are not waived. We think the true rule is that such objections as go to the merits are not waived, but that no defects in the pleadings can be considered in determining the demurrer.³ A party who demurs to the evidence does not waive the right to insist that a recovery can be had only under the issue made by the pleadings; on the contrary, his demurrer objects that the cause of action stated is not established by the evidence. It is, therefore, not sufficient to entitle the plaintiff to a judgment upon demurrer that the admitted facts would entitle him to some judgment. If the admitted facts do not establish the cause of action stated in the complaint it will be prejudicial error to overrule the demurrer.⁴

§ 689. Effect of a Demurrer upon the Right to make rulings upon the Evidence Available—As the demurrer confesses that the facts are true it may well be held that the party who demurs waives all objections to the competency of the evidence. And so it has been held.⁵ In one of our cases it was declared in very

¹ *Stockwell v. State*, 101 Ind. 1, 5; *Lindley v. Kelley*, 42 Ind. 294.

² *McLean v. Equitable, etc., Co.*, 100 Ind. 127, 135; *Bish v. Van Cannon*, 94 Ind. 263; *United States Bank v. Smith*, 11 Wheat. 171. In the case last cited it was said: "It is said, however, on the part of the plaintiffs that this court can not look beyond the demurrer to the evidence, and inquire into defects in the declaration. This position can not be sustained. The doctrine of the King's Bench in England, in the case of *Cort v. Birbeck*, 1 Doug. 218, that upon a demurrer to evidence the party can not take advantage of any objections to the pleadings does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in place of the jury. And the only question is whether the evidence is suf-

ficient to maintain the issue. And the judgments of the court upon such evidence will stand in place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration by a motion in arrest of judgment, or by writ of error. But the present case being brought here on a writ of error, and the defendant, having the judgment below in his favor, may avail himself of all defects in the declaration that are not deemed cured by the verdict." See, also, *Stolle v. Aetna, etc., Ins. Co.*, 10 W. Va. 546.

³ 2 *Tidd's Pr.* (4 Am. ed.) 865.

⁴ *Palmer v. Chicago, etc., Co.*, 112 Ind. 250.

⁵ *Miller v. Porter*, 71 Ind. 521; *Radcliff v. Radford*, 96 Ind. 482; *Stockwell v. State*, 101 Ind. 1, 5. It was well said, in *Chapize v. Bane*, 1 Bibb. 612:

broad terms that a motion for a new trial is not proper where there is a demurrer to the evidence,¹ but we think, that, while it is true that the demurring party waives all objections to the admissibility of the evidence establishing the facts confessed by his demurrer, it is, nevertheless, true that the opposite party does not waive exceptions taken by him to the exclusion of evidence which he appropriately offered. It is obvious that there is a radical difference between a case where the evidence offered by the party against whom the demurrer is directed is excluded and a case where evidence is admitted, for the party whose evidence is kept out by the objections of his adversary does nothing to waive his objections to the ruling excluding the evidence. If a party can by demurring to the evidence of his opponent deprive the latter of competent evidence he virtually takes away a right which the opponent has done his best to save and that, too, where there is no fault on his part. This would certainly be wrong.² In another case it is said in a general way that a motion for a new trial is not proper except where it relates to the assessment of damages,³ but in that case the question was not before the court, so that it can not be justly said that there was any adjudication upon it. We think it very clear that there are cases where the party adverse to the one who demurs may save objections by a motion for a new trial. If this be not true, then, it must be true that there are cases where one party by his own action may deprive his adversary of a right, although the party deprived of the right is without fault. Such a conclusion is in conflict with principle. It would place a vigilant and diligent party wholly at the mercy of his opponent and this no just principle will tolerate.

§ 690. Waiver as Affecting the Mode of Trial—Where a party fails to insist upon the right to a trial in a particular mode and

"The particular manner in which an admitted truth has been introduced into the cause as evidence, does not seem to be of any importance."

¹ *Ruddell v. Tyner*, 87 Ind. 529.

² *Washburn v. Board*, 104 Ind. 321, 322; *Huff v. Cole*, 45 Ind. 300. In the case first cited the question is discussed

and it is explicitly declared that the party whose evidence is excluded is not deprived of his right to insist upon his objections on appeal. The decision in the case here cited, in effect, denies some of the statements in *Ruddell v. Tyner*, *supra*.

³ *Strough v. Gear*, 48 Ind. 100.

submits to a trial in a mode directed by the court, he is, as a general rule, precluded from making an objection to the mode of trial adopted after the judgment or decree has been entered. It is, indeed, true, as a rule, that objections to the mode of trial must be interposed before entering upon the trial. This rule is in harmony with the general doctrine that a party must object at the proper stage of the proceedings, and this ordinarily requires that the objection be made at a time when it will not compel the court to retrace its steps. It is not the right of a party to demand that action taken by the court shall be set aside and the proceedings begun anew, so that it is the duty of a party to present his objections before entering upon the trial. The rule that a party must appropriately and seasonably object to the mode of trial ordered by the court is illustrated by many cases. Thus, where a party makes no objection to an order referring a case to a referee or to a master commissioner, he waives the objection that the case is not triable in such a mode.¹ So, a trial before a master without an objection waives the right to insist on appeal that no order of reference was made.² Again, a party who enters upon a trial by the court can not successfully object after the court has proceeded with the trial that the case is one for the jury, nor, on the other hand, can a party who does not seasonably object to a trial by jury, afterwards successfully urge that the case should have been tried by the court.³

¹ *Baird v. Mayor*, 74 N. Y. 382; *Trenholm v. Morgan*, 28 So. Car. 268, 5 S. E. Rep. 721; *Grant v. Reese*, 82 N. C. 72; *Harris v. Shaffer*, 92 N. C. 30. See, generally, *Allis v. Day*, 14 Minn. 516; *Strong v. Willey*, 104 U. S. 512; *Rhodes v. Russell*, 32 So. Car. 585, 10 S. E. Rep. 828.

² *Spencer v. Levering*, 8 Minn. 461, 467. In the case cited it was said: "The other point made by the plaintiff in error, to wit, that the record does not show an order referring the cause to a referee for trial, should have been urged in the court below, it can not be made here for the first time."

³ *Sheets v. Bray*, 125 Ind. 33, 24 N. E. Rep. 357; *Jarboe v. Severin*, 112 Ind. 572; *Sprague v. Pritchard*, 108 Ind. 491; *Taggart v. Tevanny*, 1 Ind. App. 339, 354; *Strauss v. Cooch*, 47 Ohio St. 115, 24 N. E. Rep. 1071; *Heacock v. Hosmer*, 109 Ill. 245; *Brown v. Lawler*, 21 Minn. 327; *Brown v. Nagel*, 21 Minn. 415; *Van Orman v. Merrill*, 27 Iowa. 476; *Gibbs v. Coonrod*, 54 Iowa. 736; *Weaver v. Kintzley*, 58 Iowa. 191; *Hatch v. Judd*, 29 Iowa. 95; *Taylor v. Adair*, 22 Iowa. 279; *Byers v. Rodabaugh*, 17 Iowa. 53. See, generally, *Lace v. Fixen*, 39 Minn. 46, 38 N. W. Rep. 762; *Hawes v. Clark*, 84 Cal. 272.

§ 691. **Rulings Respecting Procedure on the Trial—Illustrative Cases**—A party who fails to exercise reasonable diligence and to employ the usual and appropriate methods of objecting to those who are to act as triers of his case can not successfully object to their competency or qualifications on appeal. This general rule is subject to the limitation, mentioned in a prior paragraph of this chapter, that a party does not waive a matter of which he is excusably ignorant, but, as substantially remarked in the paragraph referred to, the ignorance must be excusable, and excusable it can not be if the party has not been vigilant and diligent. The qualification, that ignorance must be excusable, is of great practical importance and so frees the general rule from restriction that practically there are comparatively very few cases which it does not control. The rule that a party who does not object to his triers applies to the person who sits as judge, for the failure to seasonably and appropriately object to his competency precludes the party under a duty to object from successfully urging the objection on appeal as a cause for a reversal of the judgment from which the appeal is prosecuted.¹ Objections to the competency, qualification and swearing of jurymen are, as a general rule, waived unless seasonably and appropriately made,² but where proper

24 Pac. Rep. 116; *Hauser v. Roth*, 37 Ind. 89; *Griffin v. Pate*, 63 Ind. 273; *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515; *Love v. Hall*, 76 Ind. 326; *Odell v. Reynolds*, 40 Mich. 21. If objection to the mode of trial is made it will ordinarily be waived unless the ruling is specified as cause for a new trial in the proper motion. *Huffmond v. Bence*, 128 Ind. 131; *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515.

¹ *Stearns v. Wright*, 51 N. H. 600; *Peebles v. Rand*, 43 N. H. 337; *Moses v. Julian*, 45 N. H. 52; *Dolan v. Church*, 1 Wyo. 187; *State v. Whitney*, 7 Oregon, 386; *State v. Voorhies*, 41 La. Ann. 567, 6 So. Rep. 826; *Bowen v. Swander*, 121 Ind. 164; *Hayes v. Sykes*, 120 Ind. 180; *Littleton v. Smith*, 119 Ind. 230; *Smurr v. State*, 105 Ind. 125; *Schlunger v.*

State, 113 Ind. 295; *Bartley v. Phillips*, 114 Ind. 189; *Feaster v. Woodfill*, 23 Ind. 493; *Powell v. Powell*, 104 Ind. 18; *Greenwood v. State*, 116 Ind. 485, 19 N. E. Rep. 333; *Cargar v. Fee*, 119 Ind. 536; *Adams v. Gowan*, 89 Ind. 358; *Rogers v. Beauchamp*, 102 Ind. 33; *Board v. Courtney*, 105 Ind. 311; *Lillie v. Trentman (Ind.)*, 29 N. E. Rep. 405.

² See "Impaneling the Jury." *Dolan v. State*, 122 Ind. 141; *Unfried v. Baltimore, etc., Co.*, 34 W. Va. 260, 12 S. E. Rep. 512; *Sandford Tool Co. v. Mullen*, 1 Ind. App. 204. The general doctrine that a party who has an opportunity to object to the persons called to try his case must seasonably avail himself of the right applies to proceedings before inferior tribunals. *Matter of New York, etc., Co.*, 35 Hun. 575;

diligence is exercised and the incompetency of a juror is not discovered until after the verdict, the ignorance of the party is excusable, and he may then successfully urge a valid objection.¹ A party dissatisfied with the answers of the jury to interrogatories must move to recommit for more specific answers or he will waive his right to insist on appeal that the answers of the jury are not sufficiently specific.²

§ 692. Rulings on the Trial—General Doctrine—What is not objected to on the trial is, wherever the ruling relates entirely to trial procedure, waived, and so effectively waived as to be unavailing on appeal. The rule to which we have often referred that rulings on the trial not effectively questioned by specific objections are waived, is one of very wide scope. It is, it may be well enough to say here, although the subject is hereafter discussed, not sufficient to object, for the objection must be supplemented by an exception. The failure to except is, in effect, a waiver of the objection, although the objection may be seasonably interposed and well stated. There is, therefore, reason for affirming that an objection adequately stated may be waived by silence or inaction. Nor is it always sufficient to object and except, for, as a general rule, an opportunity for review must be given the trial court by the appropriate motion.³

Cauldwell v. Curry, 93 Ind. 363; *Bradley v. City of Frankfort*, 99 Ind. 417; *Towns v. Stoddard*, 30 N. H. 23; *Ipswich v. Essex Co.*, 10 Pick. 519; *Town of Groton v. Hurlburt*, 22 Conn. 178; *Johns v. Hodges*, 60 Md. 215, S. C. 45 Am. Rep. 722; *Wassum v. Feeney*, 121 Mass. 93; *Hilltown Road*, 18 Pa. St. 233; *People v. Taylor*, 34 Barb. 481; *Howard v. Sexton*, 1 Denio, 440; *Browning v. Wheeler*, 24 Wend. 258.

¹ *Rhodes v. State*, 128 Ind. 189.

² *Dockerty v. Hutson*, 125 Ind. 102; *McElfresh v. Guard*, 32 Ind. 408; *Vater v. Lewis*, 36 Ind. 288; *Reeves v. Plough*, 41 Ind. 204.

³ *Comparet v. Hedges*, 6 Blackf. 416;

Jones v. Van Patten, 3 Ind. 107; *Heaston v. Colgrove*, 3 Ind. 265; *McKinney v. Springer*, 6 Ind. 453; *Zehnor v. Beard*, 8 Ind. 96; *Vance v. Cowing*, 13 Ind. 460; *Dickerson v. Turner*, 15 Ind. 4; *Ferris v. Johnson*, 27 Ind. 247; *Ringle v. Bicknell*, 32 Ind. 369; *State v. Probasco*, 46 Kan. 310, 26 Pac. Rep. 749; *Hughes v. Commonwealth (Ky.)*, 14 S. W. Rep. 682; *Fifth Avenue Bank v. Webber*, 27 Abbott's N. Cases, 1; *Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. Rep. 754; *Thrasher v. Postel*, 79 Wis. 503, 48 N. W. Rep. 600; *Hayes v. Solomon*, 90 Ala. 520, 7 So. Rep. 921; *Bransford v. Karn (Va.)*, 12 S. E. Rep. 404.

CHAPTER VII.

CURING ERROR.

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| § 693. Origin and nature of the power to cure error. | § 700. Withdrawal of incompetent evidence. |
| 694. Limitations of the power—Exceptional cases. | 701. Instructions to disregard incompetent evidence. |
| 695. Exercise of the power to cure errors. | 702. Exceptional cases. |
| 696. Asking for time in cases where a ruling is changed. | 703. Effect of sustaining a motion to strike out incompetent testimony. |
| 697. Rulings made during the formation of issues. | 704. When a party can not withdraw evidence over the objection of his adversary. |
| 698. Curing error in the admission of evidence by supplementing it with evidence making it competent. | 705. Curing errors in instructions. |
| 699. Proving the same facts by competent testimony sometimes obviates the error in admitting incompetent evidence. | 706. Refusal of instructions. |
| | 707. Subsequently admitting evidence once excluded. |
| | 708. Miscellaneous instances. |

§ 693. **Origin and Nature of the Power to Cure Error**—Resident in every court of general jurisdiction is the power to rectify mistakes and correct errors into which it has fallen regarding matters of law, and this power may, as a general rule, be exercised upon discovering the mistake or error at any time before the case is terminated by a final judgment. The power may, indeed, be exercised after final judgment, as, for instance, in cases where a new trial is granted or a motion in arrest is sustained. But reviewing questions upon such motions belongs to a different branch of our general subject rather than to the special subject of the present chapter, and we mention the topic here lest it be supposed that we mean to be understood as affirming that the power to correct errors or rectify mistakes can not be exercised after final judgment. That we do not mean,

for, as will elsewhere appear,¹ we assert the power to review and correct even after a final judgment, but at present our purpose is to consider the nature and extent of the power to cure or heal error during the formation of issues or the progress of a trial. The rule that courts may cure errors in their rulings is a very ancient one. The underlying principle is that which constitutes the foundation of the doctrine that *nunc pro tunc* orders and entries may be made while the proceedings are *in fieri*, and, although there is a difference between curing error and making *nunc pro tunc* entries or orders, the general principles involved are closely allied and the early discussions upon the right to make such orders or entries are pertinent to the subject of curing or healing errors.² The power to order or permit an act to be done now for then is not confined to acts of the court itself, for it may extend to the acts of the parties. Thus, a party may be permitted to file an affidavit now for then even though the affidavit is requisite to jurisdiction and ought, in strictness, to have been filed at the time the action was commenced.³ The general power to permit parties to file papers now for then, to make *nunc pro tunc* entries, and to permit amendments to be made having a retroactive effect, is nothing more at bottom than the inherent right existing in courts to rectify mistakes, cure errors and heal defects. This right is exercised in cases where orders improvidently made are vacated,⁴ where certificates to records are directed to be amended,⁵ and in many other cases, as will hereafter be fully shown. We

¹ *Post*, "Presenting an Opportunity for Review," Chapter XIV.

² Lord Mohun's Case, 6 Mod. 59; Hodges v. Templer, 6 Mod. 191; Mayor of Norwich v. Berry, 4 Burr. 2277; Mitchell v. Overman, 103 U. S. 62; Shephard v. Brenton, 20 Iowa, 41; Hess v. Cole, 23 N. J. Law, 116; Deal v. Holter, 6 Ohio St. 228. The power is an inherent one inasmuch as all courts of justice must have power to prevent wrong results from flowing from their own errors. Chissom v. Barbour, 100 Ind. 1.

³ Carr v. Fife, 45 Fed. Rep. 209;

Shepherd v. Pepper, 133 U. S. 626. See, generally, Crum v. Elliston, 33 Mo. App. 591; Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. Rep. 558; Montgomery Co. v. Auchley, 103 Mo. 492, 15 S. W. Rep. 626; State v. Farrar, 104 N. C. 702, 10 S. E. Rep. 159; Security Co. v. Arbuckle, 123 Ind. 518.

⁴ State v. New Orleans, 43 La. Ann. 441, 9 So. Rep. 643. See, generally, Hubbard v. Camperdown Mills, 26 So. Car. 581, 2 S. E. Rep. 576.

⁵ Idaho, etc., Co. v. Bradbury, 132 U. S. 509.

have indicated, in outline at least, the general nature of the power and have shown that it has long existed, and that is all that we need do at the outset; so much seemed necessary in order to prepare the way for the consideration of particular instances of the general doctrine we are endeavoring to state, but the doctrine is by no means confined to the class of cases of which that instanced is a type. It is, of course, essential that the party to whom the change in a ruling is adverse should request an opportunity to meet the new condition produced by the change, for if he does not make the proper request he will lose his right by waiver. The request must be opportunely and properly made, it must be brought into the record, and the necessary exception must be entered. This is indispensably necessary, inasmuch as there is seldom error in the change itself; the available error is in denying the request for time or opportunity to meet the case as the change presents it.

§ 694. **Limitations of the Power—Exceptional Cases**—Some of the courts hold that a ruling may be so radically wrong and so manifestly injurious that the error can not be cured by a change in the ruling. We think there may be cases, although rare and extreme ones, where the error may penetrate so deeply and be so widely influential that it can not be cured by a subsequent ruling. Thus, if evidence of a character likely to inflame the prejudices of the jurors is persistently given to the jury over objection, we think that a subsequent withdrawal of the objectionable evidence will not always cure the error. While it is no doubt true that in the very great majority of cases the withdrawal of incompetent evidence does cure the error committed in suffering it to go to the jury, there are, as we believe, rare instances where the mischief done is incurable. So, where the court improperly makes a remark effectively and strongly discrediting the testimony of a witness the withdrawal of the remark can not always repair the injury, for so much depends upon the behavior and manner of a witness, that the effect of such a remark can not always be dissipated by a withdrawal or by an instruction to disregard it. There must, it seems to us, be cases where the wrong ruling exerts such a strong influence that its effect can not be destroyed ex-

cept by granting a new trial. Although such cases are very rare, and must be decisively impressed with peculiar and extraordinary features to take them out of the general rule, they do exist.¹

§ 695. Exercise of the Power to Cure Errors—The power to cure error by withdrawing, abrogating or changing rulings, comprehensive as it is, can not be arbitrarily exercised to the injury of a litigant. As the court is presumed to adhere to a theory declared or indicated by a ruling² it can not depart from that theory without giving a party who has acted upon it an opportunity to meet the situation brought about by a change of ruling when the proper request is duly preferred. Thus, if by a ruling upon a demurrer to an answer the court clearly indicates that the defendant will not be allowed to give evidence in support of the defense held insufficient, the court can not change its ruling and allow evidence to be introduced in support of such a defense without giving the plaintiff an opportunity to prepare to meet the new theory indicated and declared by the change in the ruling. The case adduced as an illustration is but a type or representative of many, for it may very often happen that a change in a ruling will work injustice unless a party is afforded a reasonable opportunity to prepare for trial, or for proceeding with the trial, under the changed condition of affairs.

§ 696. Asking Time in Cases where a Ruling is Changed—It is, of course, not every ruling reversing, vacating, or changing prior rulings that will entitle a party to a postponement or continuance; on the contrary, it is only where the change is so radical as to make it manifestly unjust to compel him to proceed, that he can rightfully ask that proceedings may be delayed. There are, however, cases where justice requires that a trial be postponed. In cases where there is a right to a postponement, the party entitled to it should make the necessary showing and request the court to postpone the trial. This rule

¹ *Furst v. Second Avenue, etc., Co.*, Y. 299, 302; *O'Sullivan v. Roberts*, 39 72 N. Y. 542; *Erben v. Lorillard*, 19 N. Y. 360.

² *Ante*, § 591.

is supported by the numerous cases which hold that where an amendment is ordered the party who desires a postponement must make the appropriate request, and it is in harmony with the rules declared in many kindred instances.

§ 697. **Rulings made during the Formation of Issues**—It is quite clear that courts possess the power to correct rulings upon motions or demurrers at any time before the issues are closed.¹ The power may, indeed, be exercised after the close of the issues and during the progress of the trial. But, upon the principle stated in a former paragraph, a change in a ruling upon a pleading may in some instances entitle a party who appropriately and seasonably requests it to a postponement of the case in order to prepare for trial, or other action, under the new theory created by the change of a former ruling. The doctrine that the court may cure error by vacating or changing a wrong ruling made in the formation of the issues extends to cases where the court affords the party an opportunity to make the same proof that he could have made had the original ruling been entirely correct. Thus, where the court erroneously strikes out the answers of a defendant, but subsequently opens the way to him to give all the evidence he could have given had the motion to strike out been overruled, the error in sustaining the motion is cured.² While there can be no doubt that the rule is that an

¹ *First National Bank of Huntington v. Williams*, 126 Ind. 423. In *Mitchell v. Friedley*, 126 Ind. 545, it was held

that where the court had been requested to make a special finding, but had overlooked or forgotten the request, it was not error to withdraw a general finding it had announced. See *Derrick v. Emmens*, 38 N. Y. Supp. 481. See, generally, *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. Rep. 386. An error in ruling on the pleadings may be cured by the decree. *Meek v. Spracher* (Va.), 12 S. E. Rep. 397. There are many cases in which it has been held that errors in rulings on the pleadings are cured by special findings or special verdicts. *Miller v. Louisville, etc., Co.*, 128 Ind. 97, 27 N. E. Rep. 339; *Carruthers v.*

McMurray, 75 Iowa, 173, 39 N. W. Rep. 255; *Palmer v. Arthur*, 131 U. S. 60.

² *McNamara v. Estes*, 22 Iowa, 246. In the case cited Judge Dillon, speaking for the court, said: "The court, it is true, struck their answer from the files. If the action of the court were admitted to be erroneous, it was cured by the subsequent action of the court, allowing the appellants the opportunity to prove that no levy or assessment was ever made." The principle that if ample opportunity is given a party to introduce evidence, an error in a former ruling is healed is asserted in the case of the Louisville, etc., Co. *v. Falvey*, 104 Ind. 409; *Mann v. Maxwell*, 83 Me. 146, 21 Atl. Rep. 844; *Elwell v. Fabre*, 13 N. Y. Supp. 829.

error may be cured by affording a party full opportunity to avail himself of all the rights he could have made available had the original decision been correct, still, the rule is one to be applied with caution and care. If the opportunity offered is not ample, the error ought not to be regarded as cured. Thus, for illustration, if the court should sustain a demurrer to an answer, and upon the trial should change its ruling, the error would not be healed unless the defendant was allowed reasonable time and opportunity to bring forward the necessary evidence. If the defendant in such a case as that supposed were not allowed fair opportunity and reasonable time to prepare a defense, the error in the last ruling would be more injurious and the injustice more flagrant than in the first instance, inasmuch as such a course would deprive him of his exceptions to the original ruling and yield him no substantial benefit.¹ But, it may be well enough to say, if the defendant in such a case as that supposed desires to save the question he should make the proper request for time, and reserve an exception; failing in this the doctrine of waiver will preclude him from successfully urging the point on appeal. If the ultimate decision clearly shows that a full and fair opportunity was given a party to avail himself of his rights under the law, or if all such rights were secured to him, errors in ruling on the pleadings are cured. This is clearly so, for, if the ultimate decision is right although the wrong mode has been pursued, all intervening errors are cured. No party can be prejudiced where the final decision awards him what the law secures him.² It is probably true that there are other reasons supporting this conclusion than that assigned, but this does not, of course, impeach the validity of the conclusion.³

¹ *Pettygrove v. Rothschild*, 2 Wash. 6, 25 Pac. Rep. 907.

² *Bitzer v. Wagar*, 83 Mich. 223, 47 N. W. Rep. 210. See, generally, *Ellison v. Rerick*, 125 Ind. 396, 25 N. E. Rep. 454; *Payne v. Hardesty* (Ky.), 14 S. W. Rep. 348; *Roy v. Union, etc., Co.* (Wyo.), 26 Pac. Rep. 996.

³ *Ante*, § 590. "The ultimate ruling is decisive." § 590, "Right result

reached by wrong mode." *Clark v. City of Austin*, 38 Minn. 487, 38 N. W. Rep. 615.

⁴ The line between the subjects, "waiver," and "curing error," is often very indistinct and shadowy. In general the term "waiver" refers to the act of the party, while the term, "curing error," usually refers to the conduct of the court, but the general principle governing cases

§ 698. Curing error in the Admission of Evidence by supplementing it by Evidence making it Competent—The general rule is that there is no available error in admitting incompetent testimony if evidence is subsequently given which makes it competent. This is true for two reasons; one is, that the order of introducing evidence is a matter largely in the discretion of the trial court, and another is, that where the ultimate result is right, although reached by a wrong mode, intervening errors are disregarded. If the evidence subsequently introduced makes the other evidence competent the objections become unavailing.¹

§ 699. Proving the same facts by Competent Testimony sometimes obviates the error in admitting Incompetent Evidence—It is held that if facts are allowed to be proved by incompetent testimony the error is cured if the same facts are subsequently proved by competent testimony.² The decided cases may possibly require the conclusion that the statement in the preceding sentence expresses the general rule, but even if the rule can be justly said to be general, it must also be said that it is much narrower than most general rules and its operation is interrupted by very many exceptions. We are, indeed, strongly impressed with the be-

where an opportunity is offered a party of which he fails to avail himself is common to both. This is evident from the discussions found in many judicial opinions. *Newton v. Newton*, 46 Minn. 33, 48 N. W. Rep. 450; *Suarez v. Manhattan Ry. Co.*, 60 Hun. 584, 15 N. Y. Supp. 222; *Wynn v. Central, etc., Co.*, 14 N. Y. Supp. 172; *Wing v. De La Rionda*, 125 N. Y. 678, 25 N. E. Rep. 1064; *Washington v. Louisville, etc., Co.*, 34 Ill. App. 658, S. C. 26 N. E. Rep. 653; *Morrison v. Hedenberg (Ill.)*, 27 N. E. Rep. 460.

¹ *Black v. Camden, etc., Co.*, 45 Barb. 40; *Harrington v. State*, 83 Ala. 9, 3 So. Rep. 425; *Barkly v. Copeland*, 74 Cal. 1, S. C. 5 Am. St. Rep. 413; *Crich v. Williamsburgh, etc., Co.*, 45 Minn. 441, 48 N. W. Rep. 198; *Gano v. Chicago, etc., Co.*, 66 Wis. 1, 27 N. W. Rep. 628.

² *Morris v. Wells*, 54 Hun. 634, 7 N. Y. Supp. 61; *Brown v. Klock*, 52 Hun. 613, 5 N. Y. Supp. 245; *MacKay v. Riley (Ill.)*, 26 N. E. Rep. 525; *Patten v. Belo*, 79 Texas, 41; *New York, etc., Co. v. Gallagher*, 79 Texas, 685, 15 S. E. Rep. 694; *Shaw v. Bryan*, 39 Mo. App. 523; *Blake v. Broughton*, 107 N. C. 220, 12 S. E. Rep. 127; *Atkinson v. Olesener*, 57 Hun. 592, 10 N. Y. Supp. 822; *Jacksonville, etc., Co. v. Peninsular, etc., Co. (Fla.)*, 9 So. Rep. 661; *Olson v. Solverson*, 71 Wis. 663, 38 N. W. Rep. 329; *Hooker v. Village of Brandon*, 75 Wis. 8, 43 N. W. Rep. 741; *Addy v. Janesville*, 70 Wis. 401, 35 N. W. Rep. 931; *Meracle v. Down*, 64 Wis. 323, 25 N. W. Rep. 412; *Cameron v. White*, 74 Wis. 425, 43 N. W. Rep. 155; *Hanf v. Northwestern Association*, 76 Wis. 450, 45 N. W. Rep. 315.

lief that the rule can not be accurately said to be a general one. It may no doubt be properly given effect where it is clear that the incompetent evidence could have done no harm,¹ but it is equally certain that there are many cases where incompetent evidence of the same facts as those proved by other evidence may exert a very prejudicial influence, inasmuch as it is almost certain to be regarded by the jury as corroborative, whereas it ought not to be considered for any purpose.² We can not resist

¹ Of the class of cases referred to in the text the following may be taken as representatives or types: *Bradley v. Palen*, 78 Iowa, 126, 42 N.W. Rep. 623; *Beard v. First National Bank*, 41 Minn. 153, 43 N.W. Rep. 7; *Board v. Hammond*, 83 Ind. 453; *Cooper v. Coates*, 21 Wall. 105; *Barth v. Clise*, 12 Wall. 400; *McAlpin v. Ziller*, 17 Texas, 508; *Sadler v. Sadler*, 16 Ark. 628; *Cooper v. Breckenridge*, 11 Minn. 341.

² In the case of *Anderson v. Rome*, etc., Co., 54 N.Y. 334, 341, the court held that proving the same facts in a legitimate mode did not heal the error in suffering incompetent testimony to go to the jury, and said, in the course of the opinion: "The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but when the presumption is repelled, and it is clear beyond a rational doubt, that no harm was done to the party objecting, and that the illegal evidence did not and could not affect the result, the error furnishes no ground for reversal. *People v. Gonzales*, 35 N.Y. 49; *Vandevoort v. Gould*, 36 N.Y. 639, 644. Any illegal evidence that would have a tendency to excite the passions, arouse the prejudices, awaken the sympathies or warp the judgments of the jurors in any degree could not be considered harmless." It was also said: "I am of the opinion that the fact that Sullivan was called and sworn as a witness does not cure the error committed in allowing his declaration to

Hagan to be proven." In the well considered case of *McAllister v. Detroit*, etc., Co., 85 Mich. 453, 48 N.W. Rep. 612, 613, it was said: "It is true the court directed the jury that the only thing in the case was the publication of the matter so far as it was untrue, and that they should not take into consideration in the matter of damages the outrages committed by the Windsor officers, and that whether the arrest was legal or justifiable was wholly immaterial to the issue, and they should not consider the arrest at all, but only the publication. This testimony had been given to the jury, however, tending to create in their minds a feeling of indignation at such ill usage, and the charge very likely would not remove it, and it would remain with them when they retired to their jury room to consider of their verdict, notwithstanding the charge." *People v. Evans*, 72 Mich., 367, 40 N.W. Rep. 473. The subject received careful consideration in the case of *Meyer v. Lewis*, 43 Mo. App. 417, and, after a full and discriminating review of the authorities, it was held that an instruction to disregard incompetent evidence was sufficient as a general rule to cure the error, but that there are cases where such an error is not cured by an instruction. It was said: "We conclude, therefore, that the general rule applicable to civil trials is, that incompetent evidence admitted in the progress of the trial may be withdrawn by the party offering it, or stricken out on his motion, or withdrawn by

the conclusion that some of the courts have given the doctrine a much wider scope than principle warrants. In many instances it is scant comfort to a party to be turned away with the answer that it is true that the incompetent evidence ought not to have been admitted, but as the same facts were proved by competent evidence the error was healed.

§ 700. **Withdrawal of Incompetent Evidence**—The general rule asserted by many courts is that an error in suffering incompetent evidence to go to the jury over objection may be cured by an effective withdrawal of the incompetent evidence.¹ The rule is one, as it seems to us, to be applied with scrupulous care. The rule as it is sometimes applied works injustice. The mere withdrawal of evidence does not always efface or remove the effect it has produced. The impression produced by evidence once heard is not easily eradicated. The removal of an impression from the minds of men is not very

an instruction admonishing the jury to disregard it so as to cure the error of admitting it. But we are equally of opinion that many cases may arise where it will be apparent to a reviewing court, from the nature of the evidence in the case as preserved by the bill of exceptions and from the verdict rendered by the jury, that the error of admitting it was probably not cured by the withdrawing of it, or by the striking of it out, whether by the party offering it or by the judge directing the jury to disregard it." This doctrine is sustained by other cases. *French v. Detroit Free Press Co.* (Mich.), 48 N. W. Rep. 615; *Furst v. Second Avenue Ry. Co.*, 72 N. Y. 542; *Erbin v. Lorillard*, 19 N. Y. 299, 302; *Warrall v. Parmelee*, 1 Comst. 519; *Griggs v. Smith*, 13 N. Y. Supp. 273; *Nichols v. White*, 85 N. Y. 531, 536; *Pringle v. Leverich*, 97 N. Y. 181, 186; *Waring v. U. S. Tel. Co.*, 4 Daly, 233; *Foote v. Beecher*, 78 N. Y. 155; *Baird v. Gillett*, 47 N. Y. 186; *Railroad Co. v. Winslow*, 66 Ill. 219; *Lycoming, etc.,*

Co. v. Rubin, 79 Ill. 402; *Howe, etc., Co. v. Rosine*, 87 Ill. 105; *State v. Thomas*, 99 Mo. 235; *State v. Daubert*, 42 Mo. 242; *Cobb v. Griffith*, 12 Mo. App. 130; *Stephens v. Railroad*, 96 Mo. 207.

¹ *Wright v. Gillespie*, 43 Mo. App. 244; *Hillstad v. Hostetter*, 46 Minn. 393, 49 N. W. Rep. 192; *State v. Cummins*, 76 Iowa, 133, 40 N. W. Rep. 124; *Woods v. Hamilton*, 39 Kan. 69, 17 Pac. Rep. 335; *Indianapolis, etc., Co. v. Bush*, 101 Ind. 582; *Providence, etc., Co. v. Martin*, 32 Md. 310; *Boone v. Purnell*, 28 Md. 607; *Dillingham v. Russell*, 73 Tex. 47, S. C. 3 Law. Rep. Anno. 634; *Decker v. Bryant*, 7 Barb. 182, 189; *Clinton v. Rowland*, 24 Barb. 634; *Boyd v. State*, 17 Ga. 194; *Davenport v. Harris*, 27 Ga. 68; *Gray v. Gray*, 3 Litt. (Ky.) 465; *Durant v. Lexington, etc., Co.*, 97 Mo. 62, 10 S. W. Rep. 484; *State v. Collins*, 93 N. C. 564; *McAllister v. McAllister*, 12 Ired. 184; *State v. May*, 4 Dev. 328; *State v. Gay*, 94 N. C. 841.

unlike the removal of writing from paper or parchment; despite earnest efforts to remove it traces are likely to remain. Whether the withdrawal of the incompetent evidence does or does not cure the error must depend in a great measure upon the character and influence of the evidence. There may be cases where the character of the evidence is such that a mere withdrawal without specific instructions or directions is sufficient to heal the error, but in many cases the withdrawal should be accompanied by clear and explicit instructions to disregard the evidence, entirely and absolutely. A party who duly and seasonably requests it is, as we believe, entitled to have the jury specifically instructed to disregard the incompetent evidence, and a refusal to so instruct would be error although there may be a formal withdrawal of the evidence.¹ We have indicated in a former paragraph our opinion that there may be cases where the evidence is so influential that its mischievous effect can not be overcome by proving the same facts by legitimate evidence, and wherever this clearly and fully appears the verdict ought not to stand.

§ 701. Instructions to disregard Incompetent Evidence—An instruction to disregard evidence will, as a general rule, cure the error committed by the court in admitting it.² The party

¹ In the case of *Rooney v. Milwaukee, etc., Co.*, 65 Wis. 397, 399, it was said: "This court has frequently decided it would not reverse a judgment because irrelevant testimony was admitted on the trial when it was apparent that such improper evidence had no influence upon the jury. *Fowler v. Farmers, etc., Co.*, 21 Wis. 77; *Noonan v. Ilsley*, 22 Wis. 27, 39; *Hazelton v. Union Bank*, 32 Wis. 34. But where there is reason to suppose that the rights of a party were prejudiced by the admission of the improper testimony, the judgment will be reversed on that ground. *State Bank v. Dutton*, 11 Wis. 371; *Remington v. Bailey*, 13 Wis. 332. It has been held that the error of admitting such testimony was cured by a subsequent direc-

tion of the court to the jury not to consider it. *Pennsylvania Co. v. Roy*, 102 U. S. 451. In the case at bar the court was silent as to the effect which should be given the testimony 'but such silence was by no means equivalent to a positive direction to disregard it.' *Castleman v. Griffin*, 13 Wis. 535, 539."

² *State v. James* (So. Car.), 12 S. E. Rep. 657; *Pireaux v. Simon*, 79 Wis. 392, 48 N. W. Rep. 674; *Wishmier v. Behymmer*, 30 Ind. 102; *Zehner v. Kepler*, 16 Ind. 290; *Gebhart v. Burkett*, 57 Ind. 378; *Moore v. Shields*, 121 Ind. 267; *Cadman v. Markle*, 76 Mich. 448; *Dillingham v. Russell*, 73 Tex. 47; *Evansville, etc., Co. v. Montgomery*, 85 Ind. 494; *Lawler v. McPheeters*, 73 Ind. 577; *Blizzard v. Applegate*, 77 Ind. 516, 577.

against whom such evidence is admitted has a right to ask that the instructions shall be clear and explicit.¹ If a party desires an express and explicit direction to disregard evidence, he should appropriately and seasonably request the proper direction or instruction, for if there is a withdrawal and no proper request, the acquiescence of the party will, as a rule, be held to waive more specific instructions or directions.²

§ 702. **Exceptional Cases**—We fully recognize the doctrine that the presumption is that jurymen obey the instructions of

Blake *v.* Broughton, 107 N. C. 220, 12 S. E. Rep. 127; Mitts *v.* McMorrin, 85 Mich. 94, 48 N. W. Rep. 288; Alabama, etc., *Co. v.* Frazier (Ala.), 9 So. Rep. 303; Taylor *v.* Wootan, 1 Ind. App. 188, 192, 27 N. E. Rep. 502; Blaisdell *v.* Scally, 84 Mich. 149, 47 N. W. Rep. 585. In the case of Pennsylvania *Co. v.* Roy, 102 U. S. 451, the court said, in answer to the argument of counsel: "To this position we can not assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence can not be afterwards corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It can not be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider the evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too

unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury and commence anew. A rule of practice leading to such results can not meet with approval."

¹ Glenn *v.* Glore, 42 Ind. 60; Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. Rep. 372; Rooney *v.* Milwaukee, etc., *Co.*, 65 Wis. 397; People *v.* Wallace, 89 Cal. 158, 26 Pac. Rep. 650.

² It was said by the court in Moore *v.* Shields, 121 Ind. 267, 271, that: "It is quite true that the instruction, so far as the evidence admitted was concerned, was not as direct as it might have been, but the court undertook to correct the error by an instruction. As no more explicit instruction was asked on the appellant's behalf, it must have been deemed satisfactory at the time. Having neglected to ask that the jury be more explicitly instructed then, it is too late to complain now for the first time. Gebhart *v.* Burkett, 57 Ind. 378."

the court, and we quite as fully recognize the general rule that incompetent evidence may be so effectively withdrawn by instructions as to heal the error committed in admitting it. But while fully recognizing the validity and soundness of these general rules we, nevertheless, believe that exceptions exist. The rules are general, not universal. Extreme cases may arise which must be regarded as exceptions or else injustice be done. It does not follow that because exceptions exist a rule is not general. Considerations of consistency and expediency are influential, but where substantive rights are involved, such considerations must yield. If, therefore, the case is one in which it clearly appears that an instruction did not remove the effect of powerful evidence, the case must, as we believe, be regarded as an exception to the general rule.¹ It is no doubt incumbent upon a party in a case where the proper instruction to disregard illegal evidence has been given to make it clearly and strongly appear that his case constitutes an exception to the general rule, and this he can not do without making it manifest that the jury did not yield to the instructions of the court.

§ 703. Effect of Sustaining a Motion to strike out Incompetent Testimony—It is obvious that where a party moves to strike out incompetent testimony given against him and the court sustains his motion, the error in admitting the evidence is cured and the objections taken to its admission waived. Such a case is quite different from one in which the court of its own motion, or upon the motion of the adverse party withdraws the evidence or instructs the jury to disregard it, for in the former case the party elects to have the evidence struck out, and, by his election, voluntarily abandons positions previously taken.² In the one case

¹ The authorities elsewhere cited support our conclusion. *Ante*, § 698. There is no conflict between our conclusion and the cases cited in the note to the preceding paragraph, for they assert what is conceded to be the general rule, while we here assert nothing more than that there may be particular cases with such well defined and marked peculiarities as to constitute exceptions. There are very few general rules, indeed, of which it may not be truly af-

firmed that they are broken by exceptions.

² This doctrine is well illustrated by the case of *Vannoy v. Klein*, 122 Ind. 416. In that case the party requested the court to instruct the jury as to the effect of the evidence, and his instruction was given. It was held that by asking the instruction he waived objections interposed to the admission as well as his motion to strike out.

the party by his own voluntary act waives all former objections and secures what he elects to consider adequate relief, while in the other he does not abandon objections previously made.¹

§ 704. **When a Party can not withdraw Evidence over the Objection of his Adversary**—Where an objection is interposed to evidence the party by whom it was introduced is, as a general rule, at liberty to withdraw it, and error can not be successfully alleged on the ruling permitting it to be withdrawn,² although, as we have elsewhere said, the withdrawal does not invariably cure the error committed in suffering it to go to the jury. In such cases, the error, if there is error, grows out of the harm done in allowing the jury to hear the evidence, not in permitting it to be withdrawn. Where the evidence is favorable to the opposite party and is not utterly incompetent, the general rule is that the party introducing it can not at his pleasure withdraw it from the jury.³

§ 705. **Curing Errors in Instructions**—The general rule is that the court may cure errors in its instructions by withdrawing, explaining or correcting them. Where a material instruction is given that is erroneous it should be effectively withdrawn.⁴

¹ Price v. Brown, 98 N. Y. 388.

² Boyd v. State, 17 Ga. 194; Davenport v. Harris, 27 Ga. 68; Providence, etc., Co. v. Martin, 32 Md. 310, 316; Boone v. Purnell, 28 Md. 607, 630.

³ Decker v. Bryant, 7 Barb. 182, 189; Clinton v. Rowland, 24 Barb. 634. The reason for this rule is obvious. The party who brings out the evidence can not retain what favors him and reject that which benefits his adversary. Nor can a party be allowed to take the chance of eliciting evidence and if it benefits him keep it before the jury, but if it harms him take it from them. When evidence is introduced it is, as a general rule, available to the party benefited whether it be the one who introduced it or the adverse party. Some of the courts say: "Evidence, when in, is common property."

⁴ Kirland v. State, 43 Ind. 146, S. C. 13 Am. Rep. 386; McCole v. Loehr, 79 Ind. 430; Bradley v. State, 31 Ind. 492, 503; Clem v. State, 31 Ind. 480; Uhl v. Bingaman, 78 Ind. 365; Kingen v. State, 45 Ind. 518; Toledo, etc., Co. v. Shuckman, 50 Ind. 42; Binns v. State, 66 Ind. 428; Lower v. Franks, 115 Ind. 334, 340; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. Rep. 873; People v. Terrell, 58 Hun. 602; Baker v. Ashe (Texas), 16 S. W. Rep. 36; People v. Chew Sing Wing, 88 Cal. 268, 25 Pac. Rep. 1099; Jones v. Talbot, 4 Mo. 279, 285; Bank of the Metropolis v. New England Bank, 6 How. (U. S.), 212; Chicago, etc., Co. v. Wilcox (Ill.), 24 N. E. Rep. 419, S. C. 8 Law. Rep. Anno. 494; Billups v. Daggs, 38 Mo. App. 367; Fink v. Algermissen, 25 Mo. App. 186; Arcia v. State, 28 Tex. App. 198, 12 S. W. Rep. 599. It was

An error in giving an erroneous instruction is not cured by merely giving another contradicting it. The court can not without fatal error give contradictory instructions to the jury, since that would impose upon the jury the duty of determining the law as well as the facts. The court may refuse to give an instruction, although it has indicated to the parties that it would be given.¹

§ 706. **Refusal of Instructions**—Where a party appropriately asks a special instruction an error in refusing it is not always cured by giving a general charge upon the subject. A party has a right to have a specific instruction applying the law to the facts of the particular case as developed by the evidence.² It is the object of a charge to the jury to present the law of the particular case, not to inform the jury upon mere abstract general rules of law. It is obvious that the general statement of an abstract legal rule in many cases can be of no substantial benefit to a party, and yet a well drawn instruction appropriately directing the jury as to the law of the case before them might secure him the verdict. It is, however, not error to state correctly abstract propositions of law; the error is in refusing a proper and seasonable request to give a special instruction applicable to the facts of the particular case.³

held in the case of *McCroy v. Anderson*, 103 Ind. 12, that where the court gives one series of instructions and subsequently gives another and different series, the errors in the first series are cured. It may well be doubted whether the doctrine of this case can be sustained. It is clear, at all events, that the error in such a case can not be cured by giving a second series of instructions, unless that series is so full and explicit as to effectually impress the minds of the jurors that the law as declared in the last series is that by which they must be governed. Improper remarks made in ruling upon the admission of evidence may be withdrawn by a strong and unequivocal instruction. *Reinhold v. State*, 30 N. E. Rep. —.

¹ *City of Logansport v. Dykeman*, 116 Ind. 15; *Louisville, etc., Co. v. Hubbard*, 116 Ind. 193. The withdrawal of an instruction by the party by whom it was asked disposes of the exceptions of the adverse party. *Haines v. McLaughlin*, 135 U. S. 584.

² *Hipes v. State*, 73 Ind. 39, 41; *Carpenter v. State*, 43 Ind. 371, 373; *Winchester v. King*, 46 Mich. 102; *McCormick v. Smith*, 127 Ind. 230, 26 N. E. Rep. 825; *Morris v. Platt*, 32 Conn. 75; *Little Miami, etc., Co. v. Wetmore*, 19 Ohio St. 110; *Thompson v. Shannon*, 9 Texas, 536.

³ *Ante*, § 647. "Incomplete instructions." *Mutual Life Insurance Co. v. Snyder*, 93 U. S. 393; *Hall v. Wear*, 92 U. S. 728; *Tomlinson v. Wallace*, 10

§ 707. **Subsequently Admitting Evidence once Excluded**—It is barely necessary to say that if evidence is wrongfully excluded the error is completely cured by subsequently admitting the same evidence. The cases affirming this doctrine are very numerous. We cite some of them for the purpose of showing the application of the rule to particular instances, and not for the purpose of supporting the self-evident conclusion stated.¹ But where evidence of a high degree of probative force is erroneously excluded, the error is not cured by admitting evidence of the same facts by evidence of less force. Thus, if record evidence of a conclusive character is erroneously excluded, the admission of oral testimony will not cure the error. So, it has been held, the error in excluding the testimony of a disinterested witness is not cured by subsequently admitting the testimony of an interested witness.²

§ 708. **Miscellaneous Instances**—If the court by a subsequent ruling grants relief previously denied, the general rule is that the error in the original decision or ruling is cured. Thus, if a continuance is erroneously refused, the error is cured if a continuance is subsequently granted.³ So, if the court wrongfully refuses to direct a change of venue, but subsequently grants it, the error in the first ruling is healed. Again, if a court refuses to order the examination of a party, but afterwards orders the examination, the second order cures the error in the first. As another illustration we may take a case where the court erroneously directs a general and special verdict where only a special verdict ought to have been directed, the error in the direction is healed if the general verdict is disregarded and the judgment placed entirely on the special verdict.⁴

Wis. 224; *State v. Straw*, 33 Me. 554; etc., Co. (Iowa), 47 N. W. Rep. 986; *Chamberlain v. Porter*, 9 Minn. 260; *Palmer v. Conant*, 58 Hun. 333; *Hope Davis v. Elliott*, 15 Gray, 90; *Bain v. v. Blair*, 105 Mo. 85, 16 S. W. Rep. 595. *Doran*, 54 Pa. St. 124; *Moore v. Ross*, ² *Packard v. Backus*, 78 Wis. 188, 47 N. H. 547; *Barrett v. Delano* (Me.), N. W. Rep. 183.

¹ *Pennsylvania Co. v. Marion*, 123 Ind. 415; *Real Del Monte, etc., Co. v. Thompson*, 22 Cal. 542; *Abell v. Cross*, 17 Iowa, 171; *Walker v. State*, 91 Ala. 76, 9 So. Rep. 87; *Kelly v. Norwich*, etc., Co. (Iowa), 47 N. W. Rep. 986; *Palmer v. Conant*, 58 Hun. 333; *Hope v. Blair*, 105 Mo. 85, 16 S. W. Rep. 595. ² *Packard v. Backus*, 78 Wis. 188, 47 N. W. Rep. 183.

³ *Tillinghast v. Nourse*, 14 Ga. 641; *People v. Sackett*, 14 Mich. 320; *Mairs v. Gallahue*, 9 Gratt. 94. ⁴ *Toler v. Keiher*, 81 Ind. 383; *Louisville, etc., Co. v. Balch*, 105 Ind. 93.

CHAPTER VIII.

PRESUMPTIONS.

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| <p>§ 709. Resort to presumptions—What presumption will be preferred.</p> <p>710. Presumption in favor of the proceedings of the trial court.</p> <p>711. Nature of the presumption.</p> <p>712. Record susceptible of two constructions—That which sustains the judgment will be preferred.</p> <p>713. Presumptions will not prevail against the record.</p> <p>714. Court and judge.</p> <p>715. Jurisdiction of subject—Presumption of.</p> <p>716. Exception to the general rule—Judgment by default.</p> <p>717. Presumption of jurisdiction is not rebutted by the silence or incompleteness of the record.</p> | <p>§ 718. Judgment of trial court is presumed to be properly supported.</p> <p>719. Pleadings—Presumption that judgment is within and founded on.</p> <p>720. Presumption that rulings on pleadings were correct.</p> <p>721. Rulings on the evidence—Presumptions respecting.</p> <p>722. Instructions—Presumptions concerning.</p> <p>723. Juries and jurors—Presumptions concerning.</p> <p>724. Verdicts—Presumptions in aid of.</p> <p>725. Miscellaneous instances.</p> |
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§ 709. Resort to Presumptions—What Presumption will be Preferred—If the appellate tribunal is compelled to resort to presumptions it will choose that which sustains the proceedings of the trial court and reject that which would overthrow them.¹ If the condition of the record is such as to require the higher court to act upon a presumption it will, without hesitation, adopt the presumption that upholds the judgment from which the appeal is prosecuted. It has been held, upon this general principle, that it is not enough to show that "error may have been committed," but it must be shown that error was actually committed.² It is possible that the statement of the rule in the

¹ Carman v. Pultz, 21 N. Y. 547; 604. In the case cited it was said: "It Smith v. Newland, 9 Hun. 553, 554; is incumbent upon a party seeking the Phillip v. Gallant, 62 N. Y. 256, 265. reversal of a judgment or order to show

² Tracey v. Altmyer, 46 N. Y. 598. that an error was committed to his

case referred to may be somewhat stronger than authority warrants, but it is, at all events, not far out of the true line, and serves to show the strength of the presumption that judicial tribunals commit no errors.

§ 710. Presumption in favor of the Proceedings of the Trial Court—The rule that all reasonable presumptions and intendments will be made in favor of the rulings of the trial court is one of the best settled and most frequently applied rules in appellate procedure.¹ The rule rests on a firm foundation. It is supported by the elementary principle that official acts are presumed to be rightfully performed. But when it is brought to mind that a court acts impartially, upon full information and with calm deliberation, the foundation of the rule stated will at once be perceived to be broader and stronger than that which underlies the rule supporting the acts of ministerial or executive officers.

§ 711. Nature of the Presumption—The presumption while a strong one is not one of a conclusive character. It will give way to a clear exhibition of countervailing matters and may always be rebutted. The presumption which the law creates in favor of the rulings of a trial court belongs to the class generally denominated "disputable" or "rebuttable" presumptions, but is one among the strongest of its class. Strong as it

prejudice. It is not sufficient to show that it may have been committed. The latter will not overcome the presumption that all things have been transacted correctly, until the contrary appears."

¹ Cases almost past numbering declare and enforce the general rule. Of the vast number of cases upon the general subject we cite here a very small number. *Prilliman v. Mendenhall*, 120 Ind. 279, 22 N. E. Rep. 247; *Rapp v. Kester*, 125 Ind. 79; *Welsh v. State*, 126 Ind. 71; *Burrell v. State*, 28 N. E. Rep. 699; *Forelander v. Hicks*, 6 Ind. 448; *Amory v. Reilly*, 9 Ind. 490; *Milikin v. Osborne*, 12 Ind. 480; *Black v.*

Daggy, 13 Ind. 383; *Koile v. Ellis*, 16 Ind. 301; *State v. Smock*, 20 Ind. 184; *Estep v. Larsh*, 21 Ind. 183; *Round v. State*, 14 Ind. 493; *Beeler v. Hantsch*, 5 Blackf. 594; *Reddington v. Hamilton*, 8 Blackf. 62; *Maxam v. Wood*, 4 Blackf. 297; *Bishop v. Village of Goshen*, 120 N. Y. 337, 24 N. E. Rep. 720; *Walters v. Tefft*, 57 Mich. 390, 24 N. W. Rep. 117; *Sidney, etc., Co. v. Warsaw School District*, 130 Pa. St. 76, 18 Atl. Rep. 604; *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. Rep. 754; *Chestnutt v. Pollard*, 77 Texas, 86, 13 S. W. Rep. 852; *Kennedy v. McNichols*, 29 Mo. App. 11.

is, it will yield to the legitimate recitals of the record, and it can not be invoked by a party in opposition to his own admissions or averments.¹ The presumption of which we are speaking is of such strength as to cast upon the party who assails the rulings of the trial court the burden of making it clearly appear that the rulings were wrong. He can not, with hope of success, ask the appellate tribunal to overthrow the rulings of the trial court upon vague inferences or remote possibilities. He will fail unless he overcomes the presumption "by making error manifest."²

§ 712. **Record susceptible of two Constructions—That which sustains the Judgment will be Preferred**—The strength and scope of the presumption in favor of the proceedings of the trial court are illustrated by the cases which hold that where a record is susceptible of two constructions that construction which will sustain the judgment will be adopted.³ It would, however, be pressing the doctrine beyond just limits to carry it so far as to hold that recitals or statements of the record will be disregarded, or that a strained and unnatural construction will be adopted for the sake of saving the judgment. We suppose that in no event will the appellate tribunal disregard the unequivocal statements or recitals of the record, or indulge in violent and strained intendments. Where the record is contradictory the presumption is that the part is true which shows obedience to the law.⁴ Upon this principle it is held that where the record

¹ *Lucketts v. Townsend*, 3 Tex. 119, 24 Pac. Rep. 475; *Wynn v. Simons*, 33 Ala. 272; *Whipley v. Flower*, 6 Cal. 630; *Sherman v. Palmer*, 37 Mich. 509. See, upon the general subject, *Lowen v. Crossman*, 8 Ia. 325; *Worthington v. Olden*, 31 Ia. 419; *David v. Leslie*, 14 Ia. 84; *Matter of Celina*, 7 La. Ann. 162; *Keith v. Clark*, 97 U. S. 454; *Parker v. Medsker*, 80 Ind. 155; *Graves v. Duckwall*, 103 Ind. 560; *Binford v. Miner*, 101 Ind. 147; *Railsback v. Walke*, 81 Ind. 409; *Leary v. New*, 90 Ind. 502; *La Follette v. Higgins*, 100 Ind. 241.

² *People v. Board*, 23 Ill. App. 386; *O'Callahan v. Bode*, 84 Cal. 489, 24 Pac. Rep. 269; *Platt v. Continental Ins. Co.*, 62 Vt. 166, 19 Atl. Rep. 637; *Powell v. Ashlock*, 21 Ill. App. 176; *Stevenson v. Sherwood*, 22 Ill. 238, S. C. 74 Am. Dec. 140; *Parmelee v. Fischer*, 22 Ill. 212, S. C. 74 Am. Dec. 138; *Den v. Graham*, 1 Dev. & Batt. 76, S. C. 27 Am. Dec. 226; *Beach v. Packard*, 10 Vt. 96, S. C. 33 Am. Dec. 185.

³ *Denver, etc., Co. v. Cowgill* (Kan.),

24 Pac. Rep. 475; *Wynn v. Simons*, 33 Ala. 272; *Whipley v. Flower*, 6 Cal. 630; *Sherman v. Palmer*, 37 Mich. 509. See, upon the general subject, *Lowen v. Crossman*, 8 Ia. 325; *Worthington v. Olden*, 31 Ia. 419; *David v. Leslie*, 14 Ia. 84; *Matter of Celina*, 7 La. Ann. 162; *Keith v. Clark*, 97 U. S. 454; *Parker v. Medsker*, 80 Ind. 155; *Graves v. Duckwall*, 103 Ind. 560; *Binford v. Miner*, 101 Ind. 147; *Railsback v. Walke*, 81 Ind. 409; *Leary v. New*, 90 Ind. 502; *La Follette v. Higgins*, 100 Ind. 241.

⁴ *Larillian v. Lane*, 8 Ark. 372; *Foot v. Lawrence*, 1 Stew. (Ala.) 483.

contains two verdicts, the one good, the other bad, the presumption is that the good was acted upon by the trial court.¹ The same general principle governs the case in which it was held that where a finding is fairly susceptible of two constructions the construction which will uphold the judgment will be adopted.² Our decisions which assert that where answers to special interrogatories returned by a jury are contradictory the general verdict will be sustained tacitly affirm the doctrine here stated, although different reasons are assigned by the decisions for the conclusion reached.³

§ 713. **Presumptions will not prevail against the Record**—The recitals and statements of the record are stronger than the presumption which exists in favor of the proceedings of the trial court. Hence it is always implied that to the legitimate statements of the record the presumption will yield wherever there is conflict. Nor is it necessary that the record should in terms, or even by direct implication, show that the presumption is unfounded, for if it affirmatively appears that there is error the presumption will give way. If the matters of record are such as clearly authorize the inference that there was probably prejudicial error the presumption loses all force.⁴ The record is,

¹ *Smith v. Camp*, 84 Ga. 117, 10 S. E. Rep. 539.

² *Schwab v. Charles Parker Co.*, 55 Conn. 370.

³ *Wabash Ry. Co. v. Savage*, 110 Ind. 156; *Hereth v. Hereth*, 100 Ind. 35.

⁴ In the case of *Galpin v. Page*, 18 Wall. 350, 364, the Supreme Court of the United States, speaking of the class of presumptions we have under discussion, said: "They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes the averments with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the facts or that the fact was otherwise than as averred. If, for example,

it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that the service was made at another and different place, or if it appears in like manner that the service was made upon a person other than the defendant it will not be presumed in the silence of the record that it was made upon the defendant also." While the court was speaking with special reference to presumptions of jurisdiction what it said applies to presumptions such as we are dealing with generally. Upon the subject of the effect of record recitals, see *Boker v. Chapline*, 12 Iowa, 204; *Messenger v. Kintner*, 4 Binn. 97; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. Rep. 329; *Penobscot, etc., Co. v.*

however, to be taken as an entirety and the questions decided upon it as a whole.¹ Upon the principle stated in a former paragraph it is held that where the recitals of the record are contradictory the court will accept as correct the recital which sustains the proceedings of the court of original jurisdiction.² The conclusion that the recital which supports the proceedings of the trial court will be accepted as the controlling one is required by considerations of harmony and consistency, and it is necessary in order to give just effect to the general presumption that judicial tribunals do no wrong. Any other conclusion would clash with the settled and salutary principle that the appellant must bring to the appellate tribunal such a record as makes error manifest.

§ 714. **Court and Judge**—The presumption is that the court was duly organized unless the record discloses facts showing that it was not so organized. The authority of the person who assumes to discharge the functions of a judge is presumed to be lawful. This presumption applies to a special judge unless the record shows a well founded objection to his capacity to act as judge.³ The later cases declare the doctrine we have stated and they rest on sound principle, since it would be unreasonable to assume that parties quietly sat by and permitted their cause to be tried by an intruder or usurper. This doctrine can not, of course, fully prevail where there is no law authorizing the appointment of judges *pro tempore*, nor can it be carried so far as to authorize a special judge to appoint another special judge.⁴

Weeks, 52 Me. 456; Dillard v. Central, etc., Co., 82 Va. 734, 1 S. E. Rep. 124; Pollard v. Wegener, 13 Wis. 569; Hahn v. Kelly, 34 Cal. 391, S. S. 94 Am. Dec. 742.

¹ Hering v. Chambers, 103 Pa. St. 172, 175; Ely v. Tallman, 14 Wis. 28; Hahn v. Kelly, 34 Cal. 391, S. C. 94 Am. Dec. 742.

² Conrad v. Baldwin, 3 Iowa, 207.

³ Bowen v. Swander, 121 Ind. 164, 22 N. E. Rep. 725; Littleton v. Smith, 119 Ind. 230; Cargar v. Fee, 119 Ind. 536; Greenwood v. State, 116 Ind. 485;

Schlunger v. State, 113 Ind. 295; Board v. Courtney, 105 Ind. 311; Rubush v. State, 112 Ind. 107; State v. Murdock, 86 Ind. 124; Powell v. Powell, 104 Ind. 18, 29; Smurr v. State, 105 Ind. 125, 133; Henning v. State, 106 Ind. 386, 395; S. C. 55 Am. Rep. 756; State v. Baker, 63 N. C. 276; Hess v. Dean, 66 Texas, 663; People v. Woodside, 72 Ill. 407; Empire, etc., Co. v. Engley, 14 Col. 289, 23 Pac. Rep. 452; Reed v. Bagley, 24 Neb. 332; State v. Hosmer, 85 Mo. 553; Harper v. Jacobs, 51 Mo. 296.

⁴ Cargar v. Fee, 119 Ind. 536.

The appellate tribunal will presume that the courts were held at the proper time and place, and that all was done that the law requires to make the holding of the court regular and legal.¹ Where a person assumes to sign a bill of exceptions a judge it will be presumed that he had authority to do so.² Records are presumed to be duly signed by the qualified judge.³ But terms of court must be held at the time specified by law, and where the objection is appropriately and seasonably made the objection may prevail if the record properly shows that it is well founded.⁴ Where a change of judge takes place the presumption is that the change was made upon sufficient reasons and in conformity to law.⁵ Where the record is silent the presumption is that a judge who declined to try a case had legal reasons for his action.⁶ That a special judge was properly appointed will be presumed.⁷ Where a second special judge appears and hears the case without objection, the presumption is that his appointment was regular and that legal cause existed for his appointment.⁸ But where the record dis-

¹ Wood v. Franklin, 97 Ind. 117; Hanes v. Worthington, 14 Ind. 320; Carlisle v. Gaar, 18 Ind. 177; Shirts v. Irons, 28 Ind. 458; Shircliff v. State, 96 Ind. 369; Smurr v. State, 105 Ind. 125, 133; Cass v. Krimbill, 39 Ind. 357; Porter v. State, 2 Ind. 435; Myers v. Mitchell (S. Dak.), 46 N. W. Rep. 245; Cook v. Skelton, 20 Ill. 107.

² Bowen v. Preston, 48 Ind. 367.

³ Indiana, etc., Co. v. Bird, 116 Ind. 217, 18 N. E. Rep. 837. See McCray v. Humes, 116 Ind. 103, 18 N. E. Rep. 500.

⁴ Batten v. State, 80 Ind. 394; Smurr v. State, 105 Ind. 125, 129; McCool v. State, 7 Ind. 378; Smithson v. Dillon, 16 Ind. 169; Newman v. Hammond, 46 Ind. 119; Ferger v. Wesler, 35 Ind. 53. But the objection must be sustained by the record, or the general presumption will prevail.

⁵ People v. Mellon, 40 Cal. 648. The authority of the special judge continues until the case he is called to try, with

all its incidents, is fully disposed of. Staser v. Hogan, 120 Ind. 207; Shugart v. Miles, 125 Ind. 445; Naffzieger v. Reed, 98 Mo. 87, 11 S. W. Rep. 315; *Ex parte* Clay, 98 Mo. 578, 11 S. W. Rep. 998; Nebraska, etc., Co. v. Maxon, 23 Neb. 224, 36 N. W. Rep. 492; Harris v. Musgrave, 72 Tex. 18, 9 S. W. Rep. 90; Dawson v. Dawson, 29 Mo. App. 521. See, generally, upon the subject of special or *pro tempore* judges. Firestone v. Hershberger, 121 Ind. 201, 22 N. E. Rep. 985; Stary v. Winning, 7 Ind. 111; State v. Dufour, 63 Ind. 567; Feaster v. Woodfill, 23 Ind. 493; Zonker v. Cowan, 84 Ind. 395; Perkins v. Hayward, 124 Ind. 445.

⁶ Leonard v. Blair, 59 Ind. 510.

⁷ Board v. Courtney, 105 Ind. 311; Schlunger v. State, 113 Ind. 295.

⁸ Fassnow v. State, 89 Ind. 235, 236, citing Hutts v. Hutts, 51 Ind. 581; Glenn v. State, 46 Ind. 368; Singleton v. Pidgeon, 21 Ind. 118; Cincinnati, etc., Co. v. Rowe, 17 Ind. 568.

closes facts showing the invalidity of the appointment of judge *pro tempore* the presumption is effectually destroyed.¹

§ 715. **Jurisdiction of Subject—Presumption of**—A case is presumed to be within the jurisdiction of a court of superior jurisdiction unless the contrary appears.² This doctrine is often expressed in the statement that “nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so.”³ But the rule, general as it is, has its limitations. Where the whole of a general subject is by law placed within the exclusive jurisdiction of a designated class of tribunals, no presumption can arise in favor of the authority over that subject of any tribunal not belonging to the class to which jurisdiction of the general subject is assigned by law. Thus, where jurisdiction of actions involving title to real estate is exclusively lodged in one class of tribunals, jurisdiction can not be exercised over that subject by a tribunal not belonging to the class invested with jurisdiction.⁴ Where the record shows affirmatively and clearly that the case belongs to a class over which the court has no jurisdiction, the presumption must yield. But jurisdiction of the subject means much more than

¹ Haverly, etc., Co. v. Howcutt, 6 Col. 574.

² Board v. Markle, 46 Ind. 96; Markel v. Evans, 47 Ind. 326; State v. Smock, 20 Ind. 184; Pate v. Tait, 72 Ind. 450; Houk v. Barthold, 73 Ind. 21; Ragan v. Haynes, 10 Ind. 348; Hyatt v. Cochran, 69 Ind. 436; Dean v. Miller, 66 Ind. 440; Rodman v. Rodman, 54 Ind. 444; Dequindre v. Williams, 31 Ind. 444; Kinnaman v. Kinnaman, 71 Ind. 417; Chapell v. Shuee, 117 Ind. 481, 485; Brown v. Anderson, 90 Ind. 93; Brownfield v. Weicht, 9 Ind. 394; Wilcox v. Moudy, 82 Ind. 219; Godfrey v. Godfrey, 17 Ind. 6; Board v. Legg, 115 Ind. 544; Board v. Arnett, 116 Ind. 438, 444; Bass Foundry Co. v. Board, 115 Ind. 234; Shewalter v. Bergman, 123 Ind. 155.

³ Gossett v. Howard, 10 Q. B. 350; Guilford v. Love, 49 Texas. 715; Goar v. Maranda, 57 Ind. 339; Holmes v. Campbell, 12 Minn. 221; Spaulding v. Baldwin, 31 Ind. 376; Butcher v. Bank, 2 Kan. 70; Reynolds v. Stansbury, 20 Ohio, 244; Hahn v. Kelly, 34 Cal. 391; Wells v. Waterhouse, 22 Me. 131; Ely v. Tallman, 14 Wis. 28; Potter v. Merchants Bank, 28 N. Y. 641, 656. Power to decide carries with it authority to decide right as well as wrong. Snelson v. State, 16 Ind. 29; Voorhees v. Jackson, 10 Peters. 449; Elliott v. Piersol, 1 Peters, 328, 340; Ely v. Board, 112 Ind. 361, 368; Million v. Board, 89 Ind. 5; Young v. Sellers, 106 Ind. 101.

⁴ Livesey v. Livesey, 30 Ind. 398; Wolcott v. Wigton, 7 Ind. 44; Carpenter v. Vanscotten, 20 Ind. 50.

jurisdiction of the particular case.¹ It may be shown by plea that there is no jurisdiction of the particular case, and thus the presumption will be rebutted in the particular instance, but where there is jurisdiction of the general subject, the presumption, in the absence of a countervailing showing, averment, or recital, is that jurisdiction exists in the particular instance. Thus, the circuit court has jurisdiction of the general subject of titles to land, but it may not have jurisdiction of the particular case for the reason that the land lies in another territorial jurisdiction, but until it is shown that there is no jurisdiction in the particular instance jurisdiction will be presumed.

§ 716. Exception to the General Rule—Judgment by Default— The general presumption in favor of jurisdiction does not extend to cases where there is no appearance and no process, or no service, and judgment is rendered upon default. The case of a judgment upon default rendered where there is no appearance forms an important and well defined exception to the general rule.² It is important, however, to bear in mind that there is a wide and radical difference between cases where there is an appearance but a subsequent default and cases where there is no appearance and a judgment rendered by default, because of a failure to obey some order or rule of court, or because of a failure to appear at the trial.³ The latter cases are, it is evident, within the general rule.

¹ *Jackson v. Smith*, 120 Ind. 520; *Wolver v. State*, 127 Ind. 306, 315; *Yates v. Lansing*, 5 Johns. 282.

² *Ante*, §§ 329 to 335, inclusive; *Young v. Dickey*, 63 Ind. 31; *Houk v. Barthold*, 73 Ind. 21; *Cole v. Allen*, 51 Ind. 122; *New Albany, etc., Co. v. Welsh*, 9 Ind. 479; *Bryant v. Richardson*, 126 Ind. 145; *Woolery v. Grayson*, 110 Ind. 149; *Townsend v. Townsend*, 21 Ill. 540; *Bascom v. Young*, 7 Mo. 1; *Johnson v. Dellridge*, 35 Mich. 436; *Duncan v. Gerdline*, 59 Miss. 550; *State v. Billings*, 23 La. Ann. 798; *Wilkinson v. Bayley*, 71 Wis. 131; *Amason v. Nash*,

19 Ala. 104; *Wellborn v. Sheppard*, 5 Ala. 674; *Merritt v. White*, 37 Miss. 438; *Glenn v. Shelburne*, 29 Texas, 125; *Thigpen v. Mundine*, 24 Texas, 282; *Abbe v. Marr*, 14 Cal. 210; *Barreon v. Frink*, 30 Cal. 486; *Holleck v. Jauden*, 34 Cal. 167; *Bosch v. Kassing*, 64 Ia. 312, 20 N. W. Rep. 354; *Smith v. Ellendale Mill Co.*, 4 Ore. 70; *Kitsmiller v. Kitchen*, 24 Ia. 163.

³ *Langdon v. Bullock*, 8 Ind. 341; *Archibald v. Lamb*, 9 Ind. 544; *McKinney v. State*, 101 Ind. 355; *Lilly v. Dunn*, 96 Ind. 220, 225.

§ 717. **Presumption of Jurisdiction is not Rebutted by the Silence or Incompleteness of the Record**—It is an established general rule that the presumption in favor of the jurisdiction of a superior court is not impaired or destroyed by the failure of the record to affirmatively show jurisdiction, but to the general rule there is the well defined exception already stated. An incomplete or silent record will not, as a general rule, authorize the inference that jurisdiction did not exist. The defect in the record is supplied by the presumption that the court did not usurp authority nor wrongfully exercise jurisdiction.¹ It was held in one case that where the papers were lost it would be presumed that the case was one in which judgment by default was authorized.² Incomplete and defective recitals indicating that there was an appearance will sustain the presumption.³ Where the record refers to an agreement but does not set it out, the presumption is that it authorized the decree.⁴ Where the filing of an affidavit is a prerequisite to jurisdiction the silence of the record warrants the presumption that the affidavit was filed.⁵

¹ *Nichols v. State*, 127 Ind. 406, 413; *O'Brien v. State*, 125 Ind. 38; *Sims v. Gay*, 109 Ind. 501; *Jackson v. State*, 104 Ind. 516; *Exchange Bank v. Ault*, 102 Ind. 322, 1 N. E. Rep. 562; *Albertson v. State*, 95 Ind. 370; *Pickering v. State*, 106 Ind. 228; *Cassady v. Miller*, 106 Ind. 69; *Dwiggins v. Cook*, 71 Ind. 579; *State v. Ennis*, 74 Ind. 17; *Iles v. Watson*, 76 Ind. 359; *Crane v. Kimmer*, 77 Ind. 215, 219; *Waltz v. Borro-way*, 25 Ind. 380; *Dequindre v. Williams*, 31 Ind. 444; *Alexander v. Feary*, 9 Ind. 481; *Doe v. Harvey*, 3 Ind. 104; *Doe v. Smith*, 1 Ind. 451; *Horner v. Doe*, 1 Ind. 130; *Mathis v. State*, 94 Ind. 562; *Pointer v. State*, 89 Ind. 255; *Coit v. Haven*, 30 Conn. 190; *Lawler v. White*, 27 Texas, 250; *Swearengen v. Gulick*, 67 Ill. 208; *Evans v. Young*, 10 Col. 316, 15 Pac. Rep. 424; *Sharp v. Brunnings*, 35 Cal. 528; *Messenger v. Kintner*, 4 Binn. 97.

² *Fogg v. Gibbs*, 8 Baxt. 464; *Herrick v. Butler*, 30 Minn. 156, 14 N. W. Rep.

³ *Crank v. Flowers*, 4 Heisk. 629; *Welsh v. Childs*, 17 Ohio St. 319. See generally, *Sloan v. McKinstry*, 18 Pa. St. 120; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. Rep. 565; *Credit Foncier v. Rogers*, 10 Neb. 184, 4 N. W. Rep. 1012; *Woodhouse v. Fillbates*, 77 Va. 317; *Ray v. Rowley*, 1 Hun. 614; *Slicer v. Bank of Pittsburgh*, 16 How. (U. S.) 571; *Morrow v. Weed*, 4 Ia. 77.

⁴ *Collins v. Loyal*, 56 Ala. 403; *Hearn v. State*, 62 Ala. 218.

⁵ *Dean v. Thatcher*, 3 Vroom. (N. J.) 470; *Newcomb v. Newcomb*, 13 Bush. 544. See, as to effect of defective notice, *Paine v. Moreland*, 15 Ohio. 435; *Beech v. Abbott*, 6 Vt. 586; *Glover v. Holman*, 3 Heisk. 519; *Wert v. Williamson*, 1 Swan. 277; *Mooney v. Maas*, 22 Iowa. 380; *Peck v. Strauss*, 33 Cal. 678; *Town of Lyons v. Cooledge*, 89 Ill. 529; *Sacramento Savings Bank v. Spencer*, 53 Cal. 737; *Kingman v. Paulson*, 126 Ind. 507; *Lantz v. Maffatt*, 102 Ind. 23; *Atk.* §§ 330, 331, 332, 333, 334.

It has also been held that the failure of the record to show that the proper preliminary steps were taken to authorize a judgment by confession did not impair the validity of the judgment inasmuch as it would be presumed that all was done that the law required.¹

§ 718. Judgment of Trial Court is Presumed to be properly Supported—The general presumption is that the judgment of a judicial tribunal is supported by whatever is essential to its validity and effectiveness. It will be assumed on appeal, in cases where the record is silent, that the preliminary steps necessary to impart vitality and force to a judgment were duly taken.² This rule, in effect, does no more than assert that the judgments of judicial tribunals can not be deemed foundationless where their lack of support does not appear affirmatively, and it is obvious that this rule is just, for certainly judicial tribunals are entitled to an intendment or presumption that their judgments rest on proper foundations.

§ 719. Pleadings—Presumption that the Judgment is within and Founded on—In the absence of a recital or statement in the record to the contrary the presumption is that the judgment is within the issues and supported by the appropriate pleadings.³

¹ *Caley v. Morgan*, 114 Ind. 350. We are not unmindful of the fact that there is a radical difference between a collateral attack upon a judgment and a direct attack by appeal, nor are we unmindful of the fact that in many cases cited the decisions referred especially to a collateral attack. But the principle to which the cases are cited is that which asserts that the silence of the record does not overcome the presumption that the proceedings of the court were regular and legal, for that presumption exists even in the case of appeal where there is no averment or no fact opposing it. There must, indeed, be objection, exception, and a due reservation of a ruling for review, and, of course, a silent or incomplete record can not ac-

complish what only objections and exceptions can accomplish.

² *Robb v. Ankeny*, 4 Watts & S. 128; *Bell v. Davis*, 1 Cal. 134; *Headly v. Board*, 4 Blackf. 116; *Taylor v. Carpenter*, 2 Sandf. Ch. 603; *Campbell v. Dooling*, 26 Ark. 647; *Ex parte, Donaldson*, 44 Mo. 149; *Howell v. Morlan*, 78 Ill. 162; *Wise v. Ringer*, 42 Ala. 488; *Midland, etc., v. McCartney*, 1 Neb. 398. See, generally, *State v. Adams*, 84 Mo. 310. *Baker v. Armstrong*, 57 Ind. 189; *Abbott v. Johnson*, 47 Wis. 239; *Mayes v. Goldsmith*, 58 Ind. 94.

³ *Irons v. Collins*, 80 Ala. 108; *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. Rep. 146; *Buecher v. Casteen*, 41 Kan. 141, 21 Pac. Rep. 112; *Rundell v. Kalbfus*, 125 Pa. St. 123; *Brassfield*

Where there are material and immaterial issues, the presumption is that the immaterial issue was disregarded and the judgment given on the material issue, unless the record expressly or by clear implication shows the contrary.¹ Where a demurrer is overruled to the evidence and there is one good and one bad paragraph of complaint, the appellate tribunal will presume that the judgment was rested on the good paragraph.² The general doctrine that the presumption is that the judgment is founded on proper pleadings finds a striking illustration in the cases which hold that where an indictment contains several counts, some good and some bad, the presumption is that the judgment is founded on the good counts.³ It is proper to here note that the rule has no application where a timely objection challenging the pleading, either in a civil or criminal case, is made in the trial court, for if the pleading is there duly assailed and a wrong ruling is made, there is no presumption that the judgment is right; on the contrary, the presumption is (unless rebutted, as it may be by the record), that the error influenced the ultimate decision.⁴ The rule last stated is a just one, since it is but reasonable to assume, in the absence of averments or recitals to the contrary, that the court carried the theory announced in its ruling on the pleadings throughout the case.

§ 720. Presumption that Rulings on Pleadings were Correct—
The party who asserts that a ruling upon a pleading was er-

v. Burgess (Ky.), 10 S. W. Rep. 122; *Murphy v. Commonwealth*, 23 Gratt. 960; *State v. O'Brien*, 21 La. Ann. 265; *Lyons v. People*, 68 Ill. 271; generally, *Lay v. Lawson*, 23 Ald. 377.

¹ *Harvey v. Laffin*, 2 Ind. 477; *State v. Hood*, 7 Blackf. 127.

² *Ohio, etc., Co. v. Collarn*, 73 Ind. 261; *Myrick v. Meritt*, 22 Fla. 335.

³ *Powers v. State*, 87 Ind. 97; *Enwright v. State*, 58 Ind. 567; *Jennings v. Commonwealth*, 17 Pick. 80; *Stoughton v. State*, 2 Ohio St. 562; *Roberts v. State*, 14 Ga. 8; *State v. Montgomery*, 28 Mo. 594; *United States v. Burroughs*, 3 McLean, 405; *State v. Connolly*, 3 Rich. L. 337; *State v. Miller*, 7 Ired. 275; *Arlen v. State*, 18 N. H. 563;

Brown v. State, 5 Eng. 607; *Parker v. Commonwealth*, 8 B. Monr. 30; *Isham v. State*, 1 Sneed, 111; *State v. Sheldy*, 8 Iowa, 477; *Hudson v. State*, 34 Ala. 253; *West v. State*, 2 Zab. 212; *People v. Curling*, 1 Johns. 320; *State v. Stebbins*, 29 Conn. 463; *Guenther v. Peeple*, 24 N. Y. 100.

⁴ *Wolf v. Schofield*, 38 Ind. 175; *Peery v. Greensburgh, etc., Co.*, 43 Ind. 321; *Bailey v. Troxell*, 43 Ind. 432; *Schafer v. State*, 49 Ind. 460; *Evansville, etc., Co. v. Wildman*, 63 Ind. 370.

Oneous must affirmatively show his assertion to be correct, otherwise the presumption that the court rules correctly upon the pleadings will prevail against him.¹ Thus, where a demurrer is overruled and is not in the record the presumption is that the demurrer did not assign the proper cause, or that the pleading demurred to was not liable to the objection urged by the demurrer.² So, it is presumed that whatever issues were required to be decided were decided.³ Where pleadings are necessary but none are filed the presumption is that they were waived by the express or implied agreement of the parties.⁴ Pleadings appearing in the record and acted upon by the court are presumed to have been properly filed.⁵ All issues are presumed to have been correctly submitted for decision and regularly and justly decided.⁶ Amendments will be presumed to have been made at the proper time and in the appropriate mode.⁷ Improper counts may be treated as having been struck out.⁸ Where no ruling is shown it will be presumed that a ruling was expressly or impliedly waived, or if necessary, was correctly made.⁹ Where a notice is requisite to give effective-

¹ *Holding v. Smith*, 42 Ind. 536; *Blinks v. State*, 48 Ind. 172; *Sigler v. Woods*, 1 Iowa, 177; *Moore v. Gilbert*, 46 Iowa, 508; *First Nat. Bank v. Carpenter*, 41 Iowa, 518; *Supreme Lodge of Knights of the Golden Rule v. Rose*, 62 Texas, 321; *Basey v. Gallagher*, 20 Wall. 670; *Johnston v. Holmes*, 32 So. Car. 434, 11 S. E. Rep. 208; *Conoway v. Weaver*, 1 Ind. 263; *Dritt v. Dodds*, 35 Ind. 63; *Murphy v. Clayton*, 51 Ind. 147.

² *Crowell v. City of Peru*, 41 Ind. 308; *Comer v. Himes*, 49 Ind. 482. It is only the legitimate statements of the record—not the recitals of the clerk—that can overcome the presumption. *Blany v. Finley*, 2 Blackf. 338; *Wilson v. Coles*, 2 Blackf. 402; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. 146; *Conoway v. Weaver*, 1 Ind. 263.

³ *Bottorf v. Wise*, 53 Ind. 32; *Hargus v. Goodman*, 12 Ind. 629; *Indianapolis, etc., Co. v. Clark*, 21 Ind. 150; *Brandon*

v. Judah, 7 Ind. 545; *Walker v. Houlton*, 5 Blackf. 348; *Buntin v. Weadle*, 20 Ind. 449.

⁴ *Campbell v. Hayes*, 77 Cal. 36, 18 Pac. Rep. 860; *Gordon v. Donahue* (Cal.), 21 Pac. Rep. 970; *Salisbury v. Bartleson*, 39 Minn. 365, 40 N. W. Rep. 265; *Wyvell v. Jones*, 37 Minn. 68, 33 N. W. Rep. 43; *Butler v. Winona Mill Co.*, 28 Minn. 205; *Jones v. Wilder*, 28 Minn. 238; *Davidson v. Farrell*, 8 Minn. 258; *Libby v. Husby*, 28 Minn. 40; *Holland v. Union County*, 68 Iowa, 56; *Hervey v. Savery*, 48 Iowa, 313.

⁵ *Bennett v. Abbott*, 51 Ind. 252; *Figart v. Halderman*, 75 Ind. 564.

⁶ *Dorr v. McDonald*, 43 Minn. 458, 45 N. W. Rep. 864.

⁷ *Kelsey v. Chicago, etc., Co. (So. Dak.)*, 45 N. W. Rep. 204.

⁸ *Schirmeier v. Baecker*, 20 Ill. App. 373.

⁹ *Smith v. Proffitt*, 82 Va. 832, 1 S. E. Rep. 67; *Birmingham, etc., Co. v.*

ness to a ruling upon the pleadings the presumption is that it was given as the law requires.¹

§ 721. **Rulings on the Evidence—Presumptions respecting**—It is so well settled that the rulings of the trial court in admitting or excluding evidence are presumed to be right, that it is unnecessary to refer to authorities upon the general subject. It is everywhere agreed that a party who assails a ruling admitting or excluding evidence must bring to the appellate court a record clearly exhibiting the ruling and showing it to be manifestly erroneous. As there is no doubt as to the existence of the general doctrine, as much as it is necessary or profitable to do so to call attention to some instances showing peculiar applications of the settled general doctrine. It may not be improper to preface a reference to the particular instances by the general statement that the decisions all agree upon one point, and that is this: There must be full and satisfactory record proof that the ruling relied upon as a cause for reversal was wrong, for, if circumstances or facts can be legitimately inferred which will authorize the conclusion that the ruling was right, the presumption will prevail,² and, hence, it is sometimes necessary to so frame the record as to exclude facts or circumstances that will authorize an inference supporting the ruling, although it is not necessary to anticipate or provide against forced and unnatural inferences. We may with propriety begin our reference to particular instances by directing attention to one of our own cases wherein it was held that although a witness was in court a few hours before his deposition was read, yet it would be presumed that reasons existed justifying the reading of the deposition.³ A deposition is presumed to have been authenticated by the certificate of the proper officer.⁴ The general doc-

Wilder, 85 Ala. 593, 5 So. Rep. 307; *Basey v. Gallagher*, 20 Wall. 670; *United States v. Barnard*, 1 Ariz. 319, 25 Pac. Rep. 523; *Newcomb v. White* (N. M.), 23 Pac. Rep. 671.

¹ *Chattanooga, etc., Co. v. Jackson*, 86 Ga. 676, 13 S. E. Rep. 109; *Bishop v. Morris*, 22 Ill. App. Ct. 564.

² *Mercer v. Corbin*, 117 Ind. 450; *Dorbert v. State*, 68 Md. 209, 11 Atl.

Rep. 707; *Howard v. Kopperl*, 74 Tex. 494, 5 S. W. Rep. 627. A state of facts required to make evidence competent may be presumed. *Gray v. Montgomery*, 17 Ia. 66; *Chase v. Scott*, 33 Ia. 300.

³ *Louisville, etc., Co. v. Hubbard*, 110 Ind. 193. See, generally, *Hunsinger v. Hofer*, 110 Ind. 390.

⁴ *Sullivan v. Missouri Pacific R. Co.*, 97 Mo. 113, 10 S. W. Rep. 854.

rine is that written evidence received by the court is, in all cases where the contrary does not appear, presumed to have been duly authenticated.¹ Where depositions are excluded, the presumption is that sufficient reasons existed for excluding them, as, for instance, that they were not filed in time.² Where documentary evidence is admitted by the court, the presumption is that it was competent.³ Where a witness is competent as to some matters in controversy and incompetent as to others, it will be presumed, the contrary not appearing, that he was permitted to give testimony as to such matters, only, as he was competent to testify to.⁴ Where witnesses are permitted to give testimony as experts, the presumption is that the court duly ascertained their competency to testify as experts before allowing their testimony to go to the jury.⁵ If evidence not appearing in the record is required to make the evidence offered competent, it will be presumed that the offered evidence was excluded for the reason that none was given, making competent that offered.⁶

§ 722. **Instructions — Presumptions concerning** — It has been again and again decided that the trial court is presumed to have given the jury correct instructions upon all the material points in the case. A party who desires to break the force of this presumption must present to the trial court a record

¹ *Barnhart v. Ford*, 41 Kan. 341, Wall. 162; *Leedom v. Lambaert*, 80 Pa. St. 381; *Coxe v. Deringer*, 82 Pa. St. 236; *Bernes v. Jennings*, 46 Vt. 45; *Preston v. Wright*, 60 Iowa, 351; *Dodge v. Coffin*, 15 Kansas, 277; *Burke v. Pinnell*, 93 Ind. 540; *Outlaw v. Davis*, 27 Ill. 466; *Brown v. Gill*, 49 Ga. 549; *Merritt v. Baldwin*, 6 Wis. 439; *Morgan v. State*, 12 Ind. 448.

² *Leinpo v. State*, 28 Texas App. 179, 12 S. W. Rep. 588.

³ *Carroll v. Peake*, 1 Pet. 18. The case cited really does no more than give effect to the long and well settled rule (enforced in a multitude of cases) that judicial decisions are presumed to be rightfully made and properly recorded.

⁴ *Commonwealth v. Mosier*, 135 Pa. 221, 19 Atl. Rep. 943; *Van Brunt v. Greaves*, 32 Minn. 68.

⁵ *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. Rep. 266.

⁶ *Condens v. Morningstar*, 94 Ind. 150; *Brown v. Owen*, 94 Ind. 31; *Smith v. Laumier*, 12 Mo. App. 546; *Abshire v. Williams*, 76 Ind. 97.

⁷ *Bohun v. Delessert*, 2 Coop. Ch. Cases, Pt. I, 21 Gosset v. Howard, 10 Q. B. 359, 411; *Garnharts v. United States*, 16

fully and clearly showing that the trial court erred in giving or in refusing to give instructions. There is no contrariety of opinion upon the general subject so that it would be unprofitable, as well as unnecessary, to cite the authorities upon the subject, although it would be easy to collect a vast number of decisions. The presumption is not overcome by bringing partly only, of the instructions into the record, since the presumption is that those not in the record cured errors or defects in those that were given to the jury.¹ It is necessary, in order to break the force of the presumption, to bring all of the instructions into the record, or to show, where such a showing is allowable, that the instructions not in the record do not affect the point in controversy.² Where the instructions state the issues between the parties or the theories assumed, the presumption is that the statement is correct.³ Where facts are assumed in the instructions the appellate tribunal will presume, in the absence of anything to the contrary, that they were assumed by the trial court for the reason that they were admitted by the parties, or were fully established by uncontradicted evidence.⁴ Where the evidence is not in the record the general presumption will save the instructions if they can be regarded as correct upon any supposable state of facts under the issues.⁵

¹ *Cobb v. Malone*, 91 Ala. 388; *Halsey v. Darling*, 13 Col. 1, 21 Pac. Rep. 913; *Crouse v. Rowley*, 3 N. Y. S. 863; *McCarty v. Chicago, etc., Co.*, 34 Ill. App. 273; *Whiting v. City of Kansas*, 39 Mo. App. 259; *Fernbach v. City of Waterloo*, 76 Ia. 598, 41 N.W. Rep. 370; *Ford v. Ford*, 110 Ind. 89; *Lehman v. Hawks*, 121 Ind. 541; *Stott v. Smith*, 70 Ind. 298; *Bowen v. Pollard*, 71 Ind. 177; *Freeze v. De Puy*, 57 Ind. 188; *Puett v. Beard*, 86 Ind. 104; *Clore v. McIntire*, 120 Ind. 262; *Stull v. Howard*, 26 Ind. 456; *Marshall v. Lewark*, 117 Ind. 377.

² *City of New Albany v. McCulloch*, 127 Ind. 500; *Grubb v. State*, 117 Ind. 277, 279; *Cooper v. State*, 120 Ind. 377; *Taber v. Grafmiller*, 109 Ind. 206; *Kennedy v. Anderson*, 98 Ind. 151; *Mitchell*

v. Tomlinson, 91 Ind. 167; *Garrett v. State*, 109 Ind. 527; *Pittsburgh, etc., Co. v. Noel*, 77 Ind. 110; *Newcomer v. Hutchings*, 96 Ind. 119; *Delhaney v. State*, 115 Ind. 499; *Walker v. State*, 102 Ind. 502; *National Benefit Association v. Grauman*, 107 Ind. 288; *Cline v. Lindsey*, 110 Ind. 337; *Stephenson v. State*, 110 Ind. 358.

³ *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Cory v. Silcox*, 6 Ind. 39; *Legget v. Harding*, 10 Ind. 414.

⁴ *Wilson v. Atlanta, etc., Co.*, 82 Ga. 386, 9 S. E. Rep. 1076; *Hinds v. Harbou*, 58 Ind. 121.

⁵ *Abrams v. Smith*, 8 Blackf. 95; *Keating v. State*, 44 Ind. 449; *Higbee v. Moore*, 66 Ind. 263; *Elkhart, etc., Association v. Houghton*, 103 Ind. 286; *Joseph v. Mather*, 110 Ind. 114; *Weir*,

§ 723. **Juries and Jurors—Presumption Concerning**—The presumption is that juries are properly summoned and impaneled.¹ It is presumed that jurors sworn to try a cause were duly qualified.² In short the presumption is that all was done that the law requires, and that lawful persons were selected and served as jurors.³ The presumption is that the court duly admonished the jury as to their duty.⁴ Where challenges to jurors are sustained, the presumption is that the challenges were correctly allowed.⁵ It will also be presumed that the trial court allowed a party the number of peremptory challenges given him by the law.⁶

§ 724. **Verdicts—Presumptions in aid of**—It will be presumed that jurors have rightfully performed their duty and have re-

etc., *Co. v. Walmsley*, 110 Ind. 242; *Smith v. Heller*, 119 Ind. 212; *Collis v. Bowen*, 8 Blackf. 262; *Ball v. Cox*, 7 Ind. 453; *Cartwright v. Yaw*, 100 Ind. 119; *State v. Frazer*, 28 Ind. 196; *List v. Kortepeter*, 26 Ind. 27; *Ruffing v. Tilton*, 12 Ind. 259. If wrong upon any supposable state of facts the presumption will not avail. *Rapp v. Kester*, 125 Ind. 79; *Murray v. Fry*, 6 Ind. 371. It requires an extraordinarily strong case to defeat the presumption. It seems that where it can be fairly and reasonably inferred that admissions were made supplying averments the presumption will prevail.

¹ *People v. Board of Supervisors*, 23 Ill. App. 386, S. C. 125 Ill. 334, 17 N. E. Rep. 802; *Breden v. State*, 88 Ala. 20, 7 So. Rep. 258; *Parker v. People*, 13 Col. 155, 21 Pac. Rep. 1120; *State v. Jones*, 97 N. C. 469, 1 S. E. Rep. 680; *Dove v. Commonwealth*, 82 Va. 301; *State v. Jones*, 61 Mo. 232; *Holloway v. State*, 53 Ind. 554; *Page v. Commonwealth*, 27 Gratt. 954; *Osgood v. State*, 64 Wis. 472; *Chicago, etc., Co. v. Aldrich*, 134 Ill. 9, 24 N. E. Rep. 763.

² *Willey v. State*, 46 Ind. 363; *Bradford v. State*, 15 Ind. 347; *Mansell v.*

Queen, 8 Ell. & B. 54; *Chesapeake, etc., Co. v. Patton*, 9 W. Va. 648; *Shoemaker v. State* 12 Ohio, 43; *Isham v. State*, 1 Sneed, 111; *Keenan v. State*, 8 Wis. 132; *State v. Roderigas*, 7 Nev. 328; *State v. Millin*, 3 Nev. 409; *State v. Shaw*, 5 La. Ann. 342.

³ *Kessler v. State*, 50 Ind. 229; *Vanderkarr v. State*, 51 Ind. 91; *Lovell v. State*, 45 Ind. 550; *Sater v. State*, 56 Ind. 378; *Ward v. State*, 48 Ind. 289; *Bailey v. State*, 39 Ind. 438; *Bell v. State*, 42 Ind. 335; *Long v. State*, 46 Ind. 582; *Holloway v. State*, 53 Ind. 554; *Pierce v. State*, 67 Ind. 354; *Green v. State*, 88 Tenn. 614; *State v. Crawford*, 99 Mo. 74, 12 S. W. Rep. 354.

⁴ *Evans v. State*, 7 Ind. 271; *State v. Palmer*, 40 Kansas, 474, 20 Pac. Rep. 270.

⁵ *Chicago, etc., Co. v. Aldrich*, 134 Ill. 9, 24 N. E. Rep. 763; *United States v. Groesbeck*, 4 Utah, 487, 11 Pac. Rep. 542; *United States v. Bromley*, 4 Utah, 498, 11 Pac. Rep. 619; *State v. Brecht*, 41 Minn. 50, 42 N. W. Rep. 602.

⁶ *Clarke v. State*, 87 Ala. 71, 6 So. Rep. 378; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. Rep. 977.

turned a true verdict according to the law and the evidence. The general doctrine is declared and enforced in the many scores of cases which hold that it will be assumed that the verdict is supported by the evidence and that the jury properly decided the controversy in cases where the evidence is conflicting. It will be presumed that the instructions of the court were understood and obeyed.¹ The presumption is that the verdict was duly returned in open court.² In short, all reasonable intendments will be made in order to support the verdict where the record contains nothing sufficient to justify its overthrow, and this doctrine is nothing more than a reasonable application of the general rule that a breach of a sworn duty must be clearly shown.³

§ 725. **Miscellaneous Instances**—It is almost impossible to group and classify the particular presumptions recognized and applied in appellate procedure. They assume various forms and embrace a multitude of particular instances. We have not attempted to give a great number of the particular presumptions, but have selected some of the important ones which we outline in the pages that follow. Where the evidence is not in the record it will be presumed, even as against the successful party, that the costs were properly taxed against him.⁴ A case taken up out of its order is presumed to have been rightly taken up and tried.⁵ When a case goes from one court to another the presumption is that the case properly reached the court which rendered judgment.⁶ If parties appear in the court where the case was begun and there try the case, it will be presumed that a change of venue previously ordered was waived.⁷ Where the record shows the presence of the accused at the opening of

¹ *Browning v. Hight*, 78 Ind. 257.

² *Mattson v. Borgeson*, 24 Ill. App. 79.

³ *Threishel v. McGill*, 28 Ill. App. 78; *Cheatham v. State*, 67 Miss. 335, 7 So. Rep. 204; *Floege v. Wiedner*, 77 Texas, 311, 14 S. W. Rep. 132; *Hicks v. Ellis*, 65 Mo. 176; *People v. Williams*, 24 Cal. 31; *Mathis v. State*, 18 Ga. 343; *State v. Dumphy*, 4 Minn. 438; *State v. Ayer*, 23 N. H. 301.

⁴ *Dehority v. Nelson*, 56 Ind. 414;

Jamieson v. Board, 56 Ind. 466.

⁵ *Bradley v. Bradley*, 45 Ind. 67; *French v. Howard*, 14 Ind. 455.

⁶ *O'Brien v. State*, 125 Ind. 38, 41, citing *Leslie v. State*, 83 Ind. 180; *Duncan v. State*, 84 Ind. 204; App. v. State, 90 Ind. 73; *Bright v. State*, 90 Ind. 543; *Mannix v. State*, 115 Ind. 245.

⁷ *Doty v. State*, 6 Blackf. 529; *Frosh v. Holmes*, 8 Texas, 29.

the trial it has been held that it will be presumed that he was present throughout the entire proceedings.¹ A judgment is presumed to have been pronounced in open court.² A modification of a judgment or decree will be presumed to have been rightfully made and at the proper time.³ That a judgment on default was entered in open session and due form will be presumed.⁴ Where the law requires the approval of a bond before further proceedings are taken, the presumption is that the bond was approved before the proceedings were taken.⁵ Where the law requires instructions to be in writing it will be assumed that they were written.⁶ A motion to set aside service of process is presumed to have been properly sustained.⁷ Where a dismissal was entered but judgment upon default was subsequently rendered, the presumption is that the order of dismissal was vacated and the case reinstated.⁸ Open and close of the argument is presumed to have been properly directed by the trial court.⁹ Where the record shows admissions of parties but does not show what they were, it may be presumed that they sustain the judgment.¹⁰ In illustration of the general doctrine that judgments will be deemed properly supported may be cited the cases holding that consent to refer will be deemed given as the law requires,¹¹ and where specific findings are

¹ *Ante*, § 291; *Welsh v. State*, 126 Ind. 71; *People v. Sing Lum*, 61 Cal. 538; *Carper v. State*, 27 Ohio St. 572; *Bond v. State*, 23 Ohio St. 349; *Bartlett v. State*, 28 Ohio St. 669; *Contra*, *Harris v. People*, 130 Ill. 457, 22 N. E. Rep. 826.

² *Christian v. Lebeschultz*, 18 So. Car. 602. See *Woody v. Dean*, 24 So. Car. 499; *Reed v. Higgins*, 86 Ind. 143. ³ *Sumner v. Cook*, 12 Kan. 162. See *Vincent v. Evans*, 1 Metcf. (Ky.) 247; *Commonwealth v. Brown*, 123 Mass. 410.

⁴ *Bunker v. Rand*, 19 Wis. 254.

⁵ *Cromelien v. Brink*, 29 Pa. St. 522. See, generally, *Moody v. State*, 84 Ind. 433; *Sheldon v. Wright*, 7 Barb. 39; *State v. Hinchman*, 27 Pa. St. 479;

Jacobs v. Morrow, 21 Neb. 233, 31 N. W. Rep. 739.

⁶ *People v. Garcia*, 25 Cal. 531.

⁷ *Stephens v. Bradley*, 24 Fla. 201, 3 So. Rep. 415. See *Herd v. Cist* (Ky.), 12 S. W. Rep. 466.

⁸ *Bloomfield Ry. Co. v. Burress*, 82 Ind. 83.

⁹ *Loudemback v. Lowry*, 4 Ohio Cir. 65; *Dille v. Lovell*, 37 Ohio St. 415; *Louisville, etc., Co. v. Hubbard*, 116 Ind. 193, 18 N. E. Rep. 611.

¹⁰ *Rencher v. Anderson*, 95 N. C. 208.

¹¹ *Boogher v. Insurance Co.*, 103 U. S. 90. See *Morisey v. Swinson*, 104 N. C. 555; *Cooke v. Williamson*, 11 Ind. 242; *Van Marter v. Hotchkiss*, 4 Abb. Dec. (N. Y.) 484.

requisite they will be presumed to have been duly made.¹ The presumption is that the trial court did its duty in restraining the argument of counsel and preventing misconduct.² Orders granting or denying applications for a continuance, a change of venue, a new trial or the like, are presumed to have been rightfully made and entered.³ The presumption is that the rules of the trial court were rightfully adopted and regularly promulgated and recorded.⁴

¹ *Campbell v. Coburn*, 77 Cal. 36; *Simmons*, 40 Ind. 442; *La Follette v. Campbell v. Hayes*, 77 Cal. 36, 18 Pac. Rep. 860; *Gordon v. Donahue*, 79 Cal. 501. See, for application of the general doctrine to notices, *Gage v. Downey*, 79 Cal. 140, 19 Pac. Rep. 113; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. Rep. 773; *Chestnutt v. Pollard*, 77 Texas, 86, 13 S. W. Rep. 852; *Platt v. Continental Ins. Co.*, 62 Vt. 166, 19 Atl. Rep. 637.

² *Missouri, etc., Co. v. Lamothe*, 76 Texas, 219, 13 S. W. Rep. 194.

³ *McGarvey v. Ford* (N. M.), 27 Pac. Rep. 415; *Robbins v. Neal*, 10 Iowa, 560; *Ramsey v. Bush*, 27 Iowa, 17; *Willett v. Porter*, 42 Ind. 250; *Baker v.*

Simmons, 40 Ind. 442; *La Follette v. Higgins*, 109 Ind. 241; *Mackison v. Clegg*, 95 Ind. 373; *Mathews v. Drossi*, 114 Ind. 268; *Beach v. Zimmerman*, 100 Ind. 495; *Shields v. McMahan*, 101 Ind. 591, 595; *Peck v. Board*, 87 Ind. 221. *Foster v. Ward*, 75 Ind. 594; *Kernodle v. Gilson*, 114 Ind. 451; *Stewart v. State*, 111 Ind. 554; *Whisler v. Lawrence*, 112 Ind. 229; *Talcott v. Johnson*, 41 Ind. 201. See, generally, *Schwab v. Coots*, 48 Mich. 116; *Hurd v. Newton*, 35 Mich. 35; *Finn v. Corbitt*, 36 Mich. 318; *Fewlass v. Abbott*, 28 Mich. 270.

⁴ *Illinois, etc., Co. v. Haskins*, 115 Ill. 300.

CHAPTER IX.

REQUESTS AND OFFERS.

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| <p>726. No ruling or no request, no error.</p> <p>727. Refusal to rule.</p> <p>728. Implied requests.</p> <p>729. Time for making request.</p> <p>730. A party basing a right on a request must himself make it.</p> <p>731. Request must be affirmatively shown.</p> <p>732. Request for a special finding.</p> <p>733. Request for written instructions.</p> <p>734. Request for an inspection of the instructions of the court.</p> <p>735. Requesting special instructions.</p> <p>736. Requests where instructions are correct as far as they go.</p> <p>737. Request for the submission of interrogatories to the jury.</p> <p>738. Request for a special verdict.</p> | <p>§ 739. The practice in requesting special verdicts.</p> <p>740. Request for inspection and production of documents.</p> <p>741. When notice to produce not required.</p> <p>742. Offers—General doctrine.</p> <p>743. Offers of oral testimony.</p> <p>744. Showing materiality and relevancy.</p> <p>745. Effect of mingling competent with incompetent evidence.</p> <p>746. Offer unaccompanied by interrogatory unavailing.</p> <p>747. Offer not required on cross-examination.</p> <p>748. Offer of documentary evidence.</p> <p>749. Repeating offers.</p> |
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§ 726. No Ruling or no Request, no Error—It is in general true that errors are founded upon rulings or decisions actually made by the trial court, but there may be error in refusing to rule where a request for a ruling is appropriately and seasonably made. It is safe to say that the general rule, and one of very comprehensive scope, is that where there is no ruling, or no sufficient request to rule, there is no available error.¹ There

¹ Highfill v. Monk, 81 Ind. 203; Wash-
er v. Allensville, etc., Co., 81 Ind. 78;
Doe v. McDonald, 4 Ind. 615; Priddy
v. Dodd, 4 Ind. 84; Coleman v. Dob-
bins, 8 Ind. 156, 163; Brownlee v. Hare,
64 Ind. 311, 317; Noon v. Lanahan, 55
Ind. 262; Meredith v. Lackey, 14 Ind.
529; White v. Gregory, 126 Ind. 95;
Richardson v. St. Joseph, etc., Co., 5
Blackf. 146; Clark v. Donaldson, 49
How. Pr. 63; Hazewell v. Coursen, 81
N. Y. 630, 637; Tyson v. Tyson, 100 N.
C. 360, 368; Scroggs v. Stevenson, 100
N. C. 354. Motions calling for a rul-
ing must be presented to the court.
Gilbert v. Hall, 115 Ind. 549, 18 N. E.
Rep. 28. Motions in course filed prop-
erly, or duly docketed, must be taken
notice of by the parties in court. Bent
v. Maupin, 86 Ky. 271, 5 S.W. Rep. 425.

are exceptions to this rule but they are few. One exception is that a question affecting the jurisdiction of the subject may be interposed at any time, another is that a complaint, or an indictment, may be assailed for the first time on appeal.

§ 727. **Refusal to Rule**—In cases where a party has a right to a ruling, and prefers in due season and in an appropriate mode, a request for a designated ruling it is error to neglect or refuse to rule, provided of course, the ruling, is asked upon a material and proper matter. But where the power invoked is a discretionary one the refusal to rule is not always error, indeed, as is elsewhere shown, error can be seldom successfully assigned upon a ruling, or upon a refusal to rule, where the court exercises a purely discretionary power and the duty to decide or the character of the decision is mere matter of discretion. It is obvious that if a trial court could pass over motions or requests duly filed or preferred without a ruling there would be danger of great injustice to parties not in fault. Where parties do all that it is incumbent upon them to do it would be a reproach to the law if silence or inaction on the part of the court should be permitted to prevent a review of the proceedings of the court.¹ If the duty which the party requests the judge to perform is of a mandatory nature and the duty is exclusively devolved upon the judge it is error for him to refuse performance upon the ground that the party has failed to do an act remotely connected with the duty, but it is otherwise where the party fails in any respect to do what the law requires of him.²

¹ In *Corning v. Woodin*, 46 Mich. 44, the court held that silence was equivalent to a refusal. It was there said, in speaking of the refusal of the judge to rule: "But the objection taken was an explicit call upon him to do so, and his omission to state any opinion can not be set up as a bar against revision of the proceedings. Injurious irregularities at the trial court can not be protected against review in an appellate court by the judge's refusal to make ex-

press rulings on objections properly made against them. Were it otherwise it would be in his power to stifle the right to a revision in many cases."

² *Wells v. McGeoch*, 71 Wis. 196, 221, 35 N. W. Rep. 769. "The presumption of regularity in the proceedings of the trial court requires the complaining party to show affirmatively that he was denied some right." *Craig v. Frazier*, 127 Ind. 286, 288.

§ 728. **Implied Requests**—It is not always necessary that the request for a ruling should be an express one. In every instance there is an implied request to rule or decide where a proper motion, demurrer or pleading is filed tendering an issue of law, so it is, indeed, in many cases where issues of fact or of law are presented on objections made in the course of a trial. But under our practice it is necessary to do more than simply present a request by implication, for a ruling must be insisted upon and an exception reserved, upon the failure or refusal to rule.¹

§ 729. **Time for Making Request**—Where the statute fixes the time within which a request shall be made it will generally be futile unless made within that time. If no time is fixed by law or by the rules of practice within which the request shall be made, then it must be made within a reasonable time, before action is required upon it. The trial court should be allowed a reasonable time and opportunity to consider and decide upon the questions involved, and to do what the request requires should be done.²

§ 730. **A party Basing a Right on a Request must himself make it**—Where a specific request is essential to the existence of a right the party who attempts to make the request available in cases where it is denied, is bound to show that the request was his. This general rule precludes a party, where a refusal or denial is the basis of a claim of error, from availing himself of a request which came from his adversary. His own request is, in general, the only foundation upon which he can safely and securely build. Thus, a party can not avail himself of his adversary's request for a special finding in a case where the request is denied.³ So, a party who desires written instructions should himself ask them, for he can not always rely upon the request of his adversary. But the rule does not fully or

¹ *White v. Gregory*, 126 Ind. 95, 98; *Coleman v. State*, 111 Ind. 563; *Grubb v. State*, 117 Ind. 277, 283.

² *Moore v. Barnett*, 17 Ind. 349. In *Hartlep v. Cole*, 120 Ind. 247, it is held

that the request for a special finding must, to be seasonable, be made at the commencement of the trial.

³ *Bingham v. Stage*, 123 Ind. 281.

necessarily apply where the request has been acted upon by the court. Thus, where special interrogatories are submitted to a jury upon the request of one of the parties they can not, as a general rule, be withdrawn over the objection of the other.¹ It is clear that there is an essential difference between a case where there is affirmative action upon a request and a case where the request is denied, for, if action is taken the clear implication is that any other request would be fruitless and idle. Not only this, but more, for in the case of affirmative action the party has a right to assume that what has been asked will be done, and it might work great injustice to him if the court should change its decision, as, for instance, in a case where the court has announced that a special verdict will be directed. But even the general rule that where there is a refusal the one party can not take advantage of the request of the other has its limitations and exceptions. If the party not making the request should show that he was diligent, free from fault and that he was wrongfully misled to his prejudice he would not be turned away entirely remediless.

§ 731. **Request must be Affirmatively Shown**—Where a special request is a condition precedent to the right to demand a ruling it must appear by the record to have been made in due season and in the appropriate mode. A party can not successfully complain of a ruling unless the record regularly shows that he did all that the law required him to do in order to make it the duty of the court to give the particular decision. If the party has been in fault in this respect he will not be aided on appeal.²

¹ *Summers v. Greathouse*, 87 Ind. 205; *Duesterberg v. State*, 116 Ind. 144; *Peters v. Lane*, 55 Ind. 391; *Wood v. Ostram*, 29 Ind. 177; *Noakes v. Morey*, 30 Ind. 103; *Otter Creek, etc., Co. v. Raney*, 34 Ind. 329; *Maxwell v. Boyne*, 36 Ind. 120; *Pitzer v. Indianapolis Co.*, 80 Ind. 569. But these decisions do not govern equity cases since the submission of questions in such cases is merely for the purpose of obtaining advice as to matters of fact. *Platter v. Board*, 103 Ind. 360. Nor do they govern where the interrogatories are not material or relevant. *Groscup v. Rainier*, 111 Ind. 361; *Myers v. Murphy*, 60 Ind. 282; *Foster v. Ward*, 75 Ind. 594; *Frank v. Grimes*, 105 Ind. 346; *Continental, etc., Co. v. Yung*, 113 Ind. 159. See *Porter v. Waltz*, 108 Ind. 40; *Schreiber v. Butler*, 84 Ind. 576.

² In the case of *Puett v. Beard*, 86 Ind. 104, 107, the court said: "One complaining of a ruling must, in order

§ 732. **Request for Special Finding**—An express request is necessary in order to secure a special finding.¹ A request will not be implied, and a finding in the record which does not affirmatively appear to have been made upon request will be deemed a general finding.² The request must be made at the commencement of the trial in order to render it the compulsory duty of the court to find the facts specially.³ It is, however, discretionary with the court to make a finding upon a request made at a later stage,⁴ but as it is discretionary no error can, as a general rule, be successfully assigned upon the refusal to make such a finding. We suppose, however, that if a diligent party free from fault is misled, a request at a later stage of the proceedings would be regarded as effective. To entitle such a request to full force, it would undoubtedly be necessary to make a very strong and clear case. If the court elects to act upon the request and does make a special finding, the adverse party's complaint will not be heeded.⁵ A specific and direct request to make a special finding and state conclusions of law is sufficient. It is not necessary to add to the request the statement that the finding is asked with a view to except to the conclusions of law.⁶ It is no more necessary to state why a special finding is asked than it is to accompany a request for written

to secure a reversal, affirmatively show that he placed himself in an attitude to rightfully ask that which the court refused him. If this be not done the presumption of regularity which always attends the proceedings of the trial court in the absence of a contrary showing will require the appellate court to assume that the party did not do that which the law required him to do in order to entitle him to the ruling asked."

¹ *Nash v. Caywood*, 39 Ind. 457; *Montgomery, etc., Co. v. Rock*, 41 Ind. 263; *Hasselman v. Allen*, 42 Ind. 257; *Rose v. Duncan*, 43 Ind. 512; *Board v. Reynolds*, 44 Ind. 509; *Weston v. Johnson*, 48 Ind. 1; *Shane v. Lowry*, 48 Ind. 171; *Smith v. Tatman*, 71 Ind. 394; *Grover, etc., Co. v. Barnes*, 49 Ind. 136; *Rennick v. Chandler*, 59 Ind. 354;

Northcutt v. Buckles, 60 Ind. 577; *Conner v. Town of Marion*, 112 Ind. 517; *McClellan v. Bond*, 92 Ind. 424; *Zeller v. City of Crawfordsville*, 90 Ind. 262; *Martin v. Martin*, 74 Ind. 207.

² *Lawson v. Hilgenberg*, 77 Ind. 221; *Powers v. Fletcher*, 84 Ind. 154; *Bake v. Smiley*, 84 Ind. 212; *Downey v. State*, 77 Ind. 87; *Wallace v. Kirtley*, 98 Ind. 485; *Steel v. Grigsby*, 79 Ind. 184; *Conner v. Town of Marion*, 112 Ind. 517; *Barkley v. Tapp*, 87 Ind. 25.

³ *Hartlep v. Cole*, 120 Ind. 247; *Miller v. Lively*, 1 Ind. App. 6, 27 N. E. Rep. 437.

⁴ *Kopelke v. Kopelke*, 112 Ind. 435.

⁵ *Kopelke v. Kopelke*, 112 Ind. 435.

⁶ *Western Union Tel. Co. v. Tinsal*, 98 Ind. 566; *Trentman v. Eldridge*, 98 Ind. 525.

instructions with a statement of the object of the request, or to accompany a request for the submission of special interrogatories to a jury with a similar statement, for, in all such cases, the object of making the request is impliedly disclosed in the request itself. The request is the essential and indispensable requisite and if it is definitely and appropriately made all is done that the law requires. The request for a special finding must be in the record in some appropriate form,¹ but it is sufficient if it is in the finding signed and filed by the judge.² The finding, when signed by the judge, is part of the record,³ and there is no reason why the request may not be shown by a recital in the finding. It is difficult to conceive where it could be more appropriately shown than in the special finding it called forth. Where a special finding is actually made, signed and filed, and it recites that a request was made, the presumption is that the request was appropriately and seasonably preferred.⁴ If the party who requests a special finding is denied one, it is incumbent upon him to show that he made a specific request, and made it in due season. Upon him rests the burden of overcoming the presumption that the trial court did not err. He must take such steps as entitle him to the special finding and he must see to it that the record is so prepared as to show that he did all that it was incumbent upon him to do, and that he did it in the appropriate mode and within a reasonable time.

§ 733. Request for Written Instructions—The proper course for a party who desires that the jury shall be instructed in writing is to submit a written request⁵ asking that the instructions be given in writing. Where a request for written instructions is

¹ *Smith v. Uhler*, 99 Ind. 140.

² *Bodkin v. Merit*, 102 Ind. 293.

³ *State v. St. Paul, etc., Co.*, 92 Ind. 42; *Button v. Ferguson*, 11 Ind. 314; *Peoria, etc., Co. v. Walser*, 22 Ind. 73, 87. But it is indispensably necessary that the finding should be signed by the judge; it will not avail unless signed, although copied at full length in the order book. *Smith v. Davidson*, 45 Ind. 396. See, also, *Smith v. Jeffries*,

25 Ind. 376; *Conwell v. Clifford*, 45 Ind. 392; *Roberts v. Smith*, 34 Ind. 550; *McClellan v. Bond*, 92 Ind. 424.

⁴ *Clark v. Deutsch*, 101 Ind. 491.

⁵ The safe practice and the better practice, is to put such requests in writing, but it is impliedly held in *Gray v. Stivers*, 38 Ind. 197, that a verbal request is sufficient. The case cited is not easily harmonized with *Nickless v. Pearson*, 126 Ind. 477, 484.

opportune and seasonably submitted it is the duty of the court to give all of its instructions in writing and it is error to give any oral instruction.¹ The request must be made before the argument begins.² A mere general direction to the jury not embodying any proposition of law but simply indicating a matter of general duty is not within the rule forbidding oral modifications, for such a direction is not regarded as an instruction.³ The request of the adverse party can not be made available by the appellant.⁴

§ 734. Request for an Inspection of the Instructions of the Court— If counsel desire to inspect instructions which the court of its own motion proposes to give to the jury they should request the court to "lay before them" such instructions.⁵ The statute

¹ The statute is mandatory and can not be disregarded. *Hopt v. United States*, 104 U. S. 631, 635. In the case cited it was held that to read from a book was error. Our decisions are to the same effect. *Stephenson v. State*, 110 Ind. 358; *Townsend v. Chapin*, 8 Blackf. 328; *Meredith v. Crawford*, 34 Ind. 399; *Kenworthy v. Williams*, 5 Ind. 375; *Bottorff v. Shelton*, 79 Ind. 98; *Sutherland v. Venard*, 34 Ind. 390; *Hardin v. Helton*, 50 Ind. 319; *Bosworth v. Barker*, 65 Ind. 595. The rule is strictly enforced, and with reason, since the object is to prevent any changes, substitutions, or modifications that can not be fully exhibited in the record, and that without resorting to the memory of the judge or counsel. *Provinces v. Heaston*, 67 Ind. 482; *Smurr v. State*, 88 Ind. 504; *Bradway v. Waddell*, 95 Ind. 170; *Widner v. State*, 28 Ind. 394; *Toledo, etc., Co. v. Daniels*, 21 Ind. 256; *Rising Sun, etc., Co. v. Conway*, 7 Ind. 187; *Laselle v. Wells*, 17 Ind. 33; *Riley v. Watson*, 18 Ind. 291; *Strattan v. Paul*, 10 Iowa, 139; *Head v. Langworthy*, 15 Iowa, 235.

² *Chance v. Indianapolis, etc., Co.*, 32 Ind. 472; *Patterson v. Indianapolis*,

etc., Co., 56 Ind. 20; *Craig v. Frazier*, 127 Ind. 286; *Puett v. Beard*, 86 Ind. 104; *Malady v. McEnary*, 30 Ind. 273; *Ollam v. Shaw*, 27 Ind. 388; *Welsh v. State*, 126 Ind. 71, 78.

³ *Lehman v. Hawks*, 121 Ind. 541; *Bradway v. Waddell*, 95 Ind. 170; *Dodd v. Moore*, 91 Ind. 522; *Lawler v. McPheeters*, 73 Ind. 577; *Stanley v. Sutherland*, 54 Ind. 339; *McCallister v. Mount*, 73 Ind. 559; *Trentman v. Wiley*, 85 Ind. 33; *Hasbrouck v. City of Milwaukee*, 21 Wis. 219, 240; *Patterson v. Ball*, 19 Wis. 243.

⁴ *Jaqua v. Cordesman, etc., Co.*, 106 Ind. 141; *Columbus, etc., Co. v. Powell*, 40 Ind. 37, 42. This general rule is subject to exceptions, for if the court should indicate, clearly and decisively, that it would give written instructions, we suppose that it could not withdraw its declarations so as to wrongfully mislead a party.

⁵ R. S. 1881, § 534. Under the provisions of § 534 counsel may read instructions which the court indicates it will give to the jury and apply them to the facts, but counsel will not be permitted to dispute the rules of law therein declared. *Scott v. Scott*, 124 Ind. 66. The

does not declare that the request or application shall be in writing, but good practice so requires. The only safe rule is to require all such applications or requests to be in writing, and by many courts it is held that mere oral requests are insufficient.¹

§ 735. **Requesting Special Instructions**—The safe rule is to prepare and deliver to the court before the argument begins instructions covering the material points of the case. As in the case of a request to instruct in writing the request must be made before the beginning of the argument and the instructions which the party desires given should then be submitted to the court. The request should be special, that is, instructions should be presented to the court covering the points upon which the party desires that the jury should be fully and specifically instructed. for the failure to instruct upon a particular point is not error unless the attention of the court is opportunely and appropriately directed to that point.³ This is true, although it is the duty of the court to give general instructions. It is important that the instructions which the court is requested to give to the jury should be accurately worded and the law fully and properly expressed, for while the court may, if it deems proper, correct or modify an instruction, it is not bound to do so, but may, without error, refuse an instruction expressed in improper

record must show what comments counsel proposed to make or no question is presented. *Blizzard v. Applegate*, 77 Ind. 516, 527.

¹ *People v. Miller*, 4 Utah, 410, 11 Pac. Rep. 514.

² *Newton v. Newton*, 12 Ind. 527; *Ollam v. Shaw*, 27 Ind. 388; *Hege v. Newson*, 96 Ind. 426; *Terry v. Shively*, 93 Ind. 413; *Evansville, etc., Co. v. Crist*, 116 Ind. 446; *Noblesville, etc., Co. v. Vestal*, 118 Ind. 80.

³ *Marshall v. State*, 123 Ind. 128, 132; *Burgett v. Burgett*, 43 Ind. 78; *Rollins v. State*, 62 Ind. 46; *Sullivan v. State*, 52 Ind. 309; *Marks v. Jacobs*, 76 Ind.

216; *Pittsburgh, etc., Co. v. Noel*, 77 Ind. 110; *Carver v. Carver*, 97 Ind. 497; *White v. Behm*, 80 Ind. 239; *Simpkins v. Smith*, 94 Ind. 470; *Krack v. Wolf*, 39 Ind. 88; *Foxwell v. State*, 63 Ind. 539, 541; *Adams v. State*, 65 Ind. 565; *Shaw v. New York, etc., Co.*, 150 Mass. 182, 22 N. E. Rep. 884; *Dow v. Merrill*, 65 N. H. 248, 18 Atl. Rep. 317; *Peterson v. Toner*, 80 Mich. 350, 45 N. W. Rep. 346; *Drey v. Doyle*, 99 Mo. 459; *Silberberg v. Pearson*, 75 Texas, 287, 12 S. W. Rep. 850; *Marsh v. Richardson*, 106 N. C. 539, 11 S. E. Rep. 522; *State v. Bagan*, 41 Minn. 285.

forms.¹ The instruction as requested must be correct in its entirety; if there is a material misdirection embodied in it the court may rightfully refuse to give it to the jury, for the court is not bound to select and separate the good from the bad.² The rule that the trial court is not bound to dissect an instruction and select the good from the bad is applied by some of the courts to a series of instructions, and if one of the series is bad the whole may be rejected, but our court has not gone so far. On the contrary, it has tacitly, at least, treated each instruction in a series as independent of the others, so far as concerns its efficiency when refused, although in construing instructions even the charge is considered as an entirety.

§ 736. Requests where Instructions are Correct as far as they go—If an instruction is correct as far as it goes, the fact that it does not go far enough is not, as a general rule, the basis of available error. To make the failure to go the proper length available as error, the party must make a request for a full and complete instruction upon the particular point. It is, in short, incumbent upon a party who desires a specific and full instruction upon a point involved in the case to request it in due form and at the proper time.³

¹ *Lawrenceburgh, etc., Co. v. Montgomery*, 7 Ind. 474; *Roots v. Tyner*, 10 Ind. 87; *Mosier v. Stoll*, 119 Ind. 244, 252; *Goodwin v. State*, 96 Ind. 550, 566; *Rogers v. Leyden*, 127 Ind. 50, 56; *Dudley v. Parker*, 55 Hun. 29; *Wilson v. Atlanta, etc., Co.*, 82 Ga. 386; *Bevan v. Hayden*, 13 Iowa, 122; *Grimes v. Martin*, 10 Iowa, 347; *Lucas v. Brooks*, 18 Wall. 436; *Over v. Schiffling*, 102 Ind. 191; *Board of Commissioners v. Legg*, 93 Ind. 523; *McCammon v. Cunningham*, 108 Ind. 545; *Haus v. Niblack*, 80 Ind. 407; *Pennsylvania Co. v. Weddle*, 100 Ind. 138. See, generally, *Sheehan v. People*, 131 Ill. 22, 22 N. E. Rep. 818; *Carpenter v. Stillwell*, 11 N. Y. 61, 79; *Hodges v. Cooper*, 43 N. Y. 216.

² *McCammon v. Cunningham*, 108

Ind. 545; *Fuller v. Coats*, 18 Ohio St. 343, 353; *Bryant v. Crosby*, 40 Me. 9, 19; *Indianapolis, etc., Co. v. Horst*, 93 U. S. 291, 295; *Harvey v. Tyler*, 2 Wall. 328, 338; *Roberts v. State*, 83 Ga. 166, 369, 9 S. E. Rep. 675; *Blumhardt v. Rohr*, 70 Md. 328.

³ *Murray v. State*, 26 Ind. 141; *Blacketer v. House*, 67 Ind. 414; *Colee v. State*, 75 Ind. 511; *Carpenter v. State*, 43 Ind. 371; *Jones v. State*, 49 Ind. 549; *Moore v. Shields*, 121 Ind. 267; *Gebhart v. Burkett*, 57 Ind. 378; *Harper v. State*, 101 Ind. 109; *Hatton v. Jones*, 78 Ind. 466; *Fitzgerald v. Goff*, 99 Ind. 28. The general rule has been applied in a great number of cases and to questions presented in almost every conceivable form. *Bishop v. Redmond*, 83 Ind. 157; *Mobley v. State*, 83 Ind. 92;

§ 737. **Request for the Submission of Interrogatories to the Jury**—A party who desires the court to submit special interrogatories to a jury must expressly request that interrogatories be submitted. The request must ask that answers be returned in the event that the jury find a general verdict, for it is not error to deny an unconditional request.¹ The request should be presented to the court before the beginning of the argument, but the court may, if it chooses, receive the interrogatories at a later stage of the proceedings.² The request must not be limited by a statement that answers are required only in the event that the general verdict is in favor of a designated party, since such a limitation might tend to the prejudice of the adverse party.³ Interrogatories may, it has been decided, be placed in a sealed envelope and the jury directed not to examine them until they have agreed upon a general verdict; at all events, it was held that it was not error to pursue this course.⁴ If

Louisville, etc., Co. v. Grantham, 104 Ind. 353; Astley v. Capron, 89 Ind. 167; Du Souchet v. Dutcher, 113 Ind. 249; Conrad v. Kinzie, 105 Ind. 281; Dyer v. Dyer, 87 Ind. 13; Ireland v. Emmerson, 93 Ind. 1; City of South Bend v. Hardy, 98 Ind. 577; Judd v. Martin, 97 Ind. 173; Klosterman v. Olcott, 25 Neb. 382, 41 N. W. Rep. 250; Wimer v. Albaugh 78 Iowa, 79, 42 N. W. Rep. 587; Dow v. Merrill (N. H.), 18 Atl. Rep. 317; Parker v. Georgia, etc., Co., 83 Ga. 539, 10 S. E. Rep. 233; Brotherton v. Weathersby (Texas), 11 S. W. Rep. 505; Clapp v. Minneapolis, etc., Co., 36 Minn. 6, 29 N. W. Rep. 340.

¹ Bird v. Lanius, 7 Ind. 615; Board v. Kromer, 8 Ind. 446; Adams v. Holmes, 48 Ind. 299; Hopkins v. Stanley, 43 Ind. 553; Killian v. Eigenmann, 57 Ind. 480; Hodgson v. Jeffries, 52 Ind. 334; Ogle v. Dill, 61 Ind. 438, 443; Lake Erie, etc., Co. v. Fix, 88 Ind. 381, 383; Pitzer v. Indianapolis, etc., R. Co., 80 Ind. 569; McIlvain v. State, 80 Ind. 69; Taylor v. Burk, 91 Ind. 252; Louis-

ville, etc., Co. v. Woolery, 107 Ind. 381. Schultz v. Cremer, 59 Iowa, 182.

² Miller v. Voss, 40 Ind. 307; Truitt v. Truitt, 37 Ind. 514; Glasgow v. Hobbs, 52 Ind. 239; Union, etc., Co. v. Moore, 80 Ind. 458, 465; Morris v. Morris, 119 Ind. 341; Fleetwood v. Dorsey Machine Co., 95 Ind. 491; Kopelke v. Kopelke, 112 Ind. 435; Wabash, etc., Co. v. Tretts, 96 Ind. 450; Pavey v. American Ins. Co., 56 Wis. 221.

³ Hadley v. Hadley, 82 Ind. 75; Pitzer v. Indianapolis, etc., R. Co., 80 Ind. 569. A proper request is indispensable to make the denial error. Kalckhoff v. Zoehrlaut, 43 Wis. 373.

⁴ Summers v. Tarney, 123 Ind. 560. It is very doubtful whether the practice sanctioned in the case cited is a salutary one. It seems clear that interrogatories may sometimes direct the minds of the jurors to the controlling points in the case and thus lead them to a correct conclusion, or, at least, assist them in arriving at such a conclusion. Counsel certainly have a right to comment upon interrogatories. Gresley v. State, 123

counsel had claimed the right to examine and comment upon the interrogatories we suppose a different question would have been presented. It would be unjust to deprive counsel of this right, and yet the ruling in the case referred to might lead to this result unless the doctrine there declared is carefully and rigidly limited to cases where no such claim is duly and opportunely made. Where the request is denied the record should affirmatively show when it was made, and in strictness, the request should be set forth in the record, but where the record shows that the jury returned answers to the interrogatories the presumption is that they were duly submitted.¹ In many of the earlier cases, although there was much conflict, it was held that the request and the submission must appear by bill of exceptions, but the first case cited in the note overrules the cases declaring a different doctrine and establishes a sound and sensible rule. It is evident that any other rule than that which now prevails must be unsound for it disregards the presumption that the jury and the court acted regularly and rightfully, and also violently detaches special findings from a general verdict although such findings are duly authenticated by the signature of the foreman of the jury.

§ 738. Request for a Special Verdict—A party has a right, upon due request, to have the material facts fully found and stated in a special verdict, leaving to the court the duty of pronouncing the law upon the facts thus exhibited.² To make the duty

Ind. 72; Arkansas, etc., Co. v. Canman, 52 Ark. 517, 13 S. W. Rep. 280.

¹ Frank v. Grimes, 105 Ind. 346; Shoner v. Pennsylvania Co., 28 N. E. Rep. 616. The case first cited overrules many former decisions upon the point involved here, among them: Cleveland, etc., Co. v. Bowen, 70 Ind. 478; Hervey v. Parry, 82 Ind. 263; Aiken v. Ising, 94 Ind. 507; Hamilton v. Shoaff, 99 Ind. 63. It is, however, in harmony with the decisions in other cases. Salander v. Lockwood, 66 Ind. 285; Terre Haute, etc., Co. v. Clark, 73 Ind. 168; Boots v. Griffiths, 97 Ind. 241; Redinbo

v. Fretz, 99 Ind. 458. It is in harmony with analogous cases, for verdicts, general or special, are parts of the record proper, and it is based on principle, for there is no conceivable reason for divorcing a properly authenticated finding from a general one or for presuming that a jury voluntarily did what they were not under a duty to do.

² Hopkins v. Stanley, 43 Ind. 553, 558; Bird v. Lanjus, 7 Ind. 615; Michigan, etc., Co. v. Bivens, 13 Ind. 263; Adams Express Co. v. Pollock, 12 Ohio St. 618. The jury may elect to return a special verdict. Pittsburgh, etc., Co.

to direct a special verdict imperative a request is necessary. The request should be made in due season and if not so made it may be rightfully denied, but it is not error for the court to grant the request at a very late stage of the case, for instance after the argument has begun;² it is not, however, bound to entertain a request made so late in the case. We suppose, however, that where a request comes so late it would be error to deny the adverse party a reasonable time in which to prepare a draft of a verdict, but in order to present the question for review it would be necessary for such a party to appropriately request that time be allowed him to prepare and submit a form of a special verdict. It is implied, of course, that the refusal of the request must be followed by the proper exception and the ruling properly exhibited by the record. In saying that a request is essential to make it the duty of the court to direct a special verdict we do not mean to imply that the court may not, in its discretion, direct a special verdict of its own motion; what we mean is, that, unless there is a request, the refusal can not be made available as error on appeal. The rule is that the court may direct a special verdict on its own motion,³ but it is under no duty to do so unless a request is appropriately preferred. Where a special verdict is appropriately requested the court is not only bound to direct that such a verdict be returned, but it is also bound to refrain from directing a general verdict. The party who demands that a special verdict exhibiting the facts be returned by the jury can not be embarrassed by a general verdict.⁴ But if the court entirely disregards the general verdict and acts upon the special verdict there is no available error, inasmuch as the ultimate ruling is right although reached by the wrong road.⁵ The jury may, if it so

v. Ruby, 38 Ind. 294; *Stephens on Pleading*, 92; *Ruffing v. Tilton*, 12 Ind. 259.

¹ *Louisville, etc., Co. v. Kane*, 120 Ind. 140, 22 N. E. Rep. 80; *Woollen v. Whitacre*, 91 Ind. 502, 504.

² *Lowman v. Sheets*, 124 Ind. 416, 422.

³ *Weatherby v. Higgins*, 6 Ind. 73; *Lowman v. Sheets*, 124 Ind. 416.

⁴ *Toler v. Keiher*, 81 Ind. 383. See *Bird v. Lanius*, 7 Ind. 615, 621; *Noble v. Enos*, 19 Ind. 72, 82.

⁵ *Louisville, etc., Co. v. Balch*, 105 Ind. 93. In *Todd v. Fenton*, 66 Ind. 25, 28, it was said: "A special verdict is not to be confounded with the finding of the jury upon particular questions of fact, to be stated in writing. Where there is a special there is no

acts, return a special verdict, and it is, of course, not a valid objection to a verdict returned by the jury of its own motion; but there was no request or direction to return a special verdict.¹ If the jury of its own volition returns both a special verdict and a general verdict, the refusal of the court to strike out the latter will not be error, if it appears that the court gave judgment upon the former.² It is undoubtedly irregular for a jury to return both a general and a special verdict, for the inconsistency in such a proceeding is manifest, but if the court rests upon the controlling verdict—the special—there is no prejudicial error; if, however, the court should found its judgment upon the general verdict, and that should be directly antagonistic to the special, there would be harmful error.³

739. The Practice in Requesting Special Verdicts—The correct practice is for counsel who request a special verdict to prepare a draft to be submitted to the jury.⁴ The court is not bound to submit the draft as prepared by counsel, but may put it in proper form and make necessary corrections, nor is the jury bound to use the draft prepared by counsel.⁵ “The degree of supervision which the court may exercise over the forms submitted to it must, manifestly, be left largely to its discretion,

general verdict, and the jury may be required to find specially upon particular questions of fact only in cases where they render a general verdict.”

¹ *Hall v. Carter*, 74 Iowa, 364, 37 N. W. Rep. 956.

² *Webster v. Bebinger*, 70 Ind. 9, 14.

³ The decision in the case cited in the preceding note really proceeds upon the theory suggested in the text although the point is not very fully or clearly developed. The decision in *Hershman v. Hershman*, 63 Ind. 451, seems to be against the conclusion stated, but that decision is opposed to principle and to the decisions in *Todd v. Fenton*, 66 Ind. 25; *Louisville, etc., Co. v. Balch*, 105 Ind. 93; *Toler v. Keiher*, 81 Ind. 383. It is evident that in *Hershman v. Hershman*, *supra*, the

question was not well considered and that the court lost sight of the principle that there can not be two verdicts in the same case. We have already seen that a special verdict is essentially different from answers to interrogatories, and we need only add that a special verdict, if good for anything, necessarily covers and embraces all the material facts and hence absolutely excludes a general verdict.

⁴ *Mumford v. Wardwell*, 6 Wall. 423; *Lake Shore, etc., Co. v. Stupak*, 123 Ind. 210, 224; *Hopkins v. Stanley*, 43 Ind. 553, 2 Tidd's Pr. 897; *Pittsburgh, etc., Co. v. Ruby*, 38 Ind. 294, S. C. 10 Am. Rep. 111.

⁵ *Miller v. Shackelford*, 4 Dana (Ky.), 264; *Hopkins v. Stanley*, 43 Ind. 553.

since it is the duty of the court to instruct the jury so far as to enable them to clearly comprehend the matters in issue and the subjects to be covered by the special finding."¹ But broad as the discretion of the court is, it does not extend so far as to permit an invasion of the province of the jury. The court may reject mere general conclusions of law and mere matters of evidence, but it can neither state facts for the jury, nor can it decide questions of fact, or intimate how such questions should be decided, except in cases where there is no conflict of evidence. All questions of fact upon which there is opposing evidence must be left to the decision of the jury unconstrained by any direction or instruction from the court. It thus appears that the authority of the court is fenced in by rules which can not be disregarded. We have already suggested that presenting a draft of a special verdict is not equivalent to a request,² and we repeat the suggestion because it is to be borne in mind that the request is the foundation of the right to allege error upon a ruling refusing to require a special verdict.

§ 740. Request for Inspection and Production of Documents—A request for the production or inspection of documentary evidence³ must, under our code,⁴ be in writing, and so it should be even where there is no statute requiring a written request.⁵ An affidavit must accompany the motion or request, and it should describe with reasonable certainty the book, paper or other instrument which it is desired shall be produced or of which an inspection shall be allowed.⁶ The affidavit must

¹ *Louisville, etc., Co. v. Flannagan*, 113 Ind. 488, 494. See, generally, *Louisville, etc., Co. v. Frawley*, 110 Ind. 18; *Lake Shore, etc., Co. v. Stupak*, 123 Ind. 210; *Louisville, etc., Co. v. Hart*, 119 Ind. 273, 285; *Woollen v. Wire*, 110 Ind. 251; *Indianapolis, etc., Co. v. Bush*, 101 Ind. 582.

² *Louisville, etc., Co. v. Kane*, 120 Ind. 140; *Woollen v. Whitacre*, 91 Ind. 502.

³ As to what is regarded as documentary evidence, see *Patterson v. Churchman*, 122 Ind. 379, 385.

⁴ R. S. 1881, §§ 479, 480.

⁵ *Cummings v. McKinney*, 5 Ill. 57; *Houseman v. Roberts*, 5 C. & P. 394; *Cates v. Winter*, 3 Term Rep. 306.

⁶ *Whitman v. Weller*, 39 Ind. 515; *Duke v. Brown*, 18 Ind. 111; *Bogart v. Brown*, 5 Pick. 18; *United States v. Duff*, 6 Fed. Rep. 45; *Olney v. Hatcliff*, 37 Hun. (N. Y.) 286; *People v. Rector, etc.*, 6 Abb. Pr. Rep. 177; *New England Iron Co. v. New York Loan Co.*, 55 How. Pr. 351; *Walker v. Granite Bank*, 19 Abbott's Pr. 111.

show that the instrument is necessary and material, and that it is in the hands of the adverse party.¹ Notice must be given the party, and the notice must be reasonable.²

§ 741. When Notice to Produce not Required—In what we have said concerning notice to produce books, papers and the like we have had regard to instruments of evidence and not to written instruments forming part of the pleadings. When an instrument forms a part of the pleadings in the case, it is, in legal contemplation, part of the record. This is true, although a copy is incorporated in the pleadings. It is manifest, therefore, that there is no reason for requiring notice to produce the original instrument in such cases. A party who properly makes an instrument a part of his pleading impliedly asserts that he is ready and willing to produce the original upon request. The authorities are agreed that in such cases a notice to produce is not necessary.³

§ 742. Offers—General Doctrine—A party who asserts a right must show that the right is a substantial one and capable of en-

¹ *Whitman v. Weller*, 39 Ind. 515. It is held in many cases that the facts showing the materiality must be stated, and that it is not sufficient to state in general terms that the instrument is material and necessary. *Cassard v. Hinman*, 6 Duer. 695; *Opdyke v. Marble*, 44 Barb. 64; *Thompson v. Erie R. Co.*, 9 Abb. Pr. (N. S.) 212; *Julio v. Ingalls*, 17 Abb. Pr. 448, n.; *Davis v. Dunham*, 13 How. Pr. 425; *Speyers v. Torstritch*, 5 Rob. (N. Y.) 606; *Pegram v. Carson*, 18 How. Pr. 519; *People v. Rector*, etc., 6 Abb. Pr. 177.

² *Littleton v. Clayton*, 77 Ala. 571; *McDonald v. Carson*, 95 N. C. 377; *United States v. Duff*, 6 Fed. Rep. 45; *Shreve v. Dulany*, 1 Cranch. C. C. 499; *Leaf v. Butt*, 1 Carr & M. 451; *Foster v. Pointer*, 9 Car. & P. 718; *Dewitt v. Prescott*, 51 Mich. 298; *Atwell v. Miller*, 6 Md. 10; *Lawrence v. Clark*, 14 Mees. & W. 249. See, generally, An-

derson Bridge Co. v. Applegate, 13 Ind. 339; *United States v. Winchester*, 2 McLean, 135; *Grimes v. Fall*, 15 Cal. 63; *Farmers', etc., Bank v. Lonergan*, 21 Mo. 46. If the court errs in making the order and the instrument is not used there is no prejudicial error. *Cleveland, etc., Co. v. Closser*, 126 Ind. 348. An appeal will not lie from such an order. *Western Union Tel. Co. v. Locke*, 107 Ind. 9. See *Board v. Fullen*, 118 Ind. 158.

³ *Silvers v. Junction R. Co.*, 17 Ind. 142; *Bissel v. Drake*, 19 Johns. 66; *Hammond v. Hopping*, 13 Wend. 505; *Hardie v. Kretsinger*, 17 Johns. 293; *Nealley v. Greenough*, 25 N. H. 325; *McClellan v. Hertzog*, 6 Serg. & R. 154; *Lawson v. Bachman*, 81 N. Y. 616; *Hooker v. Eagle Bank*, 30 N. Y. 83, 86; *Scott v. Jones*, 4 Taunt. 865; *Jolley v. Taylor*, 1 Camp. 143; *Whitehead v. Scott*, 1 Mood. & R. 2.

forcement. One who demands a decision of a court must present actual matters for decision. He must show that he asks the court to decide upon an actual state of facts and not upon a mere feigned controversy. A party has no right to demand a ruling unless he brings forward the facts upon which he prays the court's decision. If parties were permitted to call for rulings upon mere general statements or abstract questions, it would often happen that courts would be occupied in ruling on fictitious controversies. The law concerns itself with the concrete, not the abstract. Parties must not only be willing, but they must be able to present to the court the real facts at the time the ruling is demanded. This can only be done by offering to present the facts to the court by competent and proper means and by means at hand. It is necessary to bring into the record what the party offers in order that the appellate tribunal may obtain a clear and adequate conception of the nature and effect of the ruling it is called upon to review, as well as to enable that tribunal to see that the question grows out of an actual controversy.

§ 743. Offers of Oral Testimony—In the examination in chief the exclusion of testimony is not available as error unless the party makes an offer to prove the facts which he assumes that his question will elicit. Where an objection is properly interposed more must be done, in cases where the objection is sustained, than to ask the question; the party producing the witness and insisting upon the question must state what he proposes to prove by the witness.¹ This is necessary in or-

¹ *Curry v. Bratney*, 29 Ind. 195; *First National Bank v. Colter*, 61 Ind. 153; *Lewis v. Lewis*, 30 Ind. 257; *Adams v. Crosby*, 48 Ind. 153; *Chamness v. Chamness*, 53 Ind. 301; *Toledo, etc., v. Goddard*, 25 Ind. 185; *Farman v. Lauman*, 73 Ind. 568; *Lowder v. Lowder*, 58 Ind. 538; *McIlvain v. State*, 80 Ind. 69; *Cox v. Dill*, 85 Ind. 334; *Conden v. Morningstar*, 94 Ind. 150; *Sharpe v. Graydon*, 99 Ind. 232; *Whitehead v. Mathaway*, 85 Ind. 85; *Harter v. Eltzroth*, 111 Ind. 159; *Smith v. Gorham*, 119 Ind. 436. The rule as stated in the text has been enforced in a vast number of cases, and the decisions exhibit rulings upon it in almost every conceivable shape and form. *Smethurst v. Independent, etc., Church*, 148 Mass. 261; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; *Blumhardt v. Rohr (Md.)*, 17 Atl. Rep. 266; *State v. Barker*, 43 Kan. 262, 23 Pac. Rep. 575; *Snead v. Tietjen (Ariz.)*, 24 Pac. Rep. 324;

der to enable the court to determine whether the testimony is competent and material. The record must show the offer and show also the presence of the witness.¹ The court will not rule upon mere abstract questions, and hence it must appear that there was an actual offer and a present ability to adduce the proffered testimony. The facts proposed to be proved must be specifically stated.² If the evidence which the appellant proposes to introduce "rests in parol, then the witness from whom the testimony is to come should be placed upon the stand and a question propounded, and if objected to, and the objection sustained," an offer should be made "as to what the witness will state in answer to the question."³ In short, there should be satisfactory indications of willingness, readiness, good faith and present ability.

§ 744. Showing Materiality and Relevancy—If the offered testimony upon its face, or considered in connection with evidence already given, shows its materiality and relevancy, no further showing is required, but where the materiality and relevancy does not so appear the relevancy and materiality must be made to appear.⁴ This is often done by the statement of counsel supplementing the offer wherein he undertakes to introduce such evidence as will impress upon that offered materiality and relevancy,⁵ but it is discretionary with the court to accept

Mordhorst v. Neb. Tel. Co., 28 Neb. 610, 44 N. W. Rep. 469; *Mergentheim v. State*, 107 Ind. 567, 8 N. E. Rep. 568; *Tedrowe v. Esher*, 56 Ind. 443; *Shellito v. Sampson*, 61 Iowa, 40. It is sometimes necessary to accompany the offer by a showing of the relevancy of the proffered testimony. *Browning v. Hight*, 78 Ind. 257; *State v. Lewis*, 20 Nev. 333, 22 Pac. Rep. 241. But this is not necessary where the offer shows the testimony to be pertinent and material.

¹ *Mills v. Winter*, 94 Ind. 329; *Echsbach v. Hurtt*, 47 Md. 61, 66; *Scotland Co. v. Hill*, 112 U. S. 183, 186; *Smith v. Gorham*, 119 Ind. 436.

² *Over v. Schiffing*, 102 Ind. 191; *Caraskadden v. Poorman*, 10 Watts. 82, S. C. 36 Am. Dec. 145.

³ *Smith v. Gorham*, 119 Ind. 436, 439.

⁴ *Browning v. Hight*, 78 Ind. 257; *State v. Lewis*, 20 Nev. 333, 22 Pac. Rep. 241; *United States v. Gibert*, 2 Sumn. (U. S.) 19; *Bank of Pleasant Hill v. Wills*, 79 Mo. 275; *Aull Savings Bank v. Aull*, 80 Mo. 199; *Jackson v. Hardin*, 83 Mo. 175, 187; *Trustees v. Brooklyn Fire Ins. Co.*, 23 How. Pr. 448; *Abney v. Kingsland*, 10 Ala. 355, S. C. 44 Am. Dec. 491; *Mechelke v. Bremer*, 59 Wis. 57, 17 N. W. Rep. 682.

⁵ *Davis v. Calvert*, 5 Gill. & J. 269, S. C. 25 Am. Dec. 283; *Place v. Minster*, 65 N. Y. 89; *Williams v. Grand Rapids*, 53 Mich. 271; *Hamilton v. Summers*, 13 B. Mon. 11, S. C. 54 Am. Dec. 509; *Pittsburgh, etc., Co. v. Conway*, 57 Ind. 52; *First Unitarian Society v. Faulk-*

or reject the statement. If the court so elects it may require that evidence making that offered relevant shall be first given. Ordinarily, however, the statement of counsel is provisionally accepted. If not made good the course for the adverse party is to move to strike out the testimony admitted upon the faith of the statement.¹ The court has, of course, the right and the power to require the production of such evidence as will make that offered competent,² but the usual rule is to allow counsel the privilege of introducing evidence in the order they prefer.³ It is necessary for the court, in order to decide upon the competency of offered testimony, to determine whether there has been evidence given making that offered relevant and material. but in so deciding the court does not intimate any opinion as to the probative force of such evidence and hence does not invade the province of the jury.⁴ But while the court must, in

ner, 91 U. S. 415; *Piper v. White*, 56 Pa. St. 90; *Abney v. Kingsland*, 10 Ala. 355, S. C. 44 Am. Dec. 491; *Carnes v. Platt*, 15 Abb. Pr. R. (N. S.) 331.

¹ *People v. Millard*, 53 Mich. 63; *People v. Hall*, 48 Mich. 482. The grounds upon which the motion to strike out is based should be specifically stated, and in the event that the motion is denied the record must show the motion with its specifications, and show, also, the proper exception.

² *Village of Ponca v. Crawford*, 18 Neb. 551, 26 N. W. Rep. 365; *Johnston v. Jones*, 1 Black. 209; *Joslin v. Grand Rapids, etc., Co.*, 53 Mich. 322; *Marshall v. Davies*, 78 N. Y. 414; *Chase v. Lee*, 50 Mich. 237, 26 N. W. Rep. 483; *Wells v. Kavanaugh*, 74 Iowa. 372, 37 N. W. Rep. 780.

³ *Clawson v. Lowry*, 7 Blackf. 140; *Ginn v. Collins*, 43 Ind. 271; *Burns v. Harris*, 66 Ind. 536. The procedure in the matter of giving evidence is largely in the discretion of the trial court. *Holmes v. Hinkle*, 63 Ind. 518; *Harker v. State*, 8 Blackf. 540; *Dane v. Treat*, 35 Me. 198.

⁴ *Pedigo v. Grimes*, 113 Ind. 148;

Shugart v. Miles, 125 Ind. 445; *Cleveland, etc., Co. v. Closser*, 126 Ind. 349, 364. "In admitting evidence tending to prove a material fact the court does not determine the weight or value of such evidence, it simply determines that the evidence shall be heard." *Whitlock v. Consumers Gas, etc., Co.*, 127 Ind. 62, 64; *Colglazier v. Colglazier*, 124 Ind. 196; *Indiana, etc., Co. v. Adamson*, 114 Ind. 282; *Robinson v. Ferry*, 11 Conn. 460; *Harris v. Wilson*, 7 Wend. 57; *Clicquot's Champagne*, 3 Wall. 114; *Swearingen v. Leach*, 7 B. Monr. 285; *Chandler v. Von Roeder*, 24 How. (U. S.) 224, 227. Where evidence is competent it is the duty of the court to receive it, leaving it for the jury to determine its weight and value. *Harbor v. Morgan*, 4 Ind. 158; *Union, etc., Co. v. Buchanan*, 100 Ind. 63, 73; *Laman v. Crooker*, 97 Ind. 163, S. C. 49 Am. Rep. 437; *Boots v. Canine*, 94 Ind. 408; *Nave v. Flack*, 90 Ind. 205, S. C. 46 Am. Rep. 205; *Hall v. Henline*, 9 Ind. 256; *Grand Rapids, etc., Co. v. Diller*, 110 Ind. 223; *Bedgood v. State*, 115 Ind. 275, 280.

many instances, decide a question of fact in passing upon the admissibility of testimony,¹ it must, if called upon by a proper request, instruct that in deciding the question of fact, it does not assume to determine it for the jury. It may, indeed, be error to submit purely preliminary questions to the decision of the jury, such, for instance, as whether there is evidence of the execution of an instrument sufficient to entitle it to be read,² or whether there is sufficient evidence of search for a lost instrument.³ We say that it may be error to refer such a question to the jury for decision, but we do not mean to imply that it would always and necessarily be prejudicial error. We can readily conceive cases where the error would not be harmful, as, for instance, where the ultimate decision is made by the court and the final and controlling decision is correct. If the final ruling is correct the irregularity, or even error, in reaching the conclusion might not be sufficient to reverse the judgment. It is nevertheless true, as a general rule, that the court can neither abdicate nor delegate its functions to the jury, but while this is true it does not necessarily result that because the court does improperly submit preliminary questions to the jury the judgment must fall, since whether the judgment stands or falls must depend upon the conclusion ultimately made, for if finally made by the court it becomes the controlling element in the case. But if it should appear that the erroneous mode pursued probably resulted in harm to the complaining party the judgment can not stand, nor can it stand if it appears that the court wholly surrendered its functions or powers to the jury. The evidence of the loss of an instrument must be such as to satisfy the court that a diligent search has been made in the proper places, and unless there is such evidence the ruling of the court rejecting secondary evidence will not be overturned.⁴ It is

¹ *Hitchins v. Eardley*, L. R., 2 Prob. & Div. 248, S. C. 40 L. J. (Prob. & Mat.) 70; *Bartlett v. Smith*, 11 Mees & W. 483; *Tabor v. Staniels*, 2 Cal. 40.

² *Hart v. Heilner*, 3 Rawle (Pa.), 407; *Stowe v. Querner*, L. R., 5 Exch. 155; *Robinson v. Ferry*, 11 Conn. 460; *Ratliffe v. Huntly*, 5 Ired. Law (N. C.),

545; *Thomason v. Odum*, 31 Ala. 108; *De Graffenreid v. Thomas*, 14 Ala. 681.

³ *Loewe v. Reismann*, 8 Brad. (Ill. App.) 525; *Tayloe v. Riggs*, 1 Pet. 591; *Graff v. Pittsburgh, etc., Co.*, 31 Pa. St. 489; *Witter v. Latham*, 12 Conn. 392; *Donelson v. Taylor*, 8 Pick. 390.

⁴ *Howe v. Fleming*, 123 Ind. 262.

evident from what has been said, and from the authorities cited. that preliminary questions of the character indicated must, as a general rule, be determined by the court, and that it is sufficient if the court is satisfied of the competency of the evidence adduced upon the preliminary questions. It is true that expressions found in some of the cases seem to indicate a different rule, but it will be found on examination that in those cases the question was not directly presented, and, of course, was not decided.¹

§ 745. Effect of mingling Competent with Incompetent Evidence—

The court is under no duty to dissect an offer of evidence and separate the competent from the incompetent. If a party offers evidence composed of proper and improper elements, the entire offer may be rightfully rejected. The only offer upon which error can be successfully alleged is one wherein no incompetent evidence is contained. It is, no doubt, the right of the court, if it so elects, to separate the competent from the incompetent and admit the former, but it is mere matter of grace for it to do so, and its refusal is not error available on appeal.²

¹ *McCormick, etc., Co. v. Gray*, 114 Ind. 340, 346; *McComas v. Haas*, 107 Ind. 512; *Johnston, etc., Co. v. Bartley*, 94 Ind. 131; *Millikan v. State*, 70 Ind. 310. It is a rudimental principle that questions as to the competency of evidence are for the court, not for the jury, and in order to determine such questions the court must, of necessity, provisionally, although not always finally, decide questions of fact. 1 *Greenleaf on Evidence*, § 49; *Company of Carpenters v. Hayward*, 1 *Douglas*, 374; *Chandler v. Von Roeder*, 24 *How. (U. S.)* 227; *Wittkowsky v. Wasson*, 71 *N. C.* 451. In the case of *Thompson v. Thompson*, 9 Ind. 323, the court quoted with approval *Greenleaf's* statement that, "The evidence of loss is addressed to the court and not to the jury." 1 *Greenleaf's Evidence*, § 558. See, also, *Carter v. Bennett*, 4 *Fla.* 283; *De France v. De France*, 34 *Pa. St.* 385;

Dayis v. Charles River, etc., Co., 11 *Cush.* 506; *Reynolds v. Lounsbury*, 6 *Hill*, 534; *Scovell v. Kingsley*, 7 *Conn.* 284; *Pleasants v. Fant*, 22 *Wall.* 116.

² *Shewalter v. Bergman*, 123 *Ind.* 155; 156; *Jones v. State*, 118 *Ind.* 39; *City of Terre Haute v. Hudnut*, 112 *Ind.* 542; *Pape v. Wright*, 116 *Ind.* 502; *Louisville, etc., Co. v. Falvey*, 104 *Ind.* 409; *Cuthrell v. Cuthrell*, 101 *Ind.* 375; *Wolfe v. Pugh*, 101 *Ind.* 293; *Elliott v. Russell*, 92 *Ind.* 526; *Sohn v. Jervia*, 101 *Ind.* 578; *Over v. Schiffling*, 102 *Ind.* 191; *St. Louis, etc., R. Co. v. Hendricks*, 48 *Ark.* 177, *S. C.* 3 *Am. St. R.* 220; *Smith v. Arsenal Bank*, 104 *Pa. St.* 518. The principle on which the rule rests is illustrated by the case wherein it was held that a motion to strike out evidence embracing both competent and incompetent evidence may be overruled without error. *Waymire v. Lank*, 121 *Ind.* 1; *Staer v.*

§ 746. **Offer Unaccompanied by Interrogatory Unavailing**—The party who desires to reserve a question upon rulings excluding testimony must propound the appropriate interrogatories. Otherwise where no questions have been asked calling for the testimony will not avail on appeal. In the absence of the interrogatories the court will not consider the competency of the proffered testimony.¹

747. **Offer Not Required on Cross-Examination**—The offer of evidence is required on the direct examination, but not on cross-examination. If the appropriate interrogatories are propounded on cross-examination, and due exception is reserved in the event that the court disallows the interrogatories, the question is saved for review without an offer or statement of what the cross-examiner proposes to elicit. The reasons for making a distinction between the direct examination and the cross-examination are obvious. It is unnecessary to give them since that is the case in the decisions of the court and the question is fully settled.²

748. **Offer of Documentary Evidence**—Where a document is offered and excluded, it must be brought into the record in order that the court, on appeal, may determine its competency. Unless the document is presented to the trial court in due form, the document and the mode of its presentation to that court³ are properly shown by the record, the appellate tribunal will not disturb the ruling of the lower court.⁴ Where documents

120 Ind. 207; *Pettigrew v. Bar-Md.* 434; *Wallis v. Randall*, 81 Ind. 64; *Day v. Henry*, 104 Ind. 324. In *v. Young*, 124 Ind. 507; *v. Fagan*, 124 Ind. 304; *Vickery v. Formick*, 117 Ind. 594; *City of Laute v. Hudnut*, 112 Ind. 542; *Hard v. Lofton*, 102 Ind. 408; *v. Walker*, 108 Ind. 78; *Woolryville, etc., Co.*, 107 Ind. 381; *v. Moore*, 105 Ind. 243; *Judy*, 101 Ind. 18; *Higham v. Van*, 101 Ind. 160; *Robinson v. State*, (Penn.), 673; *Scotland County*, 12 U. S. 183, 186; *Eschback v. Md.* 61, 66.

² *Harness v. State*, 57 Ind. 1; *Batten v. State*, 80 Ind. 394, 400; *Heagy v. State*, 85 Ind. 260; *Hutts v. Hutts*, 62 Ind. 214, 225; *Hyland v. Milner*, 99 Ind. 308; *Bedgood v. State*, 115 Ind. 275; *O'Donnell v. Segar*, 25 Mich. 367, 372; *Martin v. Elden*, 32 Ohio St. 282; *Stanton Co. v. Canfield*, 10 Neb. 389, 6 N. W. Rep. 466.

³ *Williams v. State*, 127 Ind. 471, 26 N. E. Rep. 1082.

⁴ *Gould v. Weed*, 12 Wend. 12, 24; *Scripps v. Reilly*, 38 Mich. 10; *Keely v. Newcomer*, 1 Md. 241.

are offered they should, in strictness, be handed to the court for examination and not go to the jury in any form until the court rules them competent. Counsel should not be permitted to get them before the jury under pretence of reading them to the court.¹ As a general rule a party can not successfully offer part of an entire document, he must offer all. If the instrument offered is admitted it goes to the jury, in most cases, as an entirety.²

§ 749. Repeating Offers—Where an offer is once well made there is no necessity for, nor is there propriety in, repeating it. If the question is once fully and directly presented it is as effective as if it were presented a multitude of times. It may sometimes happen that the question sought to be saved can be presented under different phases, or in different lights, and where this is so it is not improper to present it in various forms. But where the offer is once fully made and the question directly and adequately presented, and there is no change of positions or conditions, a repetition of the offer is censurable.³ Counsel sometimes resort to the artifice of multiplying offers for the purpose of influencing the jury, and this practice the courts have stingingly rebuked.⁴ As we have shown elsewhere, a party who fully and appropriately presents a question to the court for decision has a right to assume that the court will adhere to the theory declared or indicated by its ruling,⁵ so that, having once obtained a ruling, he is under no obligation to again present the

¹ *Philpot v. Taylor*, 75 Ill. 309, 312; *Scripps v. Reilly*, 38 Mich. 10; *Keedy v. Newcomer*, 1 Md. 241.

² *Brown v. Eaton*, 98 Ind. 591, 595; *Anderson v. Ackerman*, 88 Ind. 481; *State v. Hawkins*, 81 Ind. 486; *Miles v. Wingate*, 6 Ind. 458; *Coats v. Gregory*, 10 Ind. 345; *Foot v. Glover*, 4 Blackf. 313; *McNutt v. Dare*, 8 Blackf. 35; *Jenkins v. State*, 78 Ind. 133; *Miller v. Deaver*, 30 Ind. 371; *Miles v. Loomis*, 75 N. Y. 288, S. C. 31 Am. Rep. 470; *Machlin v. New England, etc., Co.*, 33 La. Ann. 801; *Hewitt v. Buck*, 17 Me.

147, S. C. 35 Am. Dec. 243; *Bell v. Keefe*, 12 La. Ann. 340. See, generally, *Tomlinson v. Briles*, 101 Ind. 538; *Carr v. Hays*, 110 Ind. 408; *Olvey v. Jackson*, 106 Ind. 286; *Thames, etc., Co. v. Beville*, 100 Ind. 309; *Gibson v. Lacy*, 87 Ind. 202; *Ashley v. Laird*, 14 Ind. 222.

³ *Scripps v. Reilly*, 38 Mich. 10, 14.

⁴ *Scripps v. Reilly*, 38 Mich. 10; *People v. Millard*, 53 Mich. 63. See *People v. Hall*, 48 Mich. 482.

⁵ *Ante*, § 591.

estion. The court may, of course, change its ruling, but the
rty has a right to act upon the assumption that there will be
change, and hence does not strengthen his position by re-
ating offers of evidence once fully ruled upon by the court.

CHAPTER X.

MOTIONS FOR JUDGMENT AND INCIDENTAL MATTERS.

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| <p>§ 750. Introductory.</p> <p>751. Motions for judgment on the pleadings.</p> <p>752. Special interrogatories to jury — Requesting judgment on the answers.</p> <p>753. Special verdicts — Motions for judgment on.</p> <p>754. Effect of moving for judgment.</p> <p>755. Distinct causes of action.</p> <p>756. Motion essential to save questions upon special verdicts.</p> <p>757. Special finding—Characteristics and incidents.</p> <p>758. The motion for a <i>venire de novo</i>—The general doctrine.</p> <p>759. <i>Venire de novo</i>—The Indiana rule.</p> <p>760. The motion for a <i>venire de novo</i> as applied to a special finding.</p> | <p>§ 761. Office of the motion for a <i>venire de novo</i>.</p> <p>762. Time of filing the motion.</p> <p>763. Requisites of the motion.</p> <p>764. Special finding—Motion to strike out.</p> <p>765. Special finding — Particular facts outside of the issues.</p> <p>766. The difference between case where only particular facts are outside of the issues and case where the whole finding is outside.</p> <p>767. Finding wholly outside of the issues.</p> <p>768. Practice where the judgment does not follow the finding or verdict.</p> |
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§ 750. **Introductory**—One of the usual means employed in making error available is a motion. A motion is, indeed, very often essential to the existence of error, inasmuch as it is very frequently the only appropriate mode of requesting a decision. and, as we have shown in another place, there can be no error unless there is a request to decide and a refusal to decide, or a decision. Motions asking affirmative relief are really requests, since they ask the court to grant an order or make a decision.¹ This is true of motions to make a complaint more specific,¹⁰ to suppress a deposition, to discharge the jury, and of many more motions in use in practice. But it is not our purpose to discuss

¹ "This may be done upon what is called a motion, which is an occasional application to the court by the parties or their counsel, in order to obtain some order or rule of court." 3 Blackst. Com. 304.

length the subject of motions generally. We shall confine our discussion to the principal motions required to make an erroneous ruling available for the reversal of a judgment. The motions here considered are those which call for a decision and thus lay the foundation for alleging error.¹

§ 751. **Motion for Judgment on the Pleadings**—A party who desires to secure a consideration of his right to a judgment on the pleadings must, as a general rule, make the appropriate motion in the trial court. The motion is essential to call forth a decision upon the particular question he desires to present on appeal, and the motion must be such as to properly present to the court of original jurisdiction the specific questions upon which he is asked to give a decision.² The closer the adherence to the rule that requests must be so framed as to fully and clearly indicate the questions upon which a decision is sought, the better the system of procedure, inasmuch as the adherence to the rule advises fairly the opposite party of what he is to meet and informs the court upon what it is expected to pronounce judgment.³

§ 752. **Special Interrogatories to Jury—Requesting Judgment on the Answers**—Where a general verdict is returned and answers are also made by the jury to special interrogatories submitted to them, the party who seeks judgment on the special interrogatories must make the proper motion for judgment.⁴ The

¹ See *post*, "Presenting an opportunity for review." Chapter XIV.

² *Ante*, § 481. "Rendering judgment on the pleadings."

³ In *Brown v. Jones*, 125 Ind. 375, 15 N. E. Rep. 452, the court said: "No specific causes for giving judgment in favor of the appellant upon the state of the pleadings were stated in his motion, and if for no other reason the court might for this reason have very properly overruled the motion. The motion should have been drawn so as to direct the court's attention to the questions sought to be raised thereby. It is the business of the

court to consider such questions as its attention may be called to if they are properly before it, but none other." It is, as we believe, the object of the code to secure specific requests, motions and objections, but it must be said that our own and other courts have not always so interpreted it.

⁴ *Ante*, §§ 651, 737. *Louisville, etc., Co. v. Stommel*, 126 Ind. 35; *Ohio, etc., Co. v. Trowbridge*, 126 Ind. 391; *Town of Poseyville v. Lewis*, 126 Ind. 80; *Smith v. Heller*, 119 Ind. 212; *Chicago, etc., Co. v. Ostrander*, 116 Ind. 259; *Cincinnati, etc., Co. v. Clifford*, 113 Ind. 460; *Redelsheimer v. Miller*, 107 Ind.

motion is not, as is sometimes said, for judgment notwithstanding the verdict, but for judgment upon the facts contained in the answers of the jury to the interrogatories. The theory upon which the motion proceeds, and upon which it must proceed, is that the facts entitle the moving party to judgment. This theory can not do unless the answers are irreconcilable with the general verdict.

§ 753. **Special Verdicts—Motions for Judgment on**—A special verdict must find the ultimate or inferential facts, and not mere matters of evidence or mere evidentiary facts, so that where the ultimate facts are not found the party who has the burden will fail.¹ If, however, the ultimate facts are stated in the verdict the presence of evidence, or of evidentiary facts, will not vitiate it, since such matters may be disregarded and the judgment rendered on the facts.² But facts must appear or the verdict will

485; *Rogers v. Leyden*, 127 Ind. 50; *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. Rep. 710; *Johnson v. Miller* (Iowa), 47 N. W. Rep. 903, S. C. 48 N. W. Rep. 1081; *Smith v. McCarthy*, 33 Ill. App. 176; *Jaquay v. Hartzell*, 1 Ind. App. 500; *Shenners v. West Side, etc., Co.*, 78 Wis. 382, 47 N. W. Rep. 622. An answer of "no evidence" is not sufficient, as a rule, to control the general verdict. *Chicago, etc., Co. v. Goyette*, 32 Ill. App. 574. But the rule is not, by any means, without exception. It can not prevail where the absence of evidence is upon a material point on which the party who obtains the general verdict has the burden, and can not succeed without establishing the particular fact. Where the answers are radically contradictory, they can not control the general verdict. *Dickey v. Shirk*, 128 Ind. 278, 281; *Graham v. Payne*, 122 Ind. 403; *Indianapolis, etc., Co. v. Lewis*, 119 Ind. 218; *Grand Rapids, etc., Co. v. Ellison*, 117 Ind. 234. It is the facts exhibited in the answers and not mere items of evidence that are of controlling

importance. *Heiney v. Garretson*, 1 Ind. App. Ct. 548; *Louisville, etc., Co. v. Hubbard*, 116 Ind. 193; *Schnurr v. Stults*, 119 Ind. 429; *Louisville, etc., Co. v. Wood*, 113 Ind. 544; *Blacker v. Slown*, 114 Ind. 322. See, generally, *Ward v. Busack*, 46 Wis. 407; *Louisville, etc., Co. v. Cauley*, 119 Ind. 142; *Manning v. Gasharie*, 27 Ind. 399; *Evansville, etc., Co. v. Gilmore*, 1 Ind. App. 468.

¹ *Indianapolis, etc., Co. v. Bush*, 101 Ind. 582; *Vinton v. Baldwin*, 95 Ind. 433; *Chicago, etc., Co. v. Burger*, 124 Ind. 275; *Louisville, etc., Co. v. Frawley*, 110 Ind. 18; *Gordon v. Stockdale*, 89 Ind. 240; *Pittsburgh, etc., Co. v. Spencer*, 98 Ind. 186; *Noblesville, etc., Co. v. Lechr*, 124 Ind. 79; *Dennis v. Louisville, etc., Co.*, 116 Ind. 42; *Louisville, etc., Co. v. Green*, 120 Ind. 367, 375.

² *Johnson v. Putnam*, 95 Ind. 57; *Par-mater v. State*, 102 Ind. 90; *Terre Haute, etc., Co. v. Bruner*, 128 Ind. 542; *Dixon v. Dukes*, 85 Ind. 434; *Locke v. Merchants Nat. Bank*, 66 Ind. 353; *Keeling*

not support a judgment of recovery, inasmuch as the place of facts can not be supplied by conclusions of law or matters of evidence. The party who moves for judgment must, if he has the burden, be able to show, from the facts stated in the verdict, that he is entitled to judgment or his motion will fail. It is evident that the party who has the burden occupies a much more disadvantageous position than his adversary. The former must have present all the material facts, while the latter will succeed if a single controlling fact is absent from the verdict. If a material fact is absent the party who has not the burden may successfully move for judgment.¹ It is the office of a special verdict to find and state the facts, referring to the court for decision only matters of law, hence it follows that the facts must be so stated that all that remains for the court is to apply the law.²

§ 754. Effect of Moving for Judgment—Where the facts are exhibited in the special verdict a party who believes himself entitled to judgment asks a decision when he appropriately moves for judgment, and if his motion is denied he may, by entering the proper exception, make the denial of his motion available on appeal.³ It is to be observed, however, that by moving for

v. Van Sickle, 74 Ind. 529, S. C. 39 Am. Rep. 101; *Woodfill v. Patton*, 76 Ind. 575; *Indiana, etc., Co. v. Finnell*, 116 Ind. 414; *Louisville, etc., Co. v. Green*, 120 Ind. 367, 373; *Henderson v. Dickey*, 76 Ind. 264.

¹ *Korraday v. Lake Shore, etc., Co.* (Ind. Sup. Ct.), 29 N. E. Rep. 1069; *Lake Shore, etc., Co. v. Pinchin*, 112 Ind. 592, 597; *Rice v. City of Evansville*, 108 Ind. 7, 11. Nothing can be added to a special verdict by intentment. *Lake Shore, etc., Co. v. Stupak*, 123 Ind. 210.

² *Goldsby v. Robertson*, 1 Blackf. 247; *Pittsburgh, etc., Co. v. Spencer*, 98 Ind. 186; *Dixon v. Dukes*, 85 Ind. 434; *Louisville, etc., Co. v. Balch*, 105 Ind. 93; *Pittsburgh, etc., Co. v. Adams*, 105 Ind. 151; *Buchanan v. Milligan*, 108 Ind.

433; *Conner v. Citizens Ry. Co.*, 105 Ind. 62; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Louisville, etc., Co. v. Flannagan*, 113 Ind. 488; *Wainright v. Burroughs*, 1 Ind. App. 393; *Louisville, etc., Co. v. Hart*, 119 Ind. 273; *Seward v. Jackson*, 8 Cow. 406; *Hill v. Covell*, 1 N. Y. 522; *Langley v. Warner*, 3 N. Y. 327; *Eisemann v. Swan*, 6 Bosw. 668; *Hallet v. Jenks*, 1 Caines Cases, 43; *Thayer v. Society, etc.*, 20 Pa. St. 60; *Kuhlman v. Medlinka*, 29 Texas, 385; *Williams v. Willis*, 7 Abbott's Pr. R. 90.

³ In *Austin v. Earhart*, 88 Ind. 182, the court said: "There is no difficulty in presenting questions upon the rulings of the court on special verdicts. It may be done in two ways, if not more, namely, by moving for judgment and

judgment he does not always accomplish the same purpose that he would do by moving that a *venire de novo* be awarded. The latter motion directs attention to defects or imperfections in the special verdict, while the other asks judgment because the facts as they appear entitle him to the judgment. Where the moving party is not the one having the burden, it may, upon the principle stated in a preceding paragraph, be the absence of facts that entitles him to judgment.

§ 755. Distinct Causes of Action—Where there are two distinct causes of action, the party entitled to a recovery upon the facts stated in the special verdict in one cause of action may successfully move for judgment as to that cause of action.¹ It does not follow that because a party does not succeed as to all the causes of action on which he declares he fails as to the cause of action on which the facts stated in the verdict entitle him to judgment. It is the duty of the court, when properly requested, to render judgment according to the verdict, since it is established law that the judgment must follow the verdict.²

§ 756. Motion essential to save Questions upon Special Verdicts—The appropriate motion must, as a general rule, be made by one who deems himself entitled to judgment in the trial court in order to save a question as to the propriety of entering judgment on a special verdict.³ A party who fails to present the

properly reserving an exception, and by excepting to the adverse party's motion for judgment." To substantially the same effect are the cases of *Dixon v. Dukes*, 85 Ind. 434; *Johnson v. Culver*, 116 Ind. 278, 280; *Louisville, etc., Co. v. Green*, 120 Ind. 367, 373. In the case last named it was said, in speaking of a motion for judgment on a special verdict: "This was a proper motion. The two causes of action were clearly distinct, and if the facts found in the special verdict entitled the appellant to a judgment upon the one cause of action it should have been sustained." The judgment was reversed for the error in denying the motion for judgment.

¹ *Johnson v. Culver*, 116 Ind. 278. *Louisville, etc., Co. v. Green*, 120 Ind. 367, 363.

² It is to be understood, of course, that the facts stated are within the issues, for facts wholly outside of the issues are utterly insufficient to support a judgment. Facts beyond the issues are to be disregarded.

³ If the one party moves for judgment and succeeds, an exception by the adverse party will save the question in some cases, but not in all, so that the safe plan for the party who desires to make a question available on appeal is to himself move for judgment.

question in that court has no question to present to the appellate tribunal for review. A question not made below as to the sufficiency of a verdict, or as to the propriety of pronouncing judgment upon it can not be made on appeal without violating settled principles. The only doubt that can arise is as to the appropriate mode of presenting such questions.¹ In the case referred to in the note there is no departure from the settled rule that a party who has the burden can not recover unless the facts essential to a recovery are found, but, on the contrary, that rule is expressly asserted. Its application is denied because the verdict was imperfect and the party did not pursue the proper course. He sought to secure judgment where he was, at most, entitled only to a *venire de novo*. If he had pursued the proper course, or if no facts had been stated in the verdict a very different question would have been presented. The case of which we are speaking strikingly illustrates the difference between a defective finding and the absence of facts. It does not assert that mere conclusions of law constitute facts, but that an imperfect statement does not authorize a party to treat the statement as a nullity, although the defect may be such as to entitle him to have another jury called. It is well settled that where the appropriate motion or objection is not interposed in the trial court, mere imperfections or defects in a

¹ In the case of *Cook v. McNaughton*, 128 Ind. 410, the court declared the rule to be that: "A special verdict which does not find the facts in detail can not be supported as such, it must be set aside and a new trial awarded." But it was held that as the verdict was simply imperfect in finding upon one issue generally when it should have found the facts specially, the failure of the appellant to assail the verdict in the appropriate mode precluded him from successfully challenging the judgment on appeal. It was said by the court: "In this case the special verdict was received without objection. No effort was made to have the jury correct it; no motion was made for a *venire de novo*. The appellant does not seek a

new trial, but seeks to treat a general finding on one issue as a nullity. He insists that the finding in question is a statement of a mere conclusion of law, and therein we think consists his error. The doctrine that a general verdict for a plaintiff embraces a finding in his favor of all the material allegations of the complaint is elementary. The defect in the special verdict under consideration does not consist in a failure to find all the facts necessary to authorize a judgment for the plaintiff, but it consists in finding the facts to one issue generally and not specially. As the appellee has not sought to have the verdict set aside for this defect, it is our duty to give it force, if that can be done."

verdict can not be made available on appeal for the reversal of the judgment.¹

§ 757. **Special Finding — Characteristics and Incidents** — The finding of facts by the court is much the same as the special verdict of a jury, especially where the finding of the facts is not supplemented, as it is required to be in this State, by the conclusions of the court as to the matters of law.² Where conclusions of law are added, then the whole case—law and facts—is presented to the appellate tribunal upon the finding. But by severing the conclusions of law from the statement of facts, as may be done for some purposes, the finding of the court is, in many respects, governed by the same rules as those which apply to special verdicts rendered by juries. If the finding of facts is defective or imperfect it is to be challenged in substantially the same manner as a special verdict. If the finding of facts is silent as to a material point, as to that point it is deemed to be adverse to the party upon whom the burden of proof rests. This conclusion is asserted in a great number of cases.³ If facts are not found which were established by the evidence the proper remedy is a motion for a new trial.⁴ It is one thing

¹ *Bohr v. Neuenschwander*, 120 Ind. 449. In the case cited it was said: "But the question as to the defect in the verdict is not properly in the record, and therefore the appellant can not have the record corrected by this appeal. He did not move in the court below to set aside the verdict. Nor did he ask that a *venire de novo* be awarded." The court cited *Moore v. Reed*, 1 Blackf. 177; *Tardy v. Howard*, 12 Ind. 404; *Anderson v. Donnell*, 66 Ind. 150.

² Where no conclusions of law are stated it is held that the finding is to be treated as a general one. *Powers v. Fletcher*, 84 Ind. 154.

³ *Yerkes v. Sabin*, 97 Ind. 141; *Krug v. Davis*, 101 Ind. 75; *Ayers v. Adams*, 82 Ind. 109; *Hunt v. Blanton*, 89 Ind. 38; *Dodge v. Pope*, 93 Ind. 480; *Quick v. Brenner*, 101 Ind. 230; *Stone v. Brown*, 116 Ind. 78; *Town of Freedom*

v. Norris, 128 Ind. 377; *Kehr v. Hall*, 117 Ind. 405; *Fletcher v. Martin*, 126 Ind. 55; *Citizens Bank v. Bolen*, 121 Ind. 301; *Nitche v. Earl*, 88 Ind. 375; *Cincinnati, etc., Co. v. Gaines*, 104 Ind. 526; *Mitchell v. Colglazier*, 106 Ind. 464; *Meeker v. Shanks*, 112 Ind. 207; *Spraker v. Armstrong*, 79 Ind. 577; *Stumph v. Bauer*, 76 Ind. 157; *Sinker-Davis Co. v. Green*, 113 Ind. 264; *Talburt v. Berkshire, etc., Co.*, 80 Ind. 434; *Montmorency, etc., Co. v. Rock*, 41 Ind. 263; *Robinson v. Snyder*, 74 Ind. 110.

⁴ *First National Bank v. Carter*, 89 Ind. 317; *Tarkington v. Purvis*, 128 Ind. 182; *Deeter v. Sellers*, 102 Ind. 458; *Hamilton v. Byram*, 122 Ind. 283; *Bowen v. Swander*, 121 Ind. 164; *Louisville, etc., Co. v. Hart*, 119 Ind. 273, 276; *Watts v. Julian*, 122 Ind. 124; *Crawford v. Powell*, 101 Ind. 421; *Knox v. Traflet*, 94 Ind. 346.

to assail the finding of facts and quite another to assail the conclusions of law, as will be shown in the paragraphs that follow. The finding of facts can not be successfully attacked by a motion to strike out where the ground is that the finding is contrary to the evidence.¹ The evidentiary facts are not to be stated, but the inferential or ultimate facts must be properly stated.² The presumption, in the absence of a countervailing showing, is that all the material facts proved are stated in the special finding.³ Facts not mere conclusions should be stated.⁴ The finding must state the facts with reasonable certainty.⁵ We have given enough of the characteristics and incidents of a special finding to show its close resemblance to a special verdict and prepare the way for a consideration of the doctrine of the applicability of motions for a *venire de novo* to special findings, and that is all we care to do here, for in a former chapter we considered the subject of requests for special find-

¹ Tarkington v. Purvis, 128 Ind. 182; Hays v. Hostetter, 125 Ind. 60, 65. Sharp v. Malia, 124 Ind. 407. See Clark v. State, 125 Ind. 1; Hays v. Hostetter, 125 Ind. 60.

² Farmers, etc., Co. v. Canada, etc., Co., 127 Ind. 250, 270; Cicero Tp. v. Picken, 122 Ind. 260; Davis v. Franklin, 25 Ind. 407; Kealing v. Van Sickle, 74 Ind. 529; Whitcomb v. Smith, 123 Ind. 329; Kirkpatrick v. Reeves, 121 Ind. 280; Wilson v. Campbell, 119 Ind. 286; Phelps v. Smith, 116 Ind. 387; Bartholomew v. Pierson, 112 Ind. 430; Stix v. Sadler, 109 Ind. 254; Elston v. Castor, 101 Ind. 426; Perkins v. Hayward, 124 Ind. 445; Zigler v. Menges, 121 Ind. 99; Smith v. Goodwin, 86 Ind. 300; Blizzard v. Riley, 83 Ind. 300; Hagaman v. Moore, 84 Ind. 496; Cottrell v. Nixon, 109 Ind. 378; Caldwell v. Boyd, 109 Ind. 447; People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474; Tyler v. Waddingham, 58 Conn. 375, 8 Law. Anno. Rep. 657; Smith v. Mohn, 87 Cal. 489, 25 Pac. Rep. 696.

³ McLaughlin v. Ward, 77 Ind. 383; Hays v. Hostetter, 125 Ind. 60, 65. The doctrine of the cases must necessarily be correct under the rule that where facts established by the evidence are not stated the remedy is by a motion for a new trial. As the settled rule is that only the facts proved need be stated it results that, until the contrary appears from the evidence, it must be assumed that all the facts established by the evidence are contained in the finding. It is, therefore, incumbent upon a party who assails the finding upon the ground that it does not state the facts proved, to make his assertion good by the evidence.

⁴ Atwood v. Welton, 57 Conn. 514, 18 Atl. Rep. 322; Ward v. Clay, 82 Cal. 502, 511, 23 Pac. Rep. 50; Braden v. Lemmon, 127 Ind. 9, 26 N. E. Rep. 476. But conclusions where facts are found may be eliminated. Faurote v. State, 123 Ind. 6, 23 N. E. Rep. 971.

⁵ Estill v. Irvine, 10 Mont. 509, 26 Pac. Rep. 1005; Cohn v. Wright, 89 Cal. 86, 26 Pac. Rep. 643.

ings and shall consider the subject of excepting to the conclusions of law in a subsequent chapter which treats of exceptions.

§ 758. The Motion for a Venire de novo—The General Doctrine—

At common law a *venire facias de novo* "is grantable when the verdict, whether general or special, is imperfect by reason of some uncertainty, or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages."¹ It was essential at common law that the verdict should respond to the whole issue. This is an important element, and in dispensing with it, as our decisions have done, it may well be doubted whether a matter important to the due and effective administration of justice has not been cast aside without just reason. Compelling a jury to respond to all the issues prevents them from evading their duty and secures a full decision of the whole controversy. There is, therefore, a solid foundation for the common law rule. It is difficult, we may add, to conceive how the court could consistently incorporate the common law rule into our system (for it was not incorporated by legislation), and yet leave out an essential and commendable element.

§ 759. Venire de novo—The Indiana Rule—Where a special verdict is silent upon a material point it is regarded as against the party having the burden upon that point.² As we have seen, this is true of a special finding. It seems necessarily to result from this established rule that a failure to find upon all the issues is not a ground upon which a *venire de novo* can be successfully claimed. So it has been finally determined, although there has been much confusion and conflict.³ The rem-

¹ 2 Tidd's Pr. 922; *Harden v. Fisher*, 1 Wheat. 300; *Fowle v. Alexandria*, 11 Wheat. 320; *United States v. Hawkins*, 10 Pet. 125; *Brown v. Hillegas*, 2 Hill (N. Y.). 447; *White v. Bailey*, 14 Conn. 271; *Grice v. Ferguson*, 1 Stew. (Ala.) 36; *Middletown v. Quigley*, 7 Halst. (N. J.) 352.

² *Waymire v. Lank*, 121 Ind. 1; *Jones v. Baird*, 76 Ind. 164; *Henderson v. Dickey*, 76 Ind. 264; *Stropes v. Board*,

72 Ind. 42; *Pitzer v. Indianapolis, etc. Co.*, 80 Ind. 569; *Gray v. Taylor* (Ind. App.), 28 N. E. Rep. 220.

³ The rule as it exists in this State was fully stated in the case of *Ex parte Walls*, 73 Ind. 95, 110. In that case the court, in answering the point made by counsel that the finding did not embrace all the issues, said: "The second proposition can not be maintained. In the case of *Graham v. State*, 66 Ind.

edy where the facts established by the evidence are not found is by a motion for a new trial, as in the case of a special finding. But while our rule differs from the common law rule in the respect indicated it is essentially the same in all other material respects, for much as the office of a special verdict is restricted by the limitation placed upon it by the doctrine that its office is not to find upon all the issues,¹ but only to find and

386, the office of a special verdict or a special finding of facts was carefully considered, and it was there determined that the facts to be stated in such finding or verdict were those which had been proved on the trial and none other; that if there were issues in a case upon which no evidence was offered, no finding should be made in reference thereto, and that the issues concerning which no facts were found should be regarded as not proved by the party on whom was the burden of the issue or issues. This case has been approved and followed in several cases decided at this term. *Martin v. Cauble*, 72 Ind. 67; *Vannoy v. Duprez*, 72 Ind. 26; *Stropes v. Board*, 72 Ind. 42. There was, before the decision of the case of *Graham v. State*, *supra*, some confusion on this subject. See *Schmitz v. Lauferty*, 29 Ind. 400; *Cruzan v. Smith*, 41 Ind. 288; *Dehority v. Nelson*, 56 Ind. 414; *Whitworth v. Ballard*, 56 Ind. 279; *Anderson v. Donnell*, 66 Ind. 150, and the cases referred to. But these cases should be deemed modified or overruled, so far as inconsistent with the doctrine now settled, that it is not the office of a special verdict or finding to find specially upon all the issues, but only to find the facts proven within the issues. The inevitable corollary proposition is that, if the special finding or verdict is silent in reference to any issue or facts, such silence is not an omission apparent on the record which can be ground for granting a *venire de novo*. If in fact there was

proof pertinent to any issue, on which the court ought to have found facts, the remedy is by a motion for a new trial." The decisions subsequent to the one from which we have quoted have not been harmonious, for many of them have yielded to the influence of the common law doctrine, but they can not be supported consistently with the established rule that silence operates against the party upon whom the burden rests. It would have been more consistent to have adhered to the common law rule from which the doctrine of a motion for a *venire de novo* was taken,—for our code makes no provision for such a motion,—but it is now too late to go back to the common law rule, inasmuch as to do so would require the overruling of scores of cases. Nothing can be justly done towards changing the rule, for a change would inevitably produce great injustice. A change would require the overruling of a great number of cases, for it would involve the cases decided upon special findings, as well as those decided upon special verdicts.

¹ In the case of *Board v. Pearson*, 120 Ind. 426, 430, it was said: "There is no imperfection in the verdict, for sufficient facts are stated to enable the court to pronounce judgment, and under the rule which prevails in this State, the failure to find upon all the issues does not entitle a party to a *venire de novo*. *Wilson v. Hamilton*, 75 Ind. 71; *Jones v. Baird*, 76 Ind. 164; *Glantz v. City of South Bend*, 106 Ind. 305, 1

state all the facts established by the evidence, a motion for a *venire de novo* is often the appropriate mode of questioning the sufficiency of a special verdict, for there are questions that can not be appropriately presented by any other motion. While a motion for a new trial is, under the doctrine established by our cases, the appropriate mode of presenting the question as to whether the facts are correctly found, still that mode is not always the proper one, inasmuch as defects and imperfections in the verdict can only be reached by a motion for a *venire de novo*. It has been held that a motion for a judgment on the verdict is the appropriate remedy,¹ and this is no doubt true where there is an absence of facts and the party having the burden is the moving party, but this doctrine can not apply to imperfec-

Works Pr. § 971, and cases cited. This has been the rule since the decision in *Graham v. State*, 66 Ind. 386, although the earlier cases declared a different rule. *Quill v. Gallivan*, 108 Ind. 235, and cases cited; *Bartley v. Phillips*, 114 Ind. 189; *Indiana, etc., Co. v. Finnell*, 116 Ind. 414. In the case of *Glantz v. City of South Bend*, *supra*, the court referred to *Bosseker v. Cramer*, 18 Ind. 44, and some other cases, and after showing that the doctrine of those cases had been denied in *Graham v. State*, *supra*, and that the later cases approved the doctrine of that case, declared in effect that the rule as stated in *Graham v. State*, *supra*, must be considered as established. The effect of the decisions has been to overrule *Bosseker v. Cramer*, *supra*. Other cases assert the doctrine of *Graham v. State*, *supra*; *Evansville, etc., Co. v. Taft* (Ind. App. Ct.), 28 N. E. Rep. 443; *Citizens' Bank v. Bolen*, 121 Ind. 301; *Wilson v. Hamilton*, 75 Ind. 71; *Louisville, etc., Co. v. Buck*, 116 Ind. 566; *Louisville, etc., Co. v. Hart*, 119 Ind. 273, 21 N. E. Rep. 753; *Bowen v. Swander*, 121 Ind. 164; *Mitchell v. Friedley*, 126 Ind. 545, 548; *Trittipio v. Morgan*, 99 Ind. 269, 271; *City of Lafayette v. Allen*, 81 Ind. 166, 169.

¹ In the case of *Louisville, etc., Co. v. Hart*, 119 Ind. 273, 277, it was said: "The court committed no error in overruling the motion for a *venire de novo*. The verdict was not defective or uncertain, but is clear and explicit as to the facts found by the jury. If it does not cover the issues in the case, or so far cover them as to entitle the appellees to a judgment, the question is not presented by a motion for a *venire de novo*, but must be presented as a reason in the motion for a new trial, or by the motion for a motion judgment upon the judgment. The question is properly presented in both ways." We think it correct to say that questions on a special verdict may, as the case from which we have quoted and other cases hold, be presented by a motion for judgment on the verdict, but we think that such a motion does not serve the purpose of a motion for a new trial. The one motion is proper where there is no question made as to the correctness of the finding and statement of the facts, whereas the other motion, that for a new trial, is, under our system, the appropriate motion in cases where the moving party desires to challenge the finding upon the ground that it is contrary to the evidence.

ns or defects in form. Where the defect is in the form or mode of stating the facts a very different method of procedure as we have indicated, essential to present and save the question of the sufficiency of a verdict for consideration on appeal.

760. The Motion for a Venire de novo as applied to a Special finding—It seems almost a perversion of language to apply the term “motion for a *venire de novo*” to a motion directed against a finding made by a judge, but usage warrants its employment when addressed to such a finding. The resemblance in essential features between a special finding and a special verdict is so close and strong that it is convenient to use a common term as applicable to both the finding of the court and the verdict of a jury. It is, at all events, quite common in this jurisdiction to apply the words “motion for a *venire de novo*” to the motion addressed to the special finding of a court.¹ What is said respecting the motion for a *venire de novo* in the paragraphs that follow is to be taken as applicable to the motion directed against special findings as well as to the motion directed against special verdicts.

61. Office of the Motion for a Venire de novo—While the system established by our decisions rejects the common law requirement that the verdict must find upon the whole matter in issue, it still retains many of the essential features of the old system. The object accomplished by a successful motion for a *de novo* is essentially the same under our system as under that of the common law; the result under both systems is, in effect, the same as that attained by a successful motion for a

Johnson v. Hosford, 110 Ind. 572, has a place in our legal terminology and should not now be cast aside. Its meaning is well known, and its application is often made to the findings of the courts as well as to the verdicts of juries. We, however, do not think that there are any defects in the special finding that a motion for a *venire de novo* will reach, for it is not uncertain or ambiguous; on the contrary, the facts are fully and clearly stated.”

new trial.¹ The difference is in the mode of procedure, not in the end reached. A motion for a *venire de novo* reached a defect in a verdict which fails to assess damages under the common law rule² and so it does under our system.³ Where, however, the amount is so fully stated that only a computation of interest is required to ascertain the damages awarded, a motion for a *venire de novo* will not prevail.⁴ If mere matters of evidence and not facts are stated in a special finding a *venire de novo* has been held to be the appropriate remedy.⁵ While it is true that objections to the form of a verdict or special finding must be presented to the trial court in the first instance, and that a motion for a *venire de novo* is the appropriate mode of presenting the objection,⁶ it is also true that the motion will fail if the verdict, although defective, is sufficient to support a judgment.⁷

§ 762. **Time of Filing the Motion**—The rule is that the motion for a *venire de novo* must be filed before judgment. The filing

¹ Peed v. Brenneman, 72 Ind. 288.

² Kynaston v. Mayor, etc., 2 Stra. 1051; Whitesides v. Russell, 8 Watts. & S. 44, 47; Miller v. Hower, 2 Rawle, 53; Neal v. Mills, 5 Blackf. 208.

³ Brickley v. Weghorn, 71 Ind. 497; Hershman v. Hershman, 63 Ind. 451; Ridenour v. Miller, 83 Ind. 208; Everroad v. Gabbert, 83 Ind. 489; Wainright v. Burrows, 1 Ind. App. 393.

⁴ Knight v. Fisher, 15 Col. 176, 25 Pac. Rep. 78; Clapp v. Martin, 33 Ill. App. 438; Buchanan v. Townsend, 80 Texas, 534, 16 S. W. Rep. 315; Gaff v. Hutchinson, 38 Ind. 341; Thames, etc., Co. v. Beville, 100 Ind. 309. Where no data are given in the verdict for the computation judgment can only be rendered for the sum stated in the verdict. Dawson v. Shirk, 102 Ind. 184. See Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. Rep. 684.

⁵ Parker v. Hubble, 75 Ind. 580; Smith v. Goodwin, 86 Ind. 300; Keal-

ing v. Van Sickie, 74 Ind. 529. See Jarvis v. Banta, 83 Ind. 528.

⁶ Bonewitz v. Wygant, 75 Ind. 41; Cottrell v. Nixon, 109 Ind. 378; Cincinnati, etc., Co. v. Washburn, 25 Ind. 259; Chaplin v. Sullivan, 128 Ind. 50; Roberts v. Lindley, 121 Ind. 56; Nicodemus v. Simons, 121 Ind. 564; Smith v. Jeffries, 25 Ind. 376; Leeds v. Boyer, 59 Ind. 289; Trout v. West, 29 Ind. 51; Carver v. Carver, 83 Ind. 368; Cincinnati, etc., Co. v. Clifford, 113 Ind. 460; Marcus v. State, 26 Ind. 101; Locke v. Merchants Nat. Bank, 66 Ind. 353.

⁷ State v. Funck, 17 Iowa, 365; Ward v. Thompson, 48 Iowa, 588; Wiggins v. City of Chicago, 68 Ill. 372; Lincoln v. Hapgood, 11 Mass. 350, 358; Merrick v. State, 63 Ind. 327; Moore v. Read, 1 Blackf. 177; Boxley v. Collins, 4 Blackf. 320; Ridenour v. Beekman, 68 Ind. 236; Lentz v. Martin, 75 Ind. 228; Trout v. West, 29 Ind. 51; Bonewitz v. Wygant, 75 Ind. 41; Peters v. Banta, 120 Ind. 416; Berghoff v. McDonald, 87 Ind. 549.

of the motion after judgment will not avail.¹ As the motion is an independent one it is necessary to reserve the proper exception at the time the ruling denying it is made.²

§ 763. **Requisites of the Motion**—It seems that good practice requires that the motion should specify with reasonable certainty the grounds upon which it is based. The true principle is that all such motions should specifically present the questions sought to be made, so that the court on appeal shall not be required to decide any other questions than those brought before the trial court. In the cases we have examined causes have been specified.³

§ 764. **Special Finding—Motion to Strike Out**—As we have seen, a motion for a *venire de novo* will not lie where the facts are well stated, and a party who desires to present the question, whether the finding is contrary to the evidence, must move for a new trial and assign the proper cause in his motion. We have also incidentally remarked that the decisions establish the rule that ordinarily a motion to strike out part of the finding will not lie, but it becomes necessary to give the subject a somewhat more careful consideration. The general rule that a motion to strike out is not a proper one may now be considered as settled,⁴ but how far the rule goes or what cases it governs has

¹ McClintock v. Theiss, 74 Ind. 200; Shaw v. Merchants Nat. Bank, 60 Ind. 83, 94; Deaty v. Shirley, 83 Ind. 218; Potter v. McCormack, 127 Ind. 439.

² In Wilson v. Hamilton, 75 Ind. 71, the overruling of the motion for a *venire de novo* was specified as an independent error and the specification was treated as proper, and so it was in Ogle v. Dill, 61 Ind. 438, 441; Bonewitz v. Wygant, 75 Ind. 41, and Locke v. Merchants Nat. Bank, 66 Ind. 353. See Shaw v. Merchants Nat. Bank, 60 Ind. 83. This seems the proper practice, inasmuch as a motion for a *venire de novo* is entirely distinct and different from a motion for a new trial.

³ In the cases referred to in the pre-

ceding note the grounds of the motion were specified. In Deatty v. Shirley, 83 Ind. 218, it was said: "The motion itself specifies no objection to the verdict. The record fails to show that any defect was pointed out to the court at the hearing."

⁴ Tarkington v. Purvis, 128 Ind. 182; Sharp v. Malia, 124 Ind. 407; La Follette v. Higgins (Ind.), 28 N. E. Rep. 768; Hartlepp v. Whitely (Ind.), 28 N. E. Rep. 535. See, also, Clark v. State, 125 Ind. 1; Hays v. Hostetter, 125 Ind. 60; Wray v. Hill, 85 Ind. 546; Levy v. Chittenden, 120 Ind. 37, 22 N. E. Rep. 92. The reporter's note to the case of Knox v. Trafalet, 94 Ind. 346, does not correctly state the point decided, for

not yet been determined. Where the ground upon which the court is asked to set aside its finding as to a particular fact is that the fact was found against the evidence, the motion can not be well taken. This we affirm for the reason that the appropriate remedy in such a case is by a motion for new trial, and the presence of the evidence in the record is necessary to enable the appellate tribunal to determine whether the fact was or was not correctly found. In the absence of the evidence it would be impossible to determine the question.

§ 765. Special Finding—Particular Facts Outside of the Issues—The cardinal and far reaching rule that questions must first be made in the trial court seems to us to require that where the special finding states particular facts clearly outside of the issues the general rule stated in the preceding paragraph does not apply, and that a motion to strike out particular facts not within the issues will lie.¹ If the illegitimate matter can not be excluded upon such a motion it is difficult to conceive what rem-

the court did not there decide that a motion to strike out was proper, although it decided that there was no error in overruling the motion. It is evident that the decision in that case can not be regarded as authoritative, for the reason that the point was not considered by the court. In the case of *Jordan v. St. Paul, etc., Co.*, 42 Minn. 172, S. C. 43 N. W. Rep. 839, 6 Law. Rep. Ann. 573, the court held that a motion to strike out part of a special verdict was improper. It was there said: "Where there is a general verdict, and also special findings, we do not think it proper practice to move to set aside one of the special findings upon an essential fact on the ground that it is contrary to the evidence, without asking to have a new trial, either of the whole issue or as to the particular fact. If such a finding could be set aside on that ground leaving the general verdict and other special findings to stand, then, if setting it aside would require a judgment different

from that which would be required if it were retained, the setting it aside on the ground stated would have the effect of a trial by the court without a jury." In speaking of a motion to strike out part of a special verdict the Supreme Court of Wisconsin said: "The two findings thus challenged are within the issues made by the pleadings, and are material to the case. We are aware of no ground upon which they can be properly rejected, unless unsupported by the testimony." *Dahl v. Milwaukee, etc., Co.*, 65 Wis. 371, 374. Under our practice, as has been shown, the findings could not be rejected upon a motion to strike out on the ground that they were contrary to the evidence; the remedy in such a case is a motion for a new trial.

¹ We are not here considering the subject of a finding bodily outside of the issues, but we are considering the subject of particular facts beyond the issues.

edy can be pursued without defeating the chief object which a special finding is intended to accomplish. It is certainly true that one of the principal objects a special finding was designed to accomplish is to enable parties to bring their cases to the appellate tribunal without the evidence. The evidence, it is manifest, can not give any light upon the question whether a particular fact is or is not within the issues, for such a question must be determined from the pleadings. It is equally clear that facts outside of the issues should not be considered. If such facts are contained in a special finding and are influential their presence is wrongful, and if their presence is wrongful they should be expelled. The familiar rule that only evidence pertinent or relevant to the issue is competent necessarily requires that particular facts not within the issues should be rejected in cases where the appropriate attack is made upon them, and we can not perceive how it can be more appropriately made than by a motion to set aside or strike out. A finding may be in due form, clear and explicit, and, if so, a motion for a *venire de novo* would be unavailing, so that the motion to strike out particular facts beyond the issues seems the only direct and effective mode of getting rid of the illegitimate facts. It must be true that the objection that particular matters are outside of the issues may be presented by a motion to strike out or else it must be true that the question must be presented by a motion for a new trial, and, as such a motion would necessitate an exhibition of evidence and rulings thereon, to require it would defeat the purpose of the law providing for special findings and uselessly cumber the record and put parties to needless expense. A motion to strike out a particular fact can be determined from the record proper, and, in truth, must be determined from that record, that is, from the pleadings and the special finding. The motion designated is not encumbered by useless appendages, and is appropriate and efficacious. We have here considered the question of a motion to strike out a particular fact, and have not considered the question of procedure where the finding is entirely outside of the issues; that is, as we conceive, quite a different question. A motion to strike out a particular fact where some of the facts are within the issues, but the particular

fact wholly without, is a very different thing from a motion to strike out facts contained in a special verdict, for a motion to strike out a particular fact contained in a special finding asks the court to review its own action, not that of the jury. It is unquestionably settled that while proceedings are *in fieri*, a court may correct its own mistakes, and we can not perceive why this rule does not apply to a motion to strike out a particular fact outside of the issues where some of the facts are within the issues joined upon the pleadings. We do not say that a court may change its decision upon a question of fact without granting a new trial as to the whole case. What we do say is that it may change a ruling by striking out a particular fact beyond the issues carried into a finding containing facts within the issue.

§ 766. **The difference between Cases where only Particular Facts are outside of the Issues and Cases where the Finding is Wholly Outside**—In the preceding paragraph we alluded in general terms to the fact that there is a difference between cases where the special finding is altogether and entirely outside of the issues and cases where only a particular fact is outside. The difference is an important one and requires consideration. If a particular fact is stated which is clearly outside of the issues, the error in stating it can not be reached by exceptions to the conclusions of law, nor by a motion for a *venire de novo*. If a motion for a new trial must be resorted to, a proceeding clearly not contemplated by the law is required, and one, as we have shown, which will uselessly encumber the record. That a party can not declare upon one cause of action, or set up one defence and succeed upon another, is, of course, perfectly clear, so that where the facts are wholly outside of the issue, it is, in legal contemplation, as if there were no facts at all in the record. Thus, if a party should sue for a breach of contract and the facts stated should show a right to damages for a personal injury, such facts would be of no avail for any purpose whatever. In such a case it would be appropriate to move for judgment or to except to adverse conclusions of law, for there would not be facts upon which valid conclusions could be stated or a valid judgment rendered. In a case like that supposed (an extreme one, but extreme cases best serve for illustrations),

he conclusions and judgment in favor of a plaintiff would be absolutely foundationless. But where part of the facts are within the issues and part without, it is radically different. Thus, if a plaintiff should sue on a promissory note, and the court in addition to stating legitimate matters concerning the note should state facts showing a right of action for damages for personal injury, the facts concerning the injury ought to be eliminated. In no mode could they be more appropriately or efficaciously eliminated than by a motion to strike out. It is possibly true that where illegitimate facts are injected into a special finding, a motion to modify the judgment based in part upon such facts would be proper, but even if it would be, the better, shorter and more appropriate remedy is the motion to strike out the particular facts not within the issues.

§ 767. Finding Wholly Outside of the Issues—Where the special finding is entirely outside of the issues, the question as to the right of recovery may be presented by a motion for judgment, or, according to the decisions in some of the cases, by a proper exception to the judgment.¹ But the safer practice in such a case for the unsuccessful party is to move for judgment, or, according to some of the decisions, to except to the conclusions of law. It is certainly consistent with the cardinal principle that objections must be first presented to the trial court, to move for judgment where the facts are entirely outside of the issues. One of the cases upon the general subject, while inferentially, if not expressly, holding that a motion for judgment is proper,

¹ In *Boardman v. Griffin*, 52 Ind. 101, the court reversed the judgment, holding that the facts contained in the special finding were entirely outside of the issues. It was said in the course of the opinion that: "When the trial of a cause is by the court, instead of a jury, whether the court is required to find the facts specially or not, it can not, any more than a jury can, go outside of the issues. In such cases, as well as in others, the parties must recover upon the allegations of the pleadings." That the case from which we have quoted asserts a correct conclusion is clear, but it is not so clear that some

of the expressions of the opinion are not erroneous, inasmuch as they seem to indicate that the question may be first made on appeal. If the case is to be regarded as declaring that such question can be first made on appeal, it is to that extent not well decided. That the special finding must be confined to the issues is well settled. *Neisler v. Harris*, 115 Ind. 560, 565; *Bixel v. Bixel*, 107 Ind. 534, 537; *Louisville, etc., Co. v. Godman*, 104 Ind. 490, 494; *Hasselmann v. Carroll*, 102 Ind. 153; *Cleveland, etc., Co. Wynant*, 100 Ind. 160; *Palmer v. Chicago, etc., Co.*, 112 Ind. 250.

erroneously disregards this fundamental principle, inasmuch as it seems to authorize the conclusion that the question may be first made on appeal. In some of the cases it is held that the question as to the right of recovery in a case where the theory of the complaining party is that the finding is wholly outside of the issues may be presented by exceptions to the conclusions of law.¹ It is, perhaps, safe to say that the remedies are cumulative, although it seems to us that where the finding is altogether beyond the issues, the more appropriate remedy is a motion for judgment. In such a case there is not simply an error in the conclusions of law upon the facts, but an error in stating facts which the issues do not embrace. As the facts are not within the issues their statement is utterly futile. If without the issues, the facts can not be used as the basis of a judgment, for a finding of facts outside of the issues is a nullity.² If such facts are nullities, they can not be regarded, much less can they support a recovery. In the case of erroneous conclusions of law upon facts within the issues, the error, where there is error, in stating conclusions of law, is radically and essentially different from the error in stating conclusions upon matters that ought not to have

¹ *Thomas v. Dale*, 86 Ind. 435, and cases cited. See, also, *Arnold v. Angell*, 62 N. Y. 508; *Town of Cicero v. Clifford*, 53 Ind. 191, 192.

² In *Brenner v. Bigelow*, 8 Kan. 496, 510, the court said: "With regard to the findings of the court, it seems scarcely necessary to say that such of the facts as are not founded upon any issue or issues made by the pleadings are mere nullities. The court can not go outside of the issues to make findings. Every finding that is outside of the issues must be disregarded. And we suppose it is hardly necessary to say that the court can not find against the facts as admitted by the pleadings." This doctrine is explicitly approved in *Mays v. Foster*, 26 Kan. 518, and *Newby v. Myers*, 44 Kan. 477. If facts beyond the issues are to be disregarded as mere nullities,—and this is required by settled principles,—there is

no conceivable reason why a motion for judgment is not appropriate where all the material facts are outside of the issues. Some general expressions in *Cruzan v. Smith*, 41 Ind. 288, seem to indicate a different doctrine, but the question was not before the court, and, of course, not authoritatively decided. It is to be said of *Cruzan v. Smith*, *supra*, that it has been disapproved upon many points. *Anderson v. Donnell*, 66 Ind. 150, 159; *Robinson v. Snyder*, 74 Ind. 110; *Lockwood v. Dills*, 74 Ind. 56. The case of *Peden v. King*, 30 Ind. 181, does not consider or decide the question under discussion, for in that case no such question was presented. All that is there decided is that exceptions must be taken to the conclusions of law where the error is in applying the law to the facts. There is no allusion to the case of a finding of facts wholly outside of the issues.

come into the record and can not be the basis of a judgment of recovery. The cases where the facts stated are wholly without the issues, and cases where the facts are within the issues, but the conclusions of law stated on them are erroneous, should be carefully discriminated, for there is a radical difference in the procedure. Where the facts stated are within the issues and the conclusions of law erroneous, the objection must, as will be more fully shown hereafter, be taken by excepting to the conclusions of law. Where the error is in stating the conclusions of law and not in stating the facts, neither a motion for a new trial nor for judgment is appropriate or effective, nor, it may be added, is a motion for a *venire de novo*.¹

§ 768. **Practice where the Judgment does not follow the Finding or Verdict**—Where the judgment does not follow the finding or verdict, the proper practice is to move to modify, correct or amend the judgment. It is probable, it is, perhaps, safe to say, that if the judgment entirely departs from the finding or verdict a specific exception to the judgment would present the question, but it is always safer to move to correct, modify or amend. This is certainly necessary where the judgment is valid in part and does not wholly depart from the finding or verdict.²

¹ This general subject is considered in the chapter on "Exceptions," *post*. See *Midland Ry. Co. v. Dickason*, 29 N. E. Rep. 775; *Hull v. Louth*, 109 Ind. 315, *Western Union Tel. Co. v. Trissal*, 98 Ind. 566.

² In the case of *Peoples, etc., Association v. Spears*, 115 Ind. 297, 300, it was said: "In case the judgment fails to follow the finding, it may be corrected, modified or amended, on motion for that purpose. Questions on such motions are saved by a bill of exceptions. *Forsythe v. Kreuter*, 100 Ind. 27; *Adams v. La Rose*, 75 Ind. 471." The court in the case first named also quoted with approval from a former decision the following: "Where any part of a judgment is valid, it will stand

unless proper steps have been taken by objection duly presented to the trial court to secure a modification or amendment by amending or rejecting the part which is wrong." The cases of *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 380, and *Becknell v. Becknell*, 110 Ind. 42, were cited. It is proper to say of the case of *People's, etc., Association v. Spears*, *supra*, that the incidental reference to the common law doctrine that a verdict must respond to the whole issue or a *venire de novo* will be awarded can not be regarded as a denial of the rule declared in *Graham v. State*, 66 Ind. 386, and reaffirmed in many other cases, for the question was not before the court for decision.

CHAPTER XI.

OBJECTIONS.

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| § 769. The difference between objections and exceptions. | § 776. Jurisdictional objections. |
| 770. Objections must be specific. | 777. Objections to pleadings. |
| 771. The grounds of the objection must appear of record. | 778. Objecting to jurors. |
| 772. Objections must be seasonably interposed. | 779. Specifying objections to evidence. |
| 773. The objection must come from the proper party. | 780. Separating competent from incompetent evidence. |
| 774. Practice where evidence is competent against one party but not against other parties. | 781. Practice where the question is proper but the answer incompetent. |
| 775. Grounds of objection should all be stated. | 782. Specification of objections to conduct of parties and counsel. |

§ 769. **The difference between Objections and Exceptions**—An objection precedes an exception.¹ The office of the objection is to present to the trial court the specific grounds upon which the court is asked to act in giving a decision, so that the court may be fully informed as to the reasons for the ruling sought by the objecting party. This is the office of the objection in the trial court, but its office in the appellate tribunal is to there present the precise questions that were presented to the trial

¹ In the case of *Brownlee v. Hare*, 64 Ind. 311, 318, it was said: "The record fails to show that the court, in terms, overruled these objections, or that the appellant excepted to any such decision. An objection is not an exception in any legal sense. An objection may not be insisted on; if overruled or sustained the party aggrieved by such ruling must except thereto at the time, in the mode prescribed by law, or he can not afterwards complain of it. It is firmly settled by the decisions of this court, that unless an exception is taken and entered in the record, at the time and in the manner prescribed by the statute, the objection will be waived." The statements of the court in the extract we have quoted show one particular—and an important one—in which an exception differs from an objection, but they do not show all the particulars in which it differs as is evident from what is said in the text.

court, as well as to inform that tribunal of the specific grounds upon which the party asks a favorable decision. The office of the objection in the trial court is to direct attention to specific points and request a ruling upon them, but its office in the appellate tribunal is to direct attention to specific points and to prevent the party from making points in the appellate tribunal that were not ruled upon by the trial court. It is evident, therefore, that an objection well made serves a double purpose on appeal. An exception is not required to present specific grounds or reasons upon which a ruling is asked, for an exception follows the ruling, while an objection precedes it and lays the foundation for the exception. As the objection constitutes the foundation for the exception it must be sufficient in form and substance to support the exception, for without such support the exception is destitute of strength. The exception does not present reasons or grounds as the objection does, but it directs attention to the objection and fastens it. The exception, one may say, clinches the objection.¹ But the principal purpose of an exception is to save a question upon an adverse ruling for review on appeal. So far as the trial court is concerned the exception is of very little practical utility as compared with its office on appeal, although in some of the early discussions on the code system it is treated as affording the trial court an opportunity to review and correct its own ruling. It is, however, true that an exception is in some instances of practical use in the trial court, for where a ruling upon an objection is not supplemented by an exception the objection is, as the case referred to in the opening sentence of this paragraph decides, effectually waived. If, therefore, a party does not follow an objection by the appropriate exception, the doctrine of waiver will operate against him. This is essentially true in cases where a review of a judgment is sought, for a ruling upon a question of law can not be reviewed unless the objection was supplemented by the proper exception.² As we have touched

¹ *United States v. Breitling*, 20 How. (U. S.) 252. *ford*, 21 Ind. 156; *American Ins. Co. v. Gibson*, 104 Ind. 336. In the case

² *Train v. Gridley*, 36 Ind. 241; *Davidson v. King*, 51 Ind. 224; *Goar v. Cravens*, 57 Ind. 365; *Preston v. San-* last named the doctrine of reviewing judgments is well stated. The court said: "The rules which govern in actions to

upon the subject of proceedings to review a judgment it may not be improper to say, although at the expense of a slight digression, that where objections and exceptions are necessary to make error available on a bill to review, the objections and exceptions must be legitimately brought into the record.¹

§ 770. Objections must be Specific—Theoretically the rule that objections must be specific is universal but practically it is only general. It is, however, a general rule of wide sweep and un-

review are, in the main, the same that govern in an appeal to this court. The errors that may be made available in an action to review are those that may be made available upon an appeal. *Rice v. Turner*, 72 Ind. 559; *Richardson v. Howk*, 45 Ind. 451; *Tachau v. Fiedeldey*, 81 Ind. 54; *Indiana, etc., Co. v. Routledge*, 7 Ind. 25; *Hardy v. Chipman*, 54 Ind. 591. It has been uniformly held that if no objection be made to the judgment and no motion made to modify it in the trial court, no objection can be made available upon appeal, nor in an action to review, however erroneous the judgment may be. This rule has been applied even where the judgment was rendered by default. *Barnes v. Wright*, 39 Ind. 293; *Darlington v. Warner*, 14 Ind. 449; *Searle v. Whipperman*, 79 Ind. 424; *Barnes v. Bell*, 39 Ind. 328; *Baldwin v. School City of Logansport*, 73 Ind. 346; *Ludlow v. Walker*, 67 Ind. 353; *Johnson v. Prine*, 55 Ind. 351; *Evans v. Feeny*, 81 Ind. 532; *McCormick v. Spencer*, 53 Ind. 550; *Smith v. Tatman*, 71 Ind. 171; *Powers v. Johnson*, 86 Ind. 298; *Forgey v. First National Bank*, 66 Ind. 123; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510." It is held in *Berkshire v. Young*, 45 Ind. 461, that where a complaint entirely fails to state a cause of action, a bill of review will lie, although there is no demurrer or exception, and in other cases this general doctrine is asserted. *Emmett v. Yandes*, 60 Ind. 548; *David-*

son v. King, 49 Ind. 338. In *Berkshire v. Young* there is an attempt to discriminate between that case and some of the earlier cases, but it is to be doubted whether the doctrine is not wholly unsound. In later cases much of the reasoning in *Berkshire v. Young* has been completely overthrown. *Scarlett v. Whipperman*, 79 Ind. 424, 425; *Tachau v. Fiedeldey*, 81 Ind. 54, 62. It is in conflict in many respects with such cases as *Jordan v. De Heur*, 71 Ind. 199, and *Teal v. Spangler*, 72 Ind. 350. The case of *Emmett v. Yandes*, *supra*, is directly overruled. *Scarlett v. Snodgrass*, 92 Ind. 262, 265; *Shoaf v. Joray*, 86 Ind. 70. Where there is no general jurisdiction of the subject, the bill will lie, as it has been held, although there was no exception. *Davis v. Perry*, 41 Ind. 305; *Anderson v. Anderson*, 65 Ind. 196.

¹ In *Gates v. Scott*, 123 Ind. 459, 462, it was said: "The error, in this respect, is not properly presented. A review can only be had for such error as would have been available in the Supreme Court on appeal, and to have made the ruling on motion for new trial available on appeal it would have been necessary to have filed a bill of exceptions within the time allowed; and it does not appear that any bill of exceptions was ever prepared, signed or filed. *Rigler v. Rigler*, 120 Ind. 431; *Baker v. Ludlam*, 118 Ind. 87."

usually free from exceptions. Where it is not entirely clear that the particular case constitutes an exception it is safe to assume that the rule prevails and that the grounds of the objection must be specifically stated.¹ Specification of the particular grounds or reasons upon which a party asks the court to make a ruling in his favor is necessary, as indicated in the preceding paragraph, to prevent a violation of the settled rule that parties must abide by the theories assumed in the trial court, and also to prevent a violation of the subsidiary doctrine that a party can not urge one point in the trial court and another on appeal.² It is also necessary to prevent a violation of the wider doctrine than either of those stated, that is, the fundamental doctrine that appellate jurisdiction is one of review. But there is still another reason why the grounds of objection should be specifically stated, and that is this: Common fairness to the adverse party requires specification, inasmuch as it is but just that he should be informed of the real nature and full force of the objections which he is required to meet and even an opportunity to obviate them. It is evident that specification is important for many reasons and that the rule requiring it is not justly subject to the censure sometimes passed upon by the courts. It is not a mere technical rule but one required by sound reason and supported by principle. The assertion that the rule is technical is as foundationless as the old

As the subject of this chapter is intended to establish the correctness and importance of the statement of the text will become almost self-evident. It may, however, be well enough to here refer to some of the cases which illustrate and enforce the statement. *Lewis v. New York, Co.*, 123 N. Y. 496, 26 N. E. Rep. 98; *Saxon v. Boyce*, 1 Bailey (So. Cal.), 66; *State v. Hope*, 100 Mo. 347, 8 Mo. Rep. Anno. 608, and note; *Shafer v. Ferguson*, 103 Ind. 90, and cases cited; *Ing v. Martin*, 8 Wall. 354; *City of Philadelphia v. Lowery*, 74 Ind. 520, S. C. 39 N. E. Rep. 98; *Ostrander v. Weber*, 114 Cal. 95, 21 N. E. Rep. 112; *Post v.*

Manhattan Ry. Co., 125 N. Y. 697; *Adams v. Irving Nat. Bank*, 116 N. Y. 606; *State v. Watson*, 81 Iowa, 380, 46 N. W. Rep. 868; *Portoues v. Holmes*, 33 Ill. App. 312; *Chicago, etc., Co. v. Nix* (Ill.), 27 N. E. Rep. 81; *Ferguson v. United States, etc., Co.*, 11 N. Y. Supp. 738; *Carter v. Bennett*, 4 Fla. 283, 337; *Smith v. White*, 5 Dana, 376.

¹ *Rush v. French*, 1 Ariz. Ty. 99, 124; *Manning v. Gasharie*, 27 Ind. 399; *Wakeman v. Jones*, 5 Ind. 454; *Hyatt v. Clements*, 65 Ind. 12; *Evans v. State*, 67 Ind. 68; *Betson v. State*, 47 Ind. 54; *Bowers v. Bowers*, 53 Ind. 430; *Grant v. Westfall*, 57 Ind. 121.

cry that the "rules of logic are the breeders of disputations nothings."

§ 771. The Grounds of the Objection must Appear of Record—It is necessary that the specific grounds of an objection should be appropriately incorporated in the record.¹ Many of the reasons given in the preceding paragraphs support the conclusion here asserted. There is, however, another cogent reason which gives it support and that is this: The appellate tribunal can

¹ In the case of *Camden v. Doremus*, 3 How. (U. S.), 515, 529, the court used this language: "With regard to the manner and the import of this objection, we would remark, that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected upon the suggestion of an exception, which did not obviously cover the competency of the evidence, nor point to some definite defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still, if, under the mask of such an objection, or mere hint at objection, a party should be permitted to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated in the record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and

nugatory, and, if entitled to weight anywhere, certainly without weight before an appellate tribunal." Very similar is the language used by the court in the case of *Russell v. Branham*, 8 Blackf. 277. "We are not informed by the record," said the court in that case. "what the particular objection was, and we can not, therefore, notice it. The defendants should have informed the circuit court of the ground of their objection, and when their motion was overruled, they should have taken care to have had such ground of objection made a part of the record." In speaking of the rule declared in the case last named, it was said, in *City of Delphi v. Lowery*, 74 Ind. 520, 522, that: "This doctrine has, by a long and unwavering line of decisions, been ingrained into our system of procedure as one of its fundamental principles. The party must state specifically his grounds of objection, and the bill of exceptions must exhibit them as stated. Unless this rule is adhered to we would often have cases where one ground of objection was stated in the court below, and another and different one urged on appeal." In *Bingham v. Walk*, 128 Ind. 164, 173, it was said: "To permit the appellants to shift their grounds of objections would be grossly unfair and contrary to the rules established by this court." Citing *Ohio, etc., Co. v. Walker*, 113 Ind. 196; *Fitzpatrick v. Papa*, 89 Ind. 17.

consider only such matters as are properly of record and as to that tribunal a matter not of record has practically no existence. It is true that in many instances, as, for illustration, in rulings upon demurrers to pleadings, the grounds of objection appear in the record proper, but it is nevertheless very often true that they must be exhibited by a bill of exceptions. Where the record proper exhibits them no bill is required, but where they are not so exhibited a bill, or its equivalent where provision is made by statute for its equivalent, is indispensably necessary to exhibit the specific objections alleged in the trial court. The rule is clear and strong that the specific objections must appear in the record as the law requires.¹ The question as to the sufficiency of an objection, as well as to the sufficiency of its exhibition by the record, generally arises in cases where objections are alleged to the admission of evidence, but the rule is by no means confined to such cases.

§ 772. Objections must be Seasonably Interposed—In strictness an objection must be made at the time action is asked of the court or proposed by it.² This is true for a reason we shall here allude to, and not simply because of the general doctrine that parties must act with promptness and vigilance, although that doctrine is not without influence. The reason to which we refer is that an exception must, as a general rule, immediately follow the ruling. If other rulings or decisions intervene the exception is, ordinarily, ineffective. The subject here alluded

¹ *United States v. McMasters*, 4 Wall. 680; *Burton v. Driggs*, 20 Wall. 125, 133; *Mays v. Fritton*, 20 Wall. 414, 418; *Gharkey v. Halstead*, 1 Ind. 389; *Curry v. Bratney*, 29 Ind. 195; *Rosenthal v. Chisum*, 1 New Mex. 637; *Fischer v. Neil*, 6 Fed. Rep. 89.

² The general rule is that a party must avail himself of the first reasonable opportunity. *Maxwell v. Hannibal, etc., Co.*, 85 Mo. 95; *Bull v. Commonwealth*, 14 Gratt. 613; *Price v. Commonwealth*, 77 Va. 393; *Harvey v. State*, 40 Ind. 516; *State v. Peak*, 85 Mo. 190; *Atchison, etc., Co. v. Stanford*, 12 Kan. 354; *McCormick v. Laughran*, 16 Neb. 87; *Crabs v. Mickle*, 5 Ind. 145; *Harrison v. Young*, 9 Ga. 359, 366. Where evidence is admitted a motion to strike out may, where there is reason for the delay, be made before the close of the evidence. *Miller v. Montgomery*, 78 N. Y. 282; *Judge of Probate v. Stone*, 44 N. H. 593; *Selkirk v. Cobb*, 13 Gray, 313. But this practice is not regarded with favor, nor can such a motion be made as a matter of right. *Gilmore v. Pittsburgh, etc., Co.*, 104 Pa. St. 275; *Gawtry v. Doane*, 51 N. Y. 84, 90.

to will be considered at another place, but it seems necessary to refer to it here in order to make our meaning clear.

§ 773. The Objection must come from the Proper Party—It is quite clear that an objection alleged by a party not entitled to interpose it is valueless.¹ Thus, a party can not object to evidence which does not affect him in any manner, although it may affect other parties to the suit or action. The general doctrine stated finds its most frequent and, perhaps, most important practical exemplification in objections to evidence made by two or more parties where it is valid only as to one. It has been held in numerous cases that an objection by two or more parties is unavailing in cases where the objection is valid only as to one of the parties. The rule that an objection by parties jointly where it is good as to only one is unavailing is an elementary one and runs throughout the whole system of procedure. It prevails in the assignment of errors, in motions of almost every class, in the filing of demurrers, in motions for judgment, and in exceptions to special findings.²

§ 774. Practice where Evidence is Competent against One Party but not against Other Parties—Where evidence is competent as against one of the parties it can not, of course, be entirely excluded,³ although it may not be effective against other parties. Its effect may be limited to the party against whom it is competent. This object may be secured by appropriately requesting the court to direct or instruct the jury to consider it only as to the party against whom it has any force or effect.⁴

¹ Carr v. Boone, 108 Ind. 241. See Heberd v. Wines, 105 Ind. 237.

² It is hardly necessary to refer to the decided cases upon this familiar doctrine, but as cases are at hand we cite them. Walker v. Popper, 2 Utah, 96; Holzman v. Hibben, 100 Ind. 338; Wilkerson v. Rust, 57 Ind. 172; Webster v. Tibbits, 19 Wis. 439; New York, etc., Co. v. Schuyler, 17 N. Y. 592; Feeney v. Mazelin, 87 Ind. 226; Robertson v. Garshwiler, 81 Ind. 463; Boyd v. Anderson, 102 Ind. 217; Estep v. Burke, 19 Ind. 87; Teter v. Hinders, 19

Ind. 93; First Nat. Bank v. Colter, 61 Ind. 153; Bosley v. National, etc., Co., 123 N. Y. 550, 557; Clark v. Lovering, 37 Minn. 120, 33 N. W. Rep. 776; Dunn v. Gibson, 9 Neb. 513.

³ Taylor v. Deverell, 43 Kan. 469, 23 Pac. Rep. 628; Pierce v. McConnell, 7 Blackf. 170; Bond v. Nave, 62 Ind. 505; Graham v. Henderson, 35 Ind. 195; Cowan v. Kinney, 33 Ohio St. 422; Edwards v. Tracy, 62 Pa. St. 374; Whitney v. Ferris, 10 Johns. 66.

⁴ See Vannoy v. Klein, 122 Ind. 416.

§ 775. **Grounds of Objection should all be Stated**—Where there are several grounds of objection they should be stated in one motion or objection. Good practice requires that parties should present all their grounds of objection in one motion.¹ Courts are under no duty to permit parties to assign grounds of objection in a series of motions, and it is unsafe to attempt to do so, since whether that course shall or shall not be permitted is, as a general rule, a matter of discretion. To be safe the grounds of objection should be embodied in one motion. Another consideration is important in this connection and that is this: where specific grounds of objection are stated the implication is that there are no others, or, if others, that they are waived.² This doctrine can not apply with the same force to objections to evidence made in the course of a trial as it does to formal written motions, but it does apply, although in a somewhat limited extent, to such objections. This we say for the reason that the particular grounds of objection must be stated to the trial court and the same grounds of objection brought before the appellate tribunal by the record. While this is true it is likewise true that a party may during the trial in rare instances supplement the particular grounds of objection first urged by additional ones. But where the objection is by a formal motion, even though the motion is addressed to evidence, the specific grounds of objection should be incorporated in one motion. As an example may be taken a motion to suppress a deposition.³ It is

¹ *Adams v. Lockwood*, 30 Kan. 373; *Pattison v. Bacon*, 12 Abb. Pr. 142, S. C. 21 How. Pr. 478; *Schlemmer v. Myerstein*, 19 How. Pr. 412; *Mills v. Thurbay*, 11 How. Pr. 114. As to reviewing objections upon cause shown, *Lovell v. Martin*, 12 Abb. Pr. 178.

² *Smith v. Bean*, 46 Minn. 138, 48 N. W. Rep. 687; *State v. Leehman* (S. D.), 49 N. W. Rep. 3; *Triggs v. Jones*, 46 Minn. 277, 48 N. W. Rep. 1113; *Commonwealth v. Mead*, 153 Mass. 284, 26 N. E. Rep. 855. See, generally, *Stratton v. Lockhart*, 1 Ind. App. 380, 27 N. E. Rep. 715; *Kansas, etc., Co. v. Hawley* (Kan.), 27 Pac. Rep. 176; *Crawford*

v. Witherbee, 77 Wis. 419, 46 N. W. Rep. 545; *Bell v. Bumstead*, 14 N. Y. Supp. 697; *Richards v. Bestor*, 90 Ala. 352, 8 So. Rep. 30.

³ As to the time of objecting to depositions, *Doane v. Glenno*, 21 Wall. 33, 35; *York Co. v. Central, etc., Co.*, 3 Wall. 107, 113; *Shutte v. Thompson*, 15 Wall. 151; *Wright v. Cabot*, 89 N. Y. 570; *Crowell v. Western, etc., Bank*, 3 Ohio St. 406, 409; *Lee v. Stowe*, 57 Tex. 444; *Bartlett v. Hoyt*, 33 N. H. 151; *Glenn v. Clore*, 42 Ind. 60; *Jones v. Doe, etc.*, 1 Ind. 109; *Hannibal, etc., Co. v. Moore*, 37 Mo. 338; *Graydon v. Gaddis*, 20 Ind. 515; *Stull v. Howard*, 26 Ind.

no doubt true that the general rule is not free from exceptions, and it is also true that it can not govern where the objections are not known to the party at the time the motion is interposed.

§ 776. **Jurisdictional Objections**—We have elsewhere shown that objections to the jurisdiction where objections are necessary to save the question must be promptly made or they will be lost by waiver.¹ It is in general true of objections to jurisdiction, as it is of other matters of procedure, that the objection must be so specific as to inform the court of the particular grounds of the objection.² The well known rule applicable to pleas or answers in abatement may be taken as indicative of the certainty required in making objections to jurisdiction.³ We have heretofore directed attention to the rule that where there is a mistake in selecting the remedy, as, for instance, in pursuing an equitable remedy when there was an adequate legal remedy, the objection must be appropriately and specifically presented in the court of original jurisdiction or it will not be available on appeal.⁴ As it seldom appears in the complaint where the defendant's place of residence is, the objection as to jurisdiction of his person must almost invariably be taken by answer where the specific ground of objection is that he is sued

456; *Robinius v. Lister*, 30 Ind. 142; *National Bank v. Dunn*, 106 Ind. 110; *Truman v. Scott*, 72 Ind. 258; *Newman v. Manning*, 89 Ind. 422; *McGinnis v. Gabe*, 78 Ind. 457.

¹ *Ante*, §§ 328, 329, 330. See, also, "Nature of jurisdictional questions." *Ante*, § 501. "Original objections to jurisdiction." *Ante*, § 502, and "Waiver." *Ante*, Part II, Chapter VI.

² *Hadley v. Gutridge*, 58 Ind. 302; *Campbell v. Swasey*, 12 Ind. 70.

³ We are, of course, not speaking of objections to jurisdiction of the general subject.

⁴ *Ante*, §§ 501, 502. See, also, § 657, "Mistaking the remedy—Making the error available." In *Crisfield v. Murdock*, 127 N. Y. 315, it was held that it

was too late to make the objection on the trial. The court said: "On the trial the point was made that the plaintiff ought not to maintain this suit because he had an adequate remedy at law, and it is again urged on appeal. In the answers of the several defendants no such objection was made. The parties having thus submitted to the jurisdiction of the court it was too late to take the objection on the trial that the plaintiff had a remedy at law." The cases of *Le Roy v. Platt*, 4 Paige, 77; *Town of Metz v. Cook*, 108 N. Y. 504; and *Baron v. Korn*, 127 N. Y. 224, were cited. In the case of *Chesapeake, etc., Co. v. Mackenzie* (Md.), 21 Atl. Rep. 690. See *Thomas v. Farley Mf. Co.*, 76 Iowa, 735, 39 N. W. Rep. 874.

in the wrong county.¹ It is, of course, clear that a defendant may successfully assail the jurisdiction of the general subject by demurrer,² although he is not bound to assail it in that mode, for it may be assailed at any stage of the proceedings. There is no difficulty in holding that where there is no general jurisdiction of the subject, as for instance, where an action of ejectment is brought in a court which has no jurisdiction whatever of the subject of titles to land, the objection may be general and may be interposed at any stage of the proceedings, but, as we have endeavored to show in former paragraphs, where there is jurisdiction over a general subject or class, there is real, if not insurmountable, difficulty in supporting such a holding. If there is general jurisdiction over actions involving the title to land the fact that the particular parcel of land lies in a county outside of the circuit does not divest the general jurisdiction of the circuit court, although it may, if the objection is opportunely made, prevent the exercise of authority in the particular instance, but to be opportune, the objection must, as we believe, notwithstanding the decisions to the contrary,³ be made in the lower court. If, for example, a plaintiff should bring an action in Floyd county for land situated in Marion county and the defendant should, without objection, submit the case for trial, we think it clear that the plaintiff would not be heard to aver that the proceeding was *coram non judice*. If he could not it is difficult to conceive how his adversary, who had assented to the jurisdiction, could make any such averment, since it is inconceivable that the proceedings can be treated as a nullity as to one party and valid as to the other.

§ 777. **Objections to Pleadings**—Where objections are made to pleadings by motion the motion should state the specific grounds upon which it is founded, and indicate with reasonable certainty

¹ *Newell v. Gatling*, 7 Ind. 147; 94 Ind. 205; *Dashing v. State*, 78 Ind. Keiser v. Yandes, 45 Ind. 174; *Day v.* 357; *Blair v. Hanna*, 87 Ind. 298. Henry, 104 Ind. 324. See *Robertson v.* ² *Toledo, etc., Co. v. Milligan*, 52 Ind. State, 109 Ind. 79. 505; *Jolly v. Ghering*, 40 Ind. 139;

³ *Dodson v. Scroggs*, 47 Mo. 285; *Loeb v. Mathis*, 37 Ind. 306. We think *Cones v. Ward*, 47 Mo. 289; *Doll v.* the doctrine of *Indianapolis, etc., Co. v.* Feller, 16 Cal. 432; *Seavey v. Maples*, Solomon, 23 Ind. 534, is the true one.

the relief sought.¹ The rule that objections must be specific is trenced upon by the provisions of the code respecting causes of demurrer, for there can be no doubt that the general causes of demurrer which the code authorizes do not always disclose the particular grounds of objection. But the rule holds good respecting demurrers in so far as to preclude a party from assigning one of the causes of demurrer and subsequently insisting upon another.² Where the cause of demurrer assigned goes to parties the rule governs and specification is required.³

§ 778. **Objecting to Jurors**—The better rule, and that sustained by the weight of authority, is that in order to make a refusal to allow a challenge for cause available for the reversal of a judgment, there must be a specification of the grounds of the challenge. It is not enough to declare in general terms that the party objects to the juror or that he challenges the juror.⁴ The

¹ *Fischer v. Coons*, 26 Neb. 400, 42 N. W. Rep. 417; *Ricketts v. Dorrell*, 59 Ind. 427; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Murphy v. Teter*, 56 Ind. 545; *Lucas v. Smith*, 54 Ind. 530; *Hay v. State*, 58 Ind. 337; *Mullendore v. Silvers*, 34 Ind. 98; *McDuffee v. Bentley*, 27 Neb. 380, 43 N. W. Rep. 123; *Latimer v. Sullivan*, 30 So. Car. 111, 8 S. E. Rep. 639. See *Pierce v. Biecknell*, 11 Kan. 262; *Meagher v. Morgan*, 3 Kan. 372.

² *Adams v. Lamson, etc., Co.*, 59 Hun. 127; *Leedy v. Nash*, 67 Ind. 311; *Nesbit v. Miller*, 125 Ind. 106; *Story v. O'Dea*, 23 Ind. 326; *Musselman v. Kent*, 33 Ind. 452; *Clough v. Thomas*, 53 Ind. 24; *Evans v. Schafer*, 119 Ind. 49; *Edwards v. Beall*, 75 Ind. 401; *Borchus v. Huntington, etc., Assn.*, 97 Ind. 180; *Bond v. Armstrong*, 88 Ind. 65; *Board v. Kimberlin*, 108 Ind. 449; *Dunn v. Tousey*, 80 Ind. 288; *Johnson School Township v. Citizens Bank*, 81 Ind. 515. The proper cause must be assigned or the demurrer will be unavailing. *Peden v. Mail*, 118 Ind. 556, 20 N. E. Rep. 493; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. Rep. 623; *Campbell v. Camp-*

bell, 121 Ind. 178, 23 N. E. Rep. 81; *Whipperman v. Dunn*, 124 Ind. 349, 24 N. E. Rep. 1045. See *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. Rep. 675; *Sargent v. Cunningham (Cal.)*, 25 Pac. Rep. 677; *Heeser v. Miller*, 77 Cal. 192; *Morris v. Beall*, 85 Ala. 598, 5 So. Rep. 252; *Marie v. Garrison*, 83 N. Y. 14.

³ *Hodge v. Drake*, 60 Hun. 577, 14 N. Y. Supp. 355; *Kelley v. Love*, 35 Ind. 106; *Van Sickle v. Erdelmeyer*, 36 Ind. 262; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Cookerly v. Duncan*, 87 Ind. 332; *Dewey v. State*, 91 Ind. 173; *Gardner v. Fisher*, 87 Ind. 369; *Williams v. State*, 87 Ind. 527.

⁴ *Drake v. State*, 53 N. J. L. 23, 20 Atl. Rep. 747; *State v. Muncrath*, 75 Iowa, 268, 43 N. W. Rep. 211; *People v. Hopt*, 4 Utah, 247, 9 Pac. Rep. 407; *Mann v. Glover*, 14 N. J. L. 195; *People v. Reynolds*, 16 Cal. 128; *State v. Knight*, 43 Me. 11; *State v. Squires*, 3 Nev. 226; *Paige v. O'Neal*, 12 Cal. 483; *Wilson v. People*, 94 Ill. 299; *People v. Doe*, 1 Mich. 451; *State v. Dove*, 10 Ired. L. (N. C.) 469; *Jones v. Butterworth*, 3 N. J. 345; *Stephenson v. Stiles*,

cases upon this question are in conflict, but the rule we have stated is the only one that is supported by principle, and it is the only one that is consistent with the decisions in analogous cases. The considerations which require the specification of the grounds of an objection apply quite as forcibly to challenges of jurymen for cause as to objections to evidence, instructions or pleadings. The spirit of the code is to secure specific statements from an objecting party and thus enable the adverse party and the court to understand the precise question involved. The record must show the objections, and, where they are based upon the statements of the juror himself, all of his examination, and not merely part of it, should be appropriately brought into the record.¹ This doctrine is in harmony with the general rule which requires that the whole of a series of instructions be brought into the record, and is the only one consistent with principle, since true principle demands that all of the information placed before the trial court shall be brought before the appellate tribunal. This principle requires that where there is evidence, whether in the form of affidavits or of oral testimony, it shall be properly carried into the record, so that the appellate tribunal may be able to understand the precise question decided by the trial court, and the grounds upon which it proceeded.²

§ 779. Specifying Objections to Evidence—It is no more than reasonable to assume that counsel who object to evidence are prepared to assign specific reasons for their objections, and it would be unreasonable to require the court in the progress of a trial to search for the grounds of objection.³ There is substantial agreement upon the general question and the authori-

3 N. J. L. 543. In *Freeman v. People*, 4 Denio, 9, 31, it was said: "When a juror is challenged for principal cause, or for favor, the ground of the challenge should be distinctly stated; for without this the challenge is incomplete and may be wholly disregarded by the court. It is not enough to say, 'I challenge for principal cause or favor,' and stop there; the cause of the challenge must be specified." Other New York

cases seem to hold a different doctrine. *Lohman v. People*, 1 N. Y. 379; *Rogers v. Rogers*, 14 Wend. 131; *People v. Mather*, 4 Wend. 229; *Mechanics, etc., Bank v. Smith*, 19 Johns. 115.

¹ *Johnson v. Holliday*, 79 Ind. 151; *Indianapolis, etc., Co. v. Pitzer*, 109 Ind. 179.

² *Lockhart v. State*, 92 Ind. 452; *Shular v. State*, 105 Ind. 289, 305.

³ *Clem v. Martin*, 34 Ind. 341, 343.

ties are very numerous.¹ The rule is qualified or limited by some of the courts, for it is the doctrine of some of the cases that where the grounds of the objection are disclosed by the evidence itself there is no necessity for specification. It seems to us that there should be no limitation or qualification of the rule. The attempt to limit creates useless exceptions, establishes arbitrary distinctions and builds up a system of particular instances. Such a system has nothing to commend it, and in practice works evil for the reason that it consumes the time of the court in determining whether a particular case is or is not within the rule. The rule is a wholesome and practical one and is not technical.²

§ 780. Separating Competent from Incompetent Evidence—Where testimony is in part competent and in part incompetent the ob-

¹ We cite a few of the many decisions upon this question: *People v. Nelson*, 85 Cal. 421, 24 Pac. Rep. 1006; *Kansas City, etc., Co. v. Smith*, 90 Ala. 25, 8 So. Rep. 43; *Smith v. McCarthy*, 33 Ill. App. 176; *Christian v. State (Ga.)*, 12 S. E. Rep. 645; *Litten v. Wright School Township*, 127 Ind. 81, 26 N. E. Rep. 567; *Stringer v. Frost*, 116 Ind. 477; *Bundy v. Cunningham*, 107 Ind. 360; *Chapman v. Moore*, 107 Ind. 223; *Ohio, etc., Co. v. Walker*, 113 Ind. 196, and cases cited. *Babb v. Missouri University*, 40 Mo. App. 173; *Everett v. Williamson*, 107 N. C. 204, 12 S. E. Rep. 187; *Abbott v. Chaffee*, 83 Mich. 256, 47 N. W. Rep. 216; *Kenosha Stove Co. v. Shedd (Iowa)*, 48 N. W. Rep. 933; *Ward v. Wilms (Colo.)*, 27 Pac. Rep. 247; *Henry v. Dean*, 6 Dak. 78; *Smith v. Morrill*, 39 Kan. 665, 18 Pac. Rep. 915; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Queen Ins. Co. v. Studebaker*, 117 Ind. 416; *Helena v. Albertose*, 8 Mont. 499; *Bulwinkle v. Cramer*, 30 So. Car. 153, 8 S. E. Rep. 689; *District of Columbia v. Woodbury*, 136 U. S. 450; *Prindle v. Campbell*, 7 Mackey (D. C.) 598; *Prather v. Ram-*

bo, 1 Blackf. 189; *Hall v. Gittings*, 1 Harr. & J. 112.

² The general subject is well discussed in *Rush v. French*, 1 Ariz. 99, where a great number of cases are cited. In the course of the opinion it was said: "The object of requiring grounds of objection to be stated which may seem to be a technicality is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it if possible, and let the case be tried on its merits. If it is objected that the form is leading, the form may be changed. If that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time; and thus appeals could be often saved, delays avoided and substantial justice administered."

ecting party must address his objection to the part that is incompetent. He can not impose upon the court the duty of lifting the bad from the good. It follows that an objection to evidence where part is competent and part incompetent may be overruled without available error, in cases where counsel interpose the objection to all the evidence.¹ The court may, if it so elects, undertake the work of effecting a separation but it is under no obligation to do so, and where there is no objection requiring the performance of a duty as a matter of right there can be, as a general rule, no available error.

§ 781. **Practice where the Question is Proper but the Answer Incompetent**—Where a question is proper it is obvious that an objection to it will be unavailing. But a proper question does not give validity to an improper answer, and there must be some mode in which the answer can be reached. That mode is by moving to strike out the incompetent answer.² Where part of the answer is competent and part incompetent, then, upon the principle stated in a former paragraph, the motion to strike out must be limited to so much of the answer as is incompetent. It may not be amiss to suggest that where the question is improper the objection should be at once interposed and addressed to the question. This is the safe practice for it is sometimes hazardous to take the chances of a favorable or

¹ *McGuffey v. McClain* (Ind. Sup. Ct.), 30 N. E. Rep. —; *Jones v. State*, 18 Ind. 39; *Pape v. Wright*, 116 Ind. 102; *Day v. Henry*, 104 Ind. 324; *City of Terre Haute v. Hudnut*, 112 Ind. 542; *Vaymire v. Lank*, 121 Ind. 1; *St. Louis, c., Co. v. Hendricks*, 48 Ark. 177, S. 3 Am. St. Rep. 220; *Pettigrew v. arnum*, 11 Md. 434, S. C. 69 Am. Dec. 2, and note; *Shatto v. Crocker*, 87 al. 629, 25 Pac. Rep. 921; *Bell v. Ken-ll (Ala.)*, 8 So. Rep. 492; *Fonville v. ate*, 91 Ala. 39, 8 So. Rep. 688; *South State*, 86 Ala. 617, 6 So. Rep. 52; *Las-er v. Simpson*, 78 Ga. 61, 3 S. E. p. 243; *Powell v. Augusta, etc., Co.*, 77 Ga. 192, 3 S. E. Rep. 757; *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. Rep. 753; *People v. Rose*, 52 Hun. 33; *Bad-ders v. Davis*, 88 Ala. 367, 6 So. Rep. 834; *Holmes v. Turners Falls Co.*, 150 Mass. 535, 23 N. E. Rep. 305; *Smoot v. Eslava*, 23 Ala. 659, S. C. 58 Am. Dec. 310; *Wallis v. Randall*, 81 N. Y. 164.

² *Gould v. Day*, 94 U. S. 405; *Barnes v. Ingalls*, 39 Ala. 193; *Jones v. State*, 118 Ind. 39, 40; *Conway v. State*, 118 Ind. 482, 485; *Bigelow v. Sickles (Wis.)*, 49 N. W. Rep. 106; *People v. Wilkin-son*, 60 Hun. 582, 14 N. Y. Supp. 827; *Shepard v. New York, etc., Co.*, 60 Hun. 584, 15 N. Y. Supp. 175.

harmless answer, inasmuch as the failure to promptly object to the question may be treated as a waiver of objection.

§ 782. **Specification of Objections to Conduct of Parties and Counsel**—The general doctrine that specific objections must be stated applies to the conduct of parties and counsel.¹ The question in such cases assumes a peculiar form, but the underlying principle is the same. A general objection in matters of procedure, it has been said, is "unworthy of consideration." This is true, not only of particular phases of procedure, but of all, for a denial of the principle is an assertion that there can be no such thing as a consistent system of procedure, and this assertion can not be made good. There is, therefore, reason for requiring a party who seeks to make the misconduct of counsel or parties available for the reversal of a judgment to specify the grounds of his objection.

¹ *Morrison v. State*, 76 Ind. 335, 343; *Coble v. Eltzroth*, 125 Ind. 429; *Tabor v. Judd*, 62 N. H. 288; *Dowdell v. Wilcox*, 64 Iowa, 721. See, generally, *Powers v. Mitchell*, 77 Me. 361; *State v. Degonia*, 69 Mo. 485. In the case first cited it was said, in speaking of objection to the conduct of counsel in argument: "The reasons for each objection or exception must be specified at the time and with reference to the end sought to be attained." What was said in *Rush v. French*, 1 Arizona, 99, 124, is applicable to all matters of trial procedure, although said with especial reference to objections to evidence. We quote from the opinion in that case, detached statements, because we can not give space for extended extracts. "Counsel are held to the grounds of objection stated at the time they call for a decision, because they are supposed to know the law of their case, and if they do not offer objections they are supposed to waive them. It is their business to be attentive on a trial and if they miss a point they must lose it. They must stand or fall upon the case they made below, for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case presented were correct or not."

CHAPTER XII.

EXCEPTIONS.

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| § 783. Nature and office of an exception. | § 790. A party must rely on his own exceptions. |
| 784. When an exception is required. | 791. Excepting to instructions. |
| 785. Time of taking exceptions. | 792. Noting exceptions to instructions. |
| 786. The exception must immediately follow the decision. | 793. Conclusions of law stated on a special finding of facts. |
| 787. The exception must be addressed to the specific ruling. | 794. Specifying error on exceptions to conclusions of law. |
| 788. Joint exceptions. | 795. Ruling on a motion for new trial. |
| 789. Exceptions can not be taken to several rulings in gross. | 796. Questioning judgments. |

§ 783. **Nature and Office of an Exception**—In the first paragraph of the preceding chapter we outlined the difference between an exception and an objection, and in doing so necessarily spoke of the general nature of an exception, but it is necessary to here mark somewhat more carefully the distinctive features of an exception inasmuch as confusion can not well be avoided without doing so. An exception, as we here employ the term “exception,” means a formal notice, or statement, following a ruling made in the formation of issues or in the progress of a trial or disposition of a cause, indicating an intention to reserve a question upon the ruling for future consideration.¹ An excep-

¹ Our code thus defines an exception: An exception is an objection taken to decision of the court upon a matter of law.” R. S. 1881, § 625. It is evident from this that an exception follows a ruling and does not precede it as does an objection. But while the statutory definition seems to imply that an exception is always an objection, the actual construction given to it does not warrant this conclusion. There are, however, cases where an exception is an objection, as, for instance, in cases of exceptions to conclusions of law stated upon a special finding of facts. Ordinarily, however, an objection precedes an exception and presents the question for decision, and the exception simply saves the question upon the ruling or decision for future consideration. In *Kleinschmidt v. McAndrews*, 117 U. S. 282, 286, the Supreme Court of the United States said: “But no exception to the ruling of a court can be

tion implies that the party who takes it intends to make the ruling available as error in a proceeding calling the judgment in review, or upon appeal. An exception is not required to be stated in formal words, for the declaration that the party excepts implies that he means to save the questions arising on the ruling or decision.¹ The law gives effect to the exception, and it is not necessary to state the specific grounds upon which it is based; that is done by the objection in all cases where an objection is required. An exception in chancery practice and in some special proceedings is a different thing from an exception in ordinary civil or criminal procedure, for the office of the latter is, as a general rule, to save questions on a ruling or decision and not to present questions for decision. Where the record proper, as in the case of demurrers to pleadings, discloses the grounds of objection the office of the exception is to give notice that questions are saved or reserved, and in such cases the record proper exhibits the grounds upon which the exception rests. but where the record proper does not exhibit the specific grounds of objection, an exception performs no useful function unless there is a preceding motion or objection stating specific grounds of objection. Nor will such an objection be available unless the specific grounds of objection, the ruling thereon and the matters essential to a full understanding of the decision are brought into the record as the law requires. The failure to opportunely except where an exception is required is always an effective waiver.

§ 784. When an Exception is Required—An exception must be taken in all cases save those in which the questions are such as

taken until after it is made, and it is plain, therefore, that what is meant by the section of the code referred to is, that the exception must be to some decision or ruling of the court, occurring before the final judgment is rendered, and not that the exception must be taken before the decision excepted to has been made."

¹ Our code provides that: "No particular form of exception is required." R. S. 1881, § 627. This statement expresses the general rule. The law gives force to an exception and the implication always is that the exceptor challenges the correctness of the ruling or decision and intends to subsequently make the ruling a ground for assailing the judgment.

may be first made on appeal.¹ We have elsewhere considered the subject of first making questions on appeal.² It is only necessary to say here that where there is no cause of action or no jurisdiction, there is no necessity for reserving an exception. The case of a judgment by default falls within this general classification, for in such cases jurisdiction of the person must appear from the record. In the event of a failure to show jurisdiction of the person in the case of a judgment by default, the inference is that jurisdiction did not exist. But, as we have elsewhere shown, where the record shows notice, although defective or irregular, the inference of want of jurisdiction does not necessarily arise, but it does arise where there is an entire absence of notice.³

§ 785. **Time of Taking Exceptions**—There is only one time at which an exception can be effectively taken and that is at the time the ruling is made.⁴ It is one thing to except and quite another to secure time in which to reduce an exception to writing. Time may be given in which to reduce an exception to writing, but time can not be given in which to except.⁵ It is held, and with

¹ The decisions upon this question are so numerous and the rule so firmly established that we regard it as unnecessary to cite them.

² *Ante*, Chapter XXIII.

³ *Ante*, §§ 328, 334, inclusive.

⁴ *City of La Porte v. Organ* (Ind. App.), 30 N. E. Rep. 2; *Hull v. Louth*, 109 Ind. 315; *Sohn v. Marion Gravel Road Co.*, 73 Ind. 77; *Goodwin v. Smith*, 72 Ind. 113; *Horner v. Hoadly*, 37 Ind. 600; *Cincinnati, etc., Co. v. Leviston*, 97 Ind. 488; *Alcorn v. Morgan*, 77 Ind. 184; *Rhine v. Morris*, 96 Ind. 81, and cases cited; *Boyce v. Gramam*, 91 Ind. 420; *Blacketer v. House*, 67 Ind. 414; *Leyner v. State*, 8 Ind. 490; *Johnson v. Bell*, 10 Ind. 363; *Newlon v. Wyner*, 128 Ind. 466, 27 N. E. Rep. 168; *State v. Probasco*, 46 Kan. 310, 26 Pac. Rep. 749; *Fifth Avenue Bank v. Webber*, 7 Abb. N. C. 1; *Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. Rep. 754; *Spoon-*

er v. Handley, 151 Mass. 313, 23 N. E. Rep. 840; *State v. Meyers*, 99 Mo. 107, 12 S. W. Rep. 516; *Turner v. Yates*, 16 How. (U. S.) 14, 29; *Stewart v. Huntington Bank*, 11 Sergt. & R. 267, S. C. 14 Am. Dec. 628; *Hunnicut v. Peyton*, 102 U. S. 333, 354; *United States v. Carey*, 110 U. S. 51; *Bull v. Commonwealth*, 14 Gratt. 613; *Watson v. Smith*, 28 Tex. App. 34, 12 S. W. Rep. 404; *Comparet v. Hedges*, 6 Blackf. 416; *Gallagher v. Southwood*, 1 Kan. 143.

⁵ In *Coan v. Grimes*, 63 Ind. 21, 26, it was said: "It is claimed that it was within the discretion of the court to grant leave to the appellant to except, after the decision was made, and that the denial of such leave was an abuse of discretion. We think that the court had no such discretion. The statute is mandatory. The party objecting must except at the time the decision is made. It would have been error, if the court

reason, that the exception must follow the ruling challenged, and that notice in advance of an intention to except is not sufficient.¹

§ 786. **The Exception must Immediately Follow the Decision**—The purpose of an exception is to give the court and the adverse party notice that the exceptor intends to hold to his objections to the particular ruling. It is, therefore, essential that the exception should be taken before other rulings are made. This doctrine was long since declared.² It is to be understood that the exception is generally directed to the ruling and not to an act, event, or occurrence. Thus, if a court should send a bailiff into the jury room to instruct the jury, the objection is opportune if promptly made upon a discovery of the error and an exception to a ruling denying a new trial would save the question, provided the motion specifies the proper cause. So, if jurors misconduct themselves, the objection made immediately after the discovery of the misconduct would be saved by an appropriate motion for a new trial, followed by a proper exception.³ But when a ruling is announced the exception must be at once taken. Thus, where a ruling on demurrer is made, the exception must be taken at the time.⁴ So, where a

had allowed the appellant over the appellee's objection to except to the decision two days after it was made." *Kopelke v. Kopelke*, 112 Ind. 435; *Weis v. City of Madison*, 75 Ind. 241; *Kinsey v. Satterhwaite*, 88 Ind. 342.

¹ *Gregory v. Dodge*, 14 Wend. 593, affirming the decision reported in 4 Paige, 557.

² The court in *Jones v. Van Patten*, 3 Ind. 107, declared that it "is a well established rule that erroneous steps in the progress of a cause are waived, unless excepted to before additional steps are taken." This doctrine was expressly approved in *Dickson v. Rose*, 87 Ind. 103; *Corey v. Rhineheart*, 7 Ind. 291; *Wheeler v. State*, 8 Ind. 113; *Horn-*

berger v. State, 5 Ind. 300; *State v. Bartlett*, 9 Ind. 569.

³ *Polin v. State*, 14 Neb. 540; *Barlow v. State*, 2 Blackf. 114; *Henning v. State*, 106 Ind. 386, 393.

⁴ *Niven v. Burke*, 82 Ind. 455; *Fox v. Town of Monticello*, 83 Ind. 483; *Burkham v. Burk*, 96 Ind. 270; *Brownlee v. Goldthait*, 73 Ind. 481; *State v. Mustard*, 80 Ind. 280; *Wales v. Miner*, 89 Ind. 118. In the case of the *American Insurance Co. v. Yearick*, 78 Ind. 202, at the time the ruling upon demurrer was announced, no exception taken, at the next term the party who demurred declared that he would not amend, but would abide by his complaint, and it was held that no question was presented, although he then excepted.

ruling is made upon evidence, the time for excepting is the time the ruling is declared.

§ 787. The Exception must be Addressed to the Specific Ruling—

An exception must be directed against a designated ruling. A party can not except to one ruling and make his exception available against others. This is true although the ruling to which the exception is addressed may include the one sought to be brought under review.¹

§ 788. Joint Exceptions—Where two or more parties unite in an exception it must be well taken as to all or it will be unavailing.² This doctrine is, as we have shown at another place, one of wide scope. The rule is necessary for the sake of consistency, and rests on principle.

§ 789. Exceptions can not be Taken to Several Rulings in Gross—To be effective an exception must be taken to each ruling as it is made.³ True principle requires that exceptions be so taken that there shall be no doubt as to the specific ruling sought to be reserved for review and no necessity to hunt for it during the progress of the cause.⁴ The practice of taking obscure or general exceptions has been strongly condemned.⁵

¹ *State v. Weaver*, 123 Ind. 512; *Bouknight v. Brown*, 16 So. Car. 155, 164; *State v. Turner*, 18 So. Car. 103, 104; *McDaniel v. Stokes*, 19 So. Car. 60, 61; *Lewis v. New York, etc., Co.*, 123 N. Y. 496.

² *Bosley v. National, etc., Co.*, 123 N. Y. 550, 556; *Murray v. Usher*, 117 N. Y. 542.

³ *Wilson v. Wolfer*, 8 Ind. 398. In *Leyner v. State*, 8 Ind. 490, 493, it was said: "Exceptions are not to be thus taken in gross to several rulings; the exception must be taken to each ruling as it arises on the trial." *Johnson v. McCulloch*, 89 Ind. 270, 273, asserts the same doctrine, and so does *Western Union Tel. Co. v. Trissal*, 98 Ind. 566, 570. In *Walter v. Walter*, 117 Ind. 247, the rule was thus stated: "Exceptions

must be taken to each ruling separately."

⁴ *Carroll v. Little*, 73 Wis. 52, 40 N. W. Rep. 582; *State v. Leaver*, 62 Wis. 387, 22 N. W. Rep. 576; *Buffalo, etc., v. Phillips*, 67 Wis. 129, 30 N. W. Rep. 295. In the case of *Crocker v. Currier*, 65 Wis. 662, 27 N. W. Rep. 825, it was held that exceptions taken before a referee must be renewed in the trial court or they will not be available on appeal.

⁵ In *Turner v. People*, 33 Mich. 363, 382, it was declared that: "The practice of taking general and obscure exceptions at the moment, in order to enable counsel on subsequent critical examination to raise points under the exceptions which have never been suggested at all to the minds of the judge,

§ 790. **A Party must Rely on His own Exceptions**—A party must rely on the exceptions he himself takes.¹ He can not make those taken by his adversary available. It is but fair to the court that it should know from what quarter the exception comes, for the character and effect of an exception depend in no small degree upon the party by whom it is taken.

§ 791. **Excepting to Instructions**—A party is not bound to object to instructions, but he is required to opportunely and appropriately except to them. It has been finally held by our court, after much wavering, that the exception must be taken to each instruction.² This was the original doctrine of the court,³ but it was departed from. It is the doctrine sustained by the great weight of authority.⁴ The rule respecting the specification of instructions given has been applied, and rightly as we think, to the refusal to give instruction, the court adjudging

is objectionable on many grounds, and is contrary to the theory upon which points are allowed to be raised on exceptions." See, also, *Bain v. Whitehaven, etc., Co.*, 3 H. L. Cases, 1, 16; *Jones v. Osgood*, 2 Selden, 233; *Insurance Co. v. Lea*, 21 Wall. 158; *Adams v. State*, 25 Ohio St. 584, 587. Where an exception is not preceded, as it usually is, by specific objections, there must, as a general rule, be specification, but as we have heretofore shown, where the preceding objection or motion makes the proper specification a general exception is all that is required.

¹ *Amonett v. Montague*, 63 Mo. 201; *Bingham v. Stage*, 123 Ind. 281.

² *Ohio, etc., Co. v. McCartney*, 121 Ind. 385, 387; *Wallace v. Exchange Bank*, 126 Ind. 265, 26 N. E. Rep. 175.

³ *Garrigus v. Bennett*, 9 Ind. 528; *Elliott v. Woodward*, 18 Ind. 183; *State v. Bartlett*, 9 Ind. 569; *Branham v. State*, 11 Ind. 553. The doctrine of such cases as *Bartholomew v. Langsdale*, 35 Ind. 278, has been tacitly re-

pudiated in practice and it is expressly denied in *Ohio, etc., Co. v. McCartney*, 121 Ind. 385. See, also, *Jones v. Layman*, 123 Ind. 569.

⁴ *Beavor v. Taylor*, 93 U. S. 46; *Rogers v. The Marshall*, 1 Wall. 644; *Harvey v. Tyler*, 2 Wall. 328; *Walsh v. Kelly*, 40 N. Y. 556; *Lincoln v. Claffin*, 7 Wall. 132; *Burton v. West Jersey, etc., Co.*, 114 U. S. 574; *Connecticut, etc., Co. v. Union Trust Co.*, 112 U. S. 250, 261; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. Rep. 209; *Block v. Darling*, 140 U. S. 234; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. Rep. 664; *State v. McDuffie*, 107 N. C. 885, 12 S. E. Rep. 83; *Young v. Youngman (Kan.)*, 25 Pac. Rep. 209; *Wallace v. Williams*, 59 Hun. 528, 14 N. Y. Supp. 180; *Hickam v. People (Ill.)*, 27 N. E. Rep. 88; *McFeters v. Pierson*, 15 Col. 201, 24 Pac. Rep. 1076; *Edgell v. Francis*, 86 Mich. 232, 48 N. W. Rep. 1095; *Nelson v. Warren (Ala.)*, 8 So. Rep. 413; *Everett v. Williamson*, 107 N. C. 204, 12 S. E. Rep. 187.

that exceptions must be specifically directed to particular instructions.¹

§ 792. **Noting Exceptions to Instructions**—Our code provides that exceptions to instructions may be noted by "writing on the margin or at the close of each instruction refused and excepted to, or given and excepted to, which memorandum shall be signed and dated by the judge."² It has been held under this provision that instructions may become part of the record, if the terms prescribed are complied with, without a bill of exceptions.³ In order that the instructions may become a part of the record it must appear that they were filed.⁴ It is to be observed that this mode of bringing instructions into the record is not an exclusive one, for they may be brought into the record in other modes, and they are often brought in by a bill of exceptions.⁵ It is said by an author of excellent standing, in speaking of one of the early cases⁶ that, "The present statute, as we have seen, conforms to the case first cited, and an exception signed by the party or his attorney would not now be available."⁷

§ 793. **Conclusions of Law Stated on a Special Finding of Facts**—It is now quite well settled that the proper mode of questioning

¹ *Carroll v. Williston*, 44 Minn. 287, 46 N. W. Rep. 352; *Stitt v. State*, 91 Ala. 10, 8 So. Rep. 669; *Walker v. State*, 91 Ala. 32, 76, 9 So. Rep. 87; *Read v. Nichols*, 118 N. Y. 224, S. C. 7 Law. Rep. Anno. 130; *State v. Adamson*, 43 Minn. 196, 45 N. W. Rep. 152. See *McCart v. Squire*, 150 Mass. 484, 23 N. E. Rep. 323.

² R. S. 1881, § 535.

³ In *Lower v. Franks*, 115 Ind. 334, 338, the court said: "These memorandums, signatures and indorsements brought the instructions into the record, under the provisions of section 535, R. S. 1881, without a formal bill of exceptions and without any order of the court making them a part of it. *Childress v. Callender*, 108 Ind. 394; *Fort Wayne, etc., Co. v. Beyerle*, 110

Ind. 100." See, also, *Silver v. Parr*, 115 Ind. 113. The date must be stated. *Behymer v. State*, 95 Ind. 140; *Childress v. Callender*, *supra*, p. 396. See *Craig v. Frazier*, 127 Ind. 286.

⁴ See the cases cited in the preceding note, and, also, *Blount v. Rick*, 107 Ind. 238; *Landwerlen v. Wheeler*, 106 Ind. 523; *Olds v. Deckman*, 98 Ind. 162; *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *Elliott v. Russell*, 92 Ind. 526; *O'Donald v. Constant*, 82 Ind. 212; *Marquadt v. Sieberling*, 121 Ind. 307; *Eslinger v. East*, 100 Ind. 434; *Louisville, etc., v. Wright*, 115, Ind. 378, 394.

⁵ *Newby v. Warren*, 24 Ind. 161; *Burk v. Andis*, 98 Ind. 59.

⁶ *Cross v. Pearson*, 17 Ind. 612.

⁷ 1 *Work's Practice*, § 796.

the correctness of the conclusions of law stated by the court upon a special finding of facts is by excepting, at the time,¹ to each of the conclusions. The validity of the conclusions is not reached by a motion for judgment nor by a motion for a new trial,² but the correctness of the decisions upon questions of facts must be challenged, as elsewhere shown, by a motion for a new trial. The exceptions should be addressed to the conclusions of law³ and not to the findings of facts, for exceptions to the findings of facts are ineffective.⁴ A motion for a new trial calls in question, if properly framed, the correctness of the findings of facts, but it does not challenge the correctness of the conclusion stated on the facts.⁵ An exception to the conclusions of law concedes, for the purposes of the exception, that the facts are correctly found,⁶ but an exception does not cut off a motion for new trial.⁷ The exception properly precedes the motion and concedes for the purpose of securing a decision upon the facts stated in the finding that the facts are found as the evidence requires, but after the exception is entered a motion for a new trial

¹ Time is an essential consideration. *Hull v. Louth*, 109 Ind. 315. In the case cited it was said: "It is settled by the decisions of this court, that in order to save any question for review here, in a case like this, an exception to the conclusions of law must be taken at the time the decision is made." The court cited *Smith v. McKean*, 99 Ind. 101; *Kolle v. Foltz*, 74 Ind. 54; *Johnson v. Bell*, 10 Ind. 363; *Dickson v. Rose*, 87 Ind. 103; *Cincinnati, etc., Co. v. Leviston*, 97 Ind. 488.

² *Grimes v. Duzan*, 32 Ind. 361; *Ohio, etc., Co. v. Hays*, 35 Ind. 173; *Lynch v. Jennings*, 43 Ind. 276; *Montmorency, etc., Co. v. Rock*, 41 Ind. 263; *Schmitz v. Lauferty*, 29 Ind. 400; *Martin v. Cauble*, 72 Ind. 67; *Peden v. King*, 30 Ind. 181; *Board v. Newman*, 35 Ind. 10; *Cruzan v. Smith*, 41 Ind. 288; *Rose v. Duncan*, 43 Ind. 512; *Rathburn v. Wheeler*, 29 Ind. 601; *Smith v. Davidson*, 45 Ind. 396; *Luirance v. Luirance*,

32 Ind. 198; *City of Logansport v. Wright*, 25 Ind. 512.

³ The correctness of a conclusion of law is tested by an exception and a motion for a new trial is not necessary to present questions upon the conclusions. *Rathburn v. Wheeler*, 29 Ind. 601.

⁴ *Gardner v. Case*, 111 Ind. 494, citing *Ex parte Walls*, 73 Ind. 95; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Dodge v. Pope*, 93 Ind. 480.

⁵ *Bundy v. McClarnon*, 118 Ind. 165; *Clayton v. Blough*, 93 Ind. 85.

⁶ *Fairbanks v. Meyers*, 98 Ind. 92; *Wynn v. Troy*, 109 Ind. 250; *Bass v. Elliott*, 105 Ind. 517; *Helms v. Wagner*, 102 Ind. 385; *Hartman v. Aveline*, 63 Ind. 344; *Gregory v. Van Voorst*, 85 Ind. 108; *Kurtz v. Carr*, 105 Ind. 574; *Warren v. Sohn*, 112 Ind. 213; *Schindler v. Westover*, 99 Ind. 395.

⁷ *Robinson v. Snyder*, 74 Ind. 110; *Dodge v. Pope*, 93 Ind. 480; *Bertelson v. Bower*, 81 Ind. 512.

may be made.¹ Exceptions to conclusions of law should be taken by the party before he takes any other steps in the case, for if he takes other steps his exception will, as a general rule, be ineffective,² but he will not lose the benefit of his exception if he is otherwise entitled to hold it because of steps taken by the adverse party before his exception is taken.³ The exception is shown to be timely if it appears in the same entry as that in which the special finding is contained.⁴

§ 794. Specifying Error on Exceptions to Conclusions of Law—Where an exception to a conclusion of law is well reserved in the trial court it is sufficient on appeal to specify as error that the trial court erred in its conclusions of law. Such a specification does not, however, present any question that requires for its presentation to the trial court a motion for a new trial. Where a ruling on a motion for a new trial is the one which presents the questions that ruling must be specified as error.

§ 795. Ruling on a Motion for New Trial—An exception to a ruling upon a motion for a new trial is as essential as to any other ruling.⁵ A general exception is all that is required. The exception taken to the ruling on the motion brings up for review all the questions properly saved and reserved during the trial, provided the motion appropriately specifies the rulings of which complaint is made. An exception to a ruling upon a motion for new trial does not, however, take the place of exceptions to rulings made relative to matters of trial procedure or to rulings on the trial, as each ruling as it is made must be excepted to at the time.⁶ At common law, no exception would

¹ *Ante*, §§ 757, 760. *Long v. Williams*, 74 Ind. 115; *Hess v. Hess*, 119 Ind. 66, 68. As to effect of granting motion for new trial, *State v. Templin*, 122 Ind. 235.

² *Dickson v. Rose*, 87 Ind. 103; *Smith v. McKean*, 99 Ind. 101.

³ *Helms v. Wagner*, 102 Ind. 385.

⁴ *Western Union Tel. Co. v. Trissal*, 98 Ind. 566. See *Clark v. Deutsch*, 101 Ind. 491; *Bodkin v. Merit*, 102 Ind. 293.

⁵ *Irwin v. Anthony*, 8 Ind. 470; *Hen-*

ley v. McNoun, 76 Ind. 380; *Mansur v. Churchman*, 84 Ind. 573.

⁶ The exception to the ruling on a motion for a new trial saves questions upon the immediate ruling and upon such rulings as were made during the trial and appropriately excepted to at the time, and where leave is obtained during the term to reduce the exceptions to writing, all such rulings may be exhibited in one bill of exceptions.

lie to a ruling upon a motion for a new trial, as the granting or refusal of such a motion was considered a matter of discretion. But, under our code, and under the codes of many of the States, an exception may be taken. An exception to a ruling upon a motion for new trial presents questions in some instances not presented by exceptions taken before or during the trial, as for instance, that upon newly discovered evidence or that upon the sufficiency of the evidence to sustain the finding or verdict. But, as will be shown in a subsequent chapter, a motion for a new trial is necessary in many cases to preserve and make available exceptions taken before or during the trial, inasmuch as it is the vehicle which conveys to the court an opportunity to review its rulings. As an exception must be taken to each ruling, it results that an appeal does not operate as an exception, and so it has been held.¹

§ 796. Questioning Judgments—It is true in a general sense that all exceptions properly taken do question the validity of a judgment, inasmuch as the ulterior purpose of entering an exception is to make it available as one of the steps essential to

Pitzer v. Indianapolis, etc., Co., 80 Ind. 569; *Harrison v. Price*, 22 Ind. 165. It seems to us that the ruling on the motion is made. *Ryman v. Crawford*, 86 Ind. 262, 266; *Dickson v. Lambert*, 98 Ind. 487, 494; R. S. 1881, § 626; *Vogel v. Harris*, 112 Ind. 494.

¹ *Missouri, etc., Co. v. Chicago, etc., Co.*, 132 U. S. 191; *Hallock v. Portland*, 8 Ore. 29; *Kearney v. Snodgrass*, 12 Ore. 311; *Bird v. Dansdale*, 2 Binn, 80, 90; *Whitehurst v. Pettipher*, 105 N. C. 40; *United States v. Jarvis*, 3 Wood & M. 225; *McLanahan v. Universal Ins. Co.*, 1 Pet. 169, 183; *Miller v. Baker*, 20 Pick. 217, 285; *Johnson v. Macon*, 1 Wash. (Va.), 4; *Rex v. Mawbey*, 6 Term Rep. 619, 638; *Smith v. Frampton*, 2 Salk. 644, n; *Calcraft v. Gibbs*, 5 Term Rep. 19, 20. This rule prevails in some of the code States. *St. John v. West*, 4 How. Pr. 329; *State v. Fitzhugh*, 2

Ore. 227, 236; *Onondaga, etc., Co. v. Minard*, 2 N. Y. 98.

² *Timmons v. McOnnoughhay*, 8 Ind. 483, citing *Young v. McLane*, 8 Ind. 357 and *Zehnor v. Beard*, 8 Ind. 96. It seems to us that the ruling that the taking of an appeal does not operate as an exception is right, for several reasons; one is, that it can not be ascertained what particular ruling is objected to. Another is that an appeal brings up an entire case and specific rulings can not be made available in that mode, and still another is that a proposal or offer to appeal would not be available as an exception in a suit for the review of a judgment or decree. It may be observed of the reason last stated that, as elsewhere shown, the decisions place appeals and proceedings to review upon substantially the same footing, so far as exceptions are concerned.

secure the reversal of the judgment in the particular case. But such exceptions, while operating upon the judgment, do not do so in such a sense as to enable a party to secure the modification or amendment of the judgment or decree. Where objections are interposed and exceptions duly taken they will avail, if effective, for the reversal of the judgment, but exceptions taken to rulings during the trial do not reach a defect or error in the form or substance of the judgment itself. It has, indeed, been held that no exception to a judgment is proper.¹ This is undoubtedly true where the term "exception" is used in the sense ordinarily assigned to it in code procedure, but the term is sometimes employed in a different sense. It is sometimes used as designating an objection to a judgment or decree, and when so used it expresses quite a different meaning from what it does when employed, as it ordinarily is, to denote the purpose of a party to subsequently make the ruling available as error. The proper mode, as we believe, of questioning a judgment is by moving to modify or amend and reserving an exception to the ruling on the motion. This is the established doctrine in this jurisdiction,² but a different rule is sanctioned by the decisions of other courts.³ General objections are, as

¹ *State v. Swarts*, 9 Ind. 221. The cardinal principle of appellate procedure that there should be a ruling upon a question well presented to the court of original jurisdiction, and an exception to that ruling, supports the general doctrine of the case cited. Where the trial court simply formulates and enters a judgment, an exception to the judgment in general terms presents no precise question demanding a decision and is not sufficient, for in order to secure the decision of a question it is necessary that there should be a motion or objection containing appropriate specifications.

² *Ante*, § 345. *State v. Wood* (Sup. Ct. of Ind.), 30 N. E. Rep. —; *Mansfield v. Shipp*, 128 Ind. 55, 58; *Kissel v. Anderson*, 73 Ind. 485; *People's Savings Association v. Spears*, 115 Ind. 297; *Berkey, etc., Co. v. Hascall*, 123 Ind.

502; *Adams v. La Rose*, 75 Ind. 471; *Wilkerson v. Rust*, 57 Ind. 172; *Baker v. Horsey*, 21 Ind. 246; *O'Brien v. Peterman*, 34 Ind. 556; *Rardin v. Walpole*, 38 Ind. 146; *Quill v. Gallivan*, 108 Ind. 235.

³ *Vreton v. Beltezore*, 17 Neb. 399; *Black v. Winterstein*, 6 Neb. 225; *La Fayette Bank v. Buckingham*, 12 Ohio St. 419; *Morrow v. Sullender*, 4 Neb. 374; *Parratt v. Neligh*, 7 Neb. 456; *Jones v. Null*, 9 Neb. 253. We are unable to escape the conclusion that the doctrine of the cases in this note is in conflict with the general principle that only objections presented to the trial court can be considered on appeal. It seems to us, also, that it is in conflict with the fundamental principle of appellate procedure that the court of original jurisdiction should be given an opportunity to obviate or rectify its own errors. It

we think, insufficient.¹ A trial court is entitled to be informed of the precise questions it is required to decide, and the appellate tribunal will only consider those questions. It will, indeed, consider the questions upon the objections presented to the trial court and no others.² Exceptions duly reserved upon objections made during the progress of the cause are, of course, saved, if other proper steps are taken, without an exception to the judgment.

may be further said that the doctrine of the cases cited is in conflict with the rule upon the subject of presumptions.

¹ In *Atkisson v. Martin*, 39 Ind. 242, it was said: "Conceding that the exception to the judgment might well be taken without a bill of exceptions, still there must have been some pointing out of the objection to the judgment as rendered." In *Walter v. Walter*, 117 Ind. 247, 250, a general objection to a judgment was held insufficient, the court saying: "There is an objection to the form of the judgment and an exception, but the objection is a general one. It does not point out wherein the judgment was improper." In *Sanxay v. Hunger*, 42 Ind. 44, and in *Hormann v. Hatmetz*, 128 Ind. 353, 358, the doctrine stated in the text is explicitly affirmed. It was adjudged in *Adams v. La Rose*, 75 Ind. 471, 475, that a bill of exceptions is necessary to present the question. It was there said: "There is no bill of exceptions in the record, showing any exceptions to the form or substance of the decree, or the grounds of objection or exception if any were ever made. The recitals of the clerk

following of the decree that objection was made and exception taken to the ruling thereon are not evidences of the fact. *Bayless v. Glenn*, 72 Ind. 5; *Douglass v. State*, 72 Ind. 385; *Teal v. Spangler*, 72 Ind. 380."

² The doctrine is thus stated in *Smith v. Huntley*, 48 Mich. 352: "The exception relied upon is a general exception to the judgment. It is now claimed that error appears by a comparison of the judgment with the declaration and bill of particulars; in this way, that by comparison, the judgment is shown to be more than could have been regularly given under the bill of particulars. But nothing appears by the record to show that the attention of the court was ever called to such question, or that he ever saw the bill of particulars. We review only the rulings of the circuit judge, and to enable the party to raise the question, he should either have obtained special findings which he could then claim do not support the judgment, or he should have had a ruling upon the point and taken his exception to the ruling."

CHAPTER XIII.

BILLS OF EXCEPTIONS.

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| <p>§ 797. Object of a bill of exceptions.</p> <p>798. The duty of settling a bill of exceptions is judicial.</p> <p>799. By whom the bill should be signed.</p> <p>800. Time within which the bill may be signed.</p> <p>801. How the order extending time must be shown.</p> <p>802. Presenting the bill to the judge.</p> <p>803. Time can not be extended after the close of the term.</p> <p>804. Bills filed in term.</p> <p>805. Filing after term.</p> <p>806. Form of the bill.</p> <p>807. Requisites of the bill—General doctrine.</p> <p>808. Stating the exceptions.</p> <p>809. Facts on which exceptions are based must be stated.</p> <p>810. Duty of the trial judge.</p> <p>811. Effect of the statements and recitals of the bill.</p> <p>812. Making error apparent.</p> <p>813. Rulings made in the formation of issues.</p> | <p>§ 814. Collateral motions.</p> <p>815. Recitals in direct motions.</p> <p>816. Rejected pleadings.</p> <p>817. Instruments that may be brought into the record by a bill of exceptions.</p> <p>818. Making written instruments part of the bill by reference—General rule.</p> <p>819. Instruments once properly in the record need not be copied in the bill.</p> <p>820. Oral evidence.</p> <p>821. Stenographer's report of the evidence.</p> <p>822. Making stenographer's report part of the bill.</p> <p>823. The rule where all the evidence must be in the record.</p> <p>824. The general recital not always controlling.</p> <p>825. Amendment of bills of exceptions.</p> <p>826. Application for the order to amend.</p> |
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§ 797. Object of a Bill of Exceptions—A bill of exceptions is necessary to bring into the record matters which are not parts of the record proper.¹ There is no necessity for a bill of excep-

¹ In *Young v. Martin*, 8 Wall. 354, 357, it was said: "It is true, as stated by counsel, that the object of a bill of exceptions is to make matter of record what would not otherwise appear as such, and that no bill is necessary where the error alleged is apparent upon the record." In *Gavin v. State*, 56 Ind. 51, the following definition of a bill of exceptions was adopted: "A formal statement in writing, of exceptions taken to the opinion, decision or direction of a judge delivered during the trial of a cause, setting forth the proceedings on the trial, the opinion or decision given, and the exception taken

tions where the record proper exhibits the exceptions in due form, the grounds upon which the ruling or decision proceeds, and the decision. The object of the bill is to present for review questions not presented by the record proper, so that the question whether a bill of exceptions is required is to be determined by ascertaining whether the matters involved are fully presented by the intrinsic record, that is, by the record composed of the elements made necessary by law to the record proper.¹

§ 798. **The Duty of Settling a Bill of Exceptions is Judicial**—We have incidentally shown that the duty of framing and settling a bill of exceptions is judicial,² but the important influence exerted by this doctrine makes it necessary to consider the subject somewhat more carefully. We do not mean to be understood as declaring that the judge who grants the bill must prepare it; we mean simply that he must settle it and cause it to express the truth. It must embody the facts as, in his judgment, they exist; he can not delegate his authority nor can he substitute the judgment of any other person for his own.³ It is the duty of counsel to prepare and tender the bill, but it is the

thereto, and sealed by the judge in testimony of its correctness." See *Doctor v. Hartman*, 74 Ind. 221, 230; *Suydam v. Williamson*, 20 How. (U. S.) 427; *Williams v. Norris*, 12 Wheat. 117; *Leveringe v. Dayton*, 4 Wash. C.C. 698; *Danks v. Rodeheaver*, 26 W. Va. 274; *Hamlin v. Reynolds*, 22 Ill. 207; *Swagard v. Hancock*, 25 Mo. App. 596; *State v. Anderson*, 42 La. Ann. 474, 7 So. Rep. 687; *Wampler v. State*, 28 Tex. App. 352, 13 S. W. Rep. 144; *Davis v. State*, 75 Texas, 420, 12 S. W. Rep. 957; *Herbison v. Taylor*, 29 Neb. 217, 45 N.W. Rep. 626; *Cole v. Driskell*, 1 Blackf. 16; *State v. Carr*, 37 Kan. 421, 15 Pac. Rep. 603; *Hall v. Durham*, 109 Ind. 434, 9 N. E. Rep. 926; *York, etc., Co. v. Myers*, 18 How. (U. S.) 243, 251.

¹ We have elsewhere shown what matters are regarded as parts of the record proper. *Ante*, §§ 190, 191, 196,

202. The subject will be necessarily considered from a point of view different from that occupied in the antecedent paragraphs designated in the paragraphs which follow.

² *Seymour, etc., Co. v. Brodhecker* (Ind. Sup. Ct.), 30 N. E. Rep. —; *McCoy v. Walls* (Ind. Sup. Ct.), 30 N. E. Rep. —. In *Emmerson v. Clark*, 2 Scam. 489, it was said: "It was the duty of the court to sign the bill of exceptions if it was correct. If it does not truly state the case the judge should refuse to sign it. It was not in the power of the court to delegate its authority. It is a judicial act. It then stands in this court as if no exception had been taken to the instructions of the court below." *Byrne v. Clark*, 31 Ill. App. 651.

³ *Toledo, etc., Co. v. Rogers*, 48 Ind. 427; *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 97.

duty of the judge to correct or revise it, so that it will express his own judgment and understanding of the facts. It is immaterial by whom the clerical work of preparing the bill is done, whether by a stenographer or any one else, provided the judge judicially determines that it is correct and evidences his decision by signing the bill.¹ The rule that the duty of settling and signing bills of exceptions is judicial requires that all matters required to be exhibited by a bill should be placed there by the judge and not by a ministerial officer, although the clerical work may be done by counsel, stenographers, or other persons. It seems to follow from the rule stated that a bill must be complete when it receives the signature of the judge.² Parties can not by stipulation make a complete and effective bill of exceptions.³ As the duty of settling the bill is judicial the judge who tries the case can not be compelled by mandamus, as we have elsewhere shown, to embody in it matters, which, in his judgment, do not properly belong in it.⁴ The duty of the judge, if it is judicial, as we assume it is, can not be devolved upon a ministerial officer, so that what shall constitute a bill of exceptions can not be determined by a clerk, stenographer, or any person other than the judge. It would seem to result that a stenographer's report of the evidence can not, on principle, be part of a bill of exceptions unless made so by the judge's act, and it is

¹ *Dick v. Mullins*, 128 Ind. 365; *Hill v. Hagaman*, 84 Ind. 287; *Bradway v. Waddell*, 95 Ind. 170; *Stagg v. Compton*, 81 Ind. 171; *Williams v. Pendleton, etc., Co.*, 76 Ind. 87.

² The early decisions of this court enforced this doctrine with strictness, for they held that the bill ought not to be signed until it was complete, although documentary evidence was the only part omitted. *Board of Trustees of Vincennes University v. Embree*, 7 Blackf. 461; *Huff v. Gilbert*, 4 Blackf. 19; *Spears v. Clark*, 6 Blackf. 167; *Doe v. Makepeace*, 8 Blackf. 575; *Mills v. Simmonds*, 10 Ind. 464; *Irwin v. Smith*, 72 Ind. 482, 489. But, as we shall hereafter show, the statute provides that written instruments may be made part

of the bill by reference. This does not, however, oppose the doctrine of the text that settling the bill is a judicial duty, for the identification of the writings and the noting of a proper place for their insertion is still the exercise of judicial power.

³ *Clark v. McCrary*, 80 Ala. 110; *Herman v. Jeffries*, 4 Mont. 513; *State v. Weiskittle*, 61 Md. 48; *Spencer v. St. Louis, etc., Co.*, 79 Mo. 500; *Coburn v. Murray*, 2 Me. 336; *Hodgden v. Commissioners*, 10 Kan. 637; *Leonard v. Warriner*, 20 Wis. 41; *Wessels v. Bee-man*, 66 Mich. 343, 33 N. W. Rep. 510; *Howard v. Ross* (Wash.), 28 Pac. Rep. 526.

⁴ *Ante*, p. 516, § 438, and authorities cited in the note.

quite certain that statements or recitals of the clerk can not be deemed parts of the bill.¹

§ 799. **By Whom the Bill should be Signed**—Where the judge who tried the case is still the incumbent of the office there can be no doubt upon the question as to who should sign the bill, for the authorities are well agreed that it must be signed by the judge who tried the case.² This rule applies to a special judge, for he has authority to sign a bill of exceptions tendered within the time granted by him.³ Our decisions declare that where a judge dies, or goes out of office by resignation, or because of the expiration of his term, he can not sign the bill of exceptions, but that it must be signed by his successor.⁴ It seems difficult to sustain the doctrine of our cases,⁵ for it is not easy

¹ It is obvious from what is said in the text that the report of a stenographer can not be made part of a bill of exceptions otherwise than by the judge. It is very doubtful whether the legislature can even by express enactment make a stenographer's notes, or the notes of any one else, part of the bill, inasmuch as nothing can become part of it except by judicial action and only a judge can take such action. It is, at all events, quite clear that where there is doubt, the stenographer's notes can not be considered as part of a bill.

² *Law v. Jackson*, 8 Cow. 746; *Halstead v. Brown*, 17 Ind. 202; *Travelers Insurance Co. v. Leeds*, 38 Ind. 444; *Sire v. Ellithorpe, etc., Co.*, 137 U. S. 579; *Chicago, etc., Co. v. Johnson*, 34 Ill. App. 351; *Perkins v. Bakrow*, 39 Mo. App. 331; *Connelley v. Leslie*, 28 Mo. App. 551; *Hancock v. Town of Worcester (Vt.)*, 18 Atl. Rep. 1041; *Labold v. Wilson*, 4 Ohio Cir. Ct. 345; *Ex parte Bradstreet*, 4 Peters, 102; *Stanaford v. Parker (Ky.)*, 15 S.W. Rep. 784; *Fielden v. People*, 128 Ill. 595, 21 N. E. Rep. 584. See, generally, *State v. Harris*, 39 La. Ann. 228; *Wessels v. Beeman*, 66 Mich. 343.

³ *Shugart v. Miles*, 125 Ind. 445, 446, citing *Perkins v. Hayward*, 124 Ind. 445; *Staser v. Hogan*, 120 Ind. 207, 208; *Beitman v. Hopkins*, 109 Ind. 177; *Wilson v. Piper*, 77 Ind. 437, 440.

⁴ *Smith v. Baugh*, 32 Ind. 163; *Hedrick v. Hedrick*, 28 Ind. 291; *McKeen v. Boord*, 60 Ind. 280; *Reed v. Worland*, 64 Ind. 216; *Lerch v. Emmett*, 44 Ind. 331; *State v. Murdock*, 86 Ind. 124; *Bowlus v. Brier*, 87 Ind. 391; *Toledo, etc., R. Co. v. Rogers*, 48 Ind. 427.

⁵ In *Ketcham v. Hill*, 42 Ind. 64, 70, the case of *New York, etc., Co. v. Wilson*, 8 Pet. 291, is cited as sustaining the doctrine, but that case certainly gives it no support. All that is adjudged in *New York, etc., Co. v. Wilson*, is that the successor of a judge who had died might be compelled by mandamus to sign a judgment. But the question in a case such as that is radically different from the question of who shall sign a bill of exceptions. The determination of what a bill of exceptions shall contain is a judicial act, in the strictest sense of the term. A judge can not be compelled to put into a bill matters which he decides do not belong there. *Ante*, § 516, p. 438.

to conceive how an instrument importing absolute verity can be executed by one who has no knowledge whatever of the matters it assumes to state. Nor is it easy to conceive how such a doctrine can be harmonized with the fundamental principle that the statements of the judge upon disputed questions of fact concerning matters occurring in court are conclusive. It is difficult for us to escape the conclusion that the courts are right which hold that the successor of the judge who tried the case can not sign a bill of exceptions where there is a disputed question of fact, that is, a dispute as to what the bill should contain, and that the proper course where there is no judge who can sign is to award a new trial.¹

§ 800. **Time within which the Bill may be Signed**—At common law a bill of exceptions must be completed, signed and filed during the term.² In this State and in some other States the time may be extended by an order of court. But the order can not be made after the close of the term.

§ 801. **How the Order Extending Time must be Shown**—The record must show the order giving time beyond the term in which to complete the bill of exceptions. The order must appear by an entry of record. A recital in the bill that time was given is not sufficient.³

Nor can he delegate the power to sign the bill. *Toledo, etc., Co. v. Rogers*, 48 Ind. 427. See, also, as to the character of the duty. *Emerson v. Clark*, 2 Scam. 489; *People v. Anthony*, 25 Ill. App. 532, S. C. 21 N. E. Rep. 780.

¹ *Consaul v. Lidell*, 7 Mo. 250; *Cranor v. School District*, 18 Mo. App. 397; *Wright v. Judge of Superior Court*, 41 Mich. 726.

² *United States v. Carey*, 110 U. S. 51; *Kshinka v. Cawker*, 16 Kan. 63; *Gallaher v. Southwood*, 1 Kan. 143; *Brown v. Rhodes*, 1 Kan. 359.

³ *Benson v. Baldwin*, 108 Ind. 106; *City of Indianapolis v. Kollman*, 79 Ind. 504; *Nye v. Lewis*, 65 Ind. 326; *Schoonover v. Reed*, 65 Ind. 313; *Goodwin v. Smith*, 72 Ind. 113; *Applegate v. White*,

79 Ind. 413; *Robinson v. Johnson*, 61 Ind. 535; *Greenup v. Crooks*, 50 Ind. 410; *Rinehart v. Bowen*, 44 Ind. 353; *Singer, etc., Co. v. Struckman*, 72 Ind. 601; *Fulkerson v. Armstrong*, 39 Ind. 472; *Columbus, etc., Co. v. Powell*, 40 Ind. 37; *Bargis v. Farrar*, 45 Ind. 41; *Logansport, etc., Co. v. Davidson*, 51 Ind. 472; *Louisville, etc., Co. v. Harrigan*, 94 Ind. 245; *Loy v. Loy*, 90 Ind. 404; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Robinson v. Anderson*, 106 Ind. 152. The order granting time must be made in term. *City of Westminster v. Shipley*, 68 Md. 610, 13 Atl. Rep. 365; *Wade v. Bryant (Ky.)*, 7 S.W. Rep. 397. See *George v. State*, 25 Tex. 229, 8 S. W. Rep. 25.

§ 802. **Presenting the Bill to the Judge**—If the bill is presented to the judge for his signature within the time prescribed by the order,¹ the party does not lose his right to have the bill signed and filed. The bill must show on its face that it was presented within the time allowed. It is not sufficient that the date be indorsed on the bill.²

§ 803. **Time can not be Extended after Close of the Term**—The time fixed during term can not be extended by an order in vacation.³ The one grant of time beyond the term exhausts the power of the court. It will not avail a party to show that there has been a grant of additional time, for with the close of the term the authority of the court terminates.⁴ The Indiana cases

¹ If the bill is presented to judge in due time, the failure to sign in time will not impair the rights of the party. *Creamer v. Sirp*, 91 Ind. 366; *Hamm v. Romine*, 98 Ind. 77; *Robinson v. Anderson*, 106 Ind. 152.

² *Buchart v. Burger*, 115 Ind. 123; *Bierly v. Harrison*, 123 Ind. 516; *Orton v. Tilden*, 110 Ind. 131; *Hormann v. Hartmetz*, 128 Ind. 353; *McCoy v. State*, 121 Ind. 160; *Buckner v. Spaulding*, 127 Ind. 229; *City of Plymouth v. Fields*, 125 Ind. 323; *White v. Gregory*, 126 Ind. 95; *McCormick, etc., Co. v. Maas*, 121 Ind. 132. Where the bill appears from the record to have been signed and filed within the time allowed, the absence of a statement of the date of its presentation to the judge is unimportant. *Hale v. Matthew*, 118 Ind. 527; *Shewalter v. Bergman*, 123 Ind. 155; *Short v. Chicago, etc., Co.*, 79 Iowa, 73; *Swem v. Green*, 9 Col. 358.

³ *Brouse v. Price*, 20 Ind. 216; *Harrison v. Price*, 22 Ind. 165; *Vanners v. Bradley*, 29 Ind. 388; *McElpatrick v. Coffroth*, 29 Ind. 37; *Earl v. Dresser*, 30 Ind. 11; *Thompson v. Egleton*, 33 Ind. 300; *Vandoren v. Kimes*, 29 Ind. 582; *Whitworth v. Sour*, 57 Ind. 107; *Robinson v. Johnson*, 61 Ind. 535; *Davidson v. State*, 62 Ind. 276; *Lotz v.*

Briggs, 50 Ind. 346; *Rolcson v. Herr*, 14 Ind. 539; *Simonton v. Huntington, etc., Co.*, 12 Ind. 380; *Terre Haute, etc., Co. v. Wilson*, 16 Ind. 102; *Sweetzer v. McCrea*, 67 Ind. 404; *Kansas City v. Allen*, 28 Mo. App. 133. In *Rigler v. Rigler*, 120 Ind. 431, it was said: "In respect to presenting or signing bills of exception after the time limited therefor has expired, the only proper course to pursue is to make an application to the presiding judge to have the date inserted in the bill *nunc pro tunc*." We suppose that the court did not mean to decide in the case from which we have quoted that a party has a right to have such an entry in ordinary cases. He certainly can have no such right unless a strong and clear case of fraud or accident is made. *Duvall v. Mastin*, 28 Mo. App. 526; *St. Louis, etc., Co. v. Holman*, 45 Ark. 102; *Louisville, etc., Co. v. Turner*, 81 Ky. 489.

⁴ *Bartley v. State*, 111 Ind. 358; *Marshall v. State*, 123 Ind. 128. See *Hake v. Strubel*, 121 Ill. 321, 12 N. E. Rep. 676; *Markland v. Albes*, 81 Ala. 433. 2 So. Rep. 123; *Franco-Texan Land Co. v. Chaptive (Tex.)*, 3 S. W. Rep. 31; *Hawes v. People*, 129 Ill. 123, 21 N. E. Rep. 777.

referred to in the note to the last sentence declare that the time can not be extended by agreement in criminal cases, but the cases cited in the former note indicate that time may be extended by agreement, in other cases.

§ 804. **Bills filed in Term**—There is an important difference between cases where the bill is filed in term and those where the bill is not filed until after the close of the term. In the latter case the record entry must affirmatively show, as we have said in a preceding paragraph of this chapter, that time beyond the term was given, while in the former case there is no necessity for such a record statement. There is substantial agreement that there need be no such record entry, although there is some diversity of opinion as to the grounds upon which the conclusion rests.¹ We suppose that where the bill is filed during the term the fair and reasonable presumption is that time to reduce the exceptions to writing was given at the time they were taken, inasmuch as any other conclusion would be opposed to the general principle that what is done during the term is presumed to have been effectively and rightfully done unless the contrary appears.

§ 805. **Filing After Term**—A bill of exceptions, although signed, is not part of the record until it is filed. A record entry must be made showing its filing and the date. It has been held in many cases that the filing must be shown by an independent record entry and that it can not be shown by a recital in the bill.² But it seems clear under our present statute that if the

¹ *Wysor v. Johnson* (Ind. Sup. Ct.), 30 N. E. Rep. 144; *Noblesville, etc., Co. v. Teter*, 1 Ind. App. 322; *Pitzer v. Indianapolis, etc., Co.*, 80 Ind. 569; *Boyce v. Graham*, 91 Ind. 420; *Calvert v. State*, 91 Ind. 473; *Landers v. Beck*, 92 Ind. 49, 52; *Lake Erie, etc., Co. v. Fix*, 88 Ind. 381; *Volger v. Sidener*, 86 Ind. 545; *Board v. Eperson*, 50 Ind. 275; *Flory v. Wilson*, 83 Ind. 391; *Harrison v. Price*, 22 Ind. 165; *Johnson v. Bell*, 10 Ind. 363; *Ogborn v. Hoffman*, 52 Ind. 439; *Nichol v. Thomas*, 53 Ind. 42; *Fletcher v. State*, 49 Ind. 124; *Stewart v. State*, 24 Ind. 142; *Dunn v. State*, 29 Ind. 259; *Fitzenrider v. State*, 30 Ind. 238; *Port v. Russell*, 36 Ind. 60; *Jenks v. State*, 39 Ind. 1.

² In *Guirl v. Gillett*, 124 Ind. 501, the rule was thus expressed: "A bill of exceptions only becomes a part of the record after it has been duly presented to the presiding judge and has been signed and filed by him. The bill itself can not show when it was filed. This must appear by the record independent of the

bill is presented to the judge in due season the bill is effective although not signed or filed until after the expiration of the prescribed time. This is so for the reason that when so presented it becomes the duty of the judge to sign and file it.¹ The bill can not, however, be part of the record until it is filed.² But the time of filing is no longer the important consideration, for if the bill is presented to the judge and that properly appears in the bill, it will be a part of the record, although not filed until after the time allowed has expired.³

§ 806. **Form of the Bill**—The form of a bill of exceptions is of comparatively little importance. The courts will give it a reasonably liberal construction, but they will not supply omissions nor remedy material defects. If the substance of the bill is such as to fully and fairly present the questions, purely formal defects and irregularities may be disregarded.⁴

bill." *Engleman v. Arnold*, 118 Ind. 81; *Jones v. Jones*, 91 Ind. 72; *Columbus, etc., Co. v. Powell*, 40 Ind. 37; *Fulker-son v. Armstrong*, 39 Ind. 472; *City of Indianapolis v. Kollman*, 79 Ind. 504; *Logansport, etc., Co. v. Davidson*, 51 Ind. 472; *La Rose v. Logansport, etc., Bank*, 102 Ind. 332; *State v. Leach*, 71 Iowa, 54; *Mogan v. Thompson*, 13 Ore. 230; *Horner v. Hoadley*, 97 Ind. 600; *Watson v. Watson*, 53 Ark. 415, 14 S. W. Rep. 622.

¹ *Vincennes, etc., Co. v. White*, 124 Ind. 376; *Terre Haute, etc., Co. v. Bis-sell*, 108 Ind. 113.

² *Louisville, etc., Co. v. Harrigan*, 94 Ind. 245; *Dunn v. Hubble*, 81 Ind. 489; *Shulse v. McWilliams*, 104 Ind. 512; *Stewart v. State*, 113 Ind. 505; *Hessian v. State*, 116 Ind. 58; *Pratt v. Allen*, 95 Ind. 404; *Loy v. Loy*, 90 Ind. 404; *Sherlock v. First National Bank*, 53 Ind. 73.

³ The appropriate mode of evidencing the filing is to make a vacation order. This when copied into the record shows the filing is the correct mode. *Dinwid-die v. Jacobs*, 82 Mo. 195; *Jones v.*

Christian, 24 Mo. App. 540. It is, how-ever, held by some of our cases that where the clerk's certificate recites that the transcript contains all papers on file, the filing is sufficiently shown. *Hull v. Louth*, 109 Ind. 315, 336; *Arm-strong v. Harshman*, 93 Ind. 216; *Oliver v. Pate*, 43 Ind. 132; *Porter v. Choen*, 60 Ind. 338, 346. But, as the filing must appear to be within the time granted, the certificate of the clerk can not be effective unless it appears to have been made within that time. It seems to us that the true and safe rule is to require a vacation order in all cases, but, as we have seen, our decisions declare a somewhat different doctrine.

⁴ In the case of *Kleinschmidt v. Mc-Andrews*, 117 U. S. 282, 286, it was said: "And whatever brings upon the record, properly verified by the attestation of the judge, matters of fact occurring at the trial, on which the point of law arises, which enters into the ruling and decision of the court excepted to, answers sufficiently the proper description of a bill of exceptions." To substantially

§ 807. **Requisites of the Bill—General Doctrine**—It is always essential that the bill should show the matters of fact out of which the matters of law arise, the grounds of objections where specific objections are required, and the ruling or decision to which the exception is taken.¹ The time of taking the exceptions must be shown, since, as we have elsewhere said, an exception must be taken at the time the ruling or decision sought to be brought in review is made.² The statements of the bill must be so full and definite as to present to the appellate tribunal all matters essential to a clear and accurate apprehension of the questions involved.³ A bill of exceptions is taken by a party for the purpose of making it appear to the reviewing court that there is error in the proceedings of the trial court and that he has taken the necessary steps to make the error

the same effect are the cases of *Wilson v. Giddings*, 28 Ohio St. 554, 561; *Acheson v. Sutliff*, 18 Ohio, 122.

¹ In the *Estate of Page*, 57 Cal. 238, 239, the court said: "An exception is an objection upon a matter of law to a decision made by a court. To make it effectual in a bill of exceptions the objection should be stated and also the ground upon which it was made." The court cited *Griswold v. Sharp*, 2 Cal. 17, 23; *Touchard v. Crow*, 20 Cal. 150, 163; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Blizzard v. Hayes*, 46 Ind. 166; *Grubbs v. Morris*, 103 Ind. 166; *Mooney v. Kinsey*, 90 Ind. 33; *Louisville, etc., Co. v. Worley*, 107 Ind. 320. See *ante*, § 771. "The grounds of objections must appear of record." See, also, *Stump v. Fraley*, 7 Ind. 679; *Wiler v. Manley*, 51 Ind. 169; *Richardson v. Howk*, 45 Ind. 451; *McKinney v. Shaw, etc., Co.*, 51 Ind. 219; *Miles v. Vanhorn*, 17 Ind. 245; *Baker v. McGinniss*, 22 Ind. 257; *Ammerman v. Crosby*, 26 Ind. 451.

² *Leyner v. State*, 8 Ind. 490; *Johnson v. Bell*, 10 Ind. 363; *State v. Rabbourn*, 14 Ind. 300; *Crandall v. First National Bank*, 61 Ind. 349; *Doe v.*

Makepeace, 8 Blackf. 575; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Sohn v. Marion, etc., Co.*, 73 Ind. 77; *Nye v. Lewis*, 65 Ind. 326; *Roy v. Union, etc., Co. (Wyo.)*, 26 Pac. Rep. 996; *Pacific Exp. Co. v. Malin*, 132 U. S. 531; *Kendell v. Judah*, 63 Ind. 291; *Walton v. United States*, 9 Wheat. 651; *Sheppard v. Wilson*, 6 How. (U. S.) 260; *Poole v. Fleeger*, 11 Pet. 185; *Brown v. Clarke*, 4 How. (U. S.) 415; *Turner v. Yates*, 16 How. (U. S.) 14. In the case last named it was said: "The record must show that the exception was taken at that stage of the trial when its cause arose."

³ In *Hooper v. State (Texas)*, 16 S. W. Rep. 655, it was declared that: "Bills of exceptions must be so full and certain in their statements that in and of themselves they will disclose all that is necessary to manifest the supposed error. *Eldridge v. State*, 12 Tex. App. 208; *Davis v. State*, 14 Tex. App. 645; *Walker v. State*, 9 Tex. App. 200; *Hennings v. State*, 24 Tex. App. 315, 6 S. W. Rep. 137." See, also, *Thompson v. State*, 29 Tex. App. 208, 15 S. W. Rep. 206.

available.¹ A bill which shows a wrong ruling but does not contain enough to make it appear that the proper steps were taken to make the wrong ruling available as error is ordinarily insufficient. It is, of course, true that in some instances the record proper discloses some of the steps necessary to impress upon a wrong ruling the element of availability, and where this is so there is no necessity for incorporating in the bill what is part of the intrinsic record, or record proper. As an illustration of the effect of our statement that where one of the steps required to make a wrong ruling available appears by the record the bill need not show it, we may take the case where evidence was wrongly excluded and there is a motion for a new trial; in such a case the excluded evidence must be brought into the record as offered,² but the bill need not set forth the motion for a new trial, as that motion, under our practice, is part of the intrinsic record.³

§ 808. **Stating the Exceptions**—In a work on practice it is said that it is the duty of counsel to take a bill upon each exception stated, and a bill stating several distinct exceptions is not a proper one.⁴ But this, as we believe, is a misapprehension of the rule, as the cases referred to by the authors who declare the doctrine stated will show upon careful examination.⁵ What the rule requires is that each exception shall be taken at the time the ruling is made and to the specific ruling, for exceptions can not be taken in gross, but it does not require that there shall be a separate bill for each exception. Where the exceptions are taken at the time to specific rulings and time is

¹ *Tucker v. Smith*, 68 Tex. 473, 3 S. W. Rep. 671; *Monroe v. Snow*, 33 Ill. App. 230, S. C. 23 N. E. Rep. 401. In the case last cited it was held that the bill will be most strongly construed against the party by whom it is taken.

² *Craft v. Dalles City (Ore.)*, 27 Pac. Rep. 163; *Stanley v. Smith*, 15 Ore. 505, 16 Pac. Rep. 174.

³ *Martin v. Harrison*, 50 Ind. 270; *Moore v. State*, 65 Ind. 213; *Hunter v. Hatfield*, 68 Ind. 416. But as we shall

presently show it is only the motion that is part of the record proper. In some jurisdictions the motion for a new trial must be embodied in the bill of exceptions. *Demske v. Hunter*, 23 Mo. App. 466; *Furber v. Cunway*, 23 Mo. App. 412; *McNeil v. Home Ins. Co.* 30 Mo. App. 306.

⁴ *Troubat v. Haleys Pr.*, § 701.

⁵ *Rogers v. Marshall*, 1 Wall. 644; *Harvey v. Tyler*, 2 Wall. 328.

then obtained to reduce the exceptions to writing, they may all be exhibited in one bill. In other words, it is not always necessary that there should be a separate bill for each exception,¹ although there may be instances where the time of taking exceptions and the character of the exceptions are such as to require separate bills. The bill must, however, state each exception separately, the specific grounds on which it rests (where such grounds are required to be stated), and show each ruling to which the exceptions were addressed.²

§ 809. Facts on which Exceptions are Based must be Stated—It is not enough to state exceptions in the bill. The facts on which the exceptions are based are quite as important as the exceptions.³ Where the facts are not stated there is nothing demanding consideration, for without them neither the character nor the influence of the ruling can be ascertained or determined.

§ 810. Duty of the Trial Judge—It is the duty of the trial judge to cause all matters to be incorporated in the bill of exceptions as the law requires before he signs the bill.⁴ As we shall pres-

¹ In *Mills v. Buchanan*, 36 Ind. 490, 502, it was said: "A bill of exceptions may be general, embracing everything that has to be made part of the record by such bill, or it may embrace but one question." This general doctrine is declared in *Brown v. Hall*, 85 Va. 146, 7 S. E. Rep. 182. See *Anderson v. Ames*, 6 Iowa, 486.

² *Doe v. Peeples*, 1 Ga. 1; *State v. Weber*, 22 Mo. 231; *Church v. Drummond*, 7 Ind. 17; *Porche v. La Blanche*, 12 La. Ann. 778; *Brown v. Brown*, 7 Mo. 288; *Doe v. Natchez Ins. Co.*, 8 S. & M. (Miss.) 197; *Fields v. Hunter*, 8 Mo. 128; *Morrissey v. People*, 11 Mich. 327; *Johnson v. Jennings*, 10 Gratt. 1. There may be several bills, and where they refer to one subject all may be considered. *Doe v. Gildart*, 6 Miss. (5 How.) 606; *Lindsey v. Henderson*, 27

Miss. 502; *Pitzer v. Indianapolis, etc., Co.*, 80 Ind. 569.

³ *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. Rep. 467; *Vass v. Commonwealth*, 3 Leigh (Va.), 786, S. C. 24 Am. Dec. 695; *Hennessey v. State*, 23 Tex. App. 340, 5 S. W. Rep. 215; *Phoenix, etc., Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. Rep. 500; *State v. Clement*, 15 Ore. 237, 14 Pac. Rep. 410; *Johnson v. Jennings*, 10 Gratt. 1, S. C. 60 Am. Dec. 323, and note; *Kennedy v. Shaw*, 38 Ind. 474; *Berlin v. Oglesbee*, 65 Ind. 308; *Johnson v. State*, 65 Ind. 269; *McCreary v. Cockrill*, 3 Kan. 37; *Inferior Court v. Monroe*, 21 Ga. 174; *Johnson v. Ballew*, 2 Porter (Ala.), 29; *State v. Jackson*, 12 La. Ann. 679.

⁴ It is understood, of course, that it is the duty of a trial judge to give a full and fair bill of exceptions. The settling

ently show, the duty of the judge is to cause all parol evidence to be embodied in the bill before he signs it, and, under the code, to prevent any documentary evidence from being inserted unless such evidence is appropriately identified and the proper place for its insertion indicated by the words, "here insert." It is sufficient for our present purpose to say that where the bill is not complete the judge should not sign it. The reason for this rule will appear in the paragraphs that follow.

§ 811. Effect of the Statements and Recitals of the Bill—A bill of exceptions, signed, filed and made part of the record as the law requires, imports absolute verity.¹ This effect is due to the fact that the law assumes that it is a special instrument brought under the immediate supervision of the judge, and hence subjected to a closer scrutiny than orders or entries made by the clerk, although directed by the judge. The result of this principle is that where the bill recites special matters different from the entries in the order book or other record, it controls and other recitals yield to it.²

§ 812. Making Error Apparent—It is not necessary that the prejudicial influence of a wrong ruling should be made to appear by direct recitals or statements, but it is necessary that the statements or the recitals of the bill should be full enough to show the nature and influence of the ruling or decision upon which error is alleged, and so show it as to authorize the inference that the wrong ruling was prejudicial or probably preju-

of the bill is his own act, and it would be a gross breach of duty to deny or impair a party's rights by a refusal to grant a bill fully and fairly exhibiting the case.

¹ *Walls v. Anderson, etc., Co.*, 60 Ind. 56; *Beavers v. State*, 58 Ind. 530; *Thames, etc., Co. v. Beville*, 100 Ind. 309. See, generally, *Blizzard v. Blizzard*, 48 Ind. 540; *Ryan v. Burkam*, 42 Ind. 507, 524; *Jelly v. Roberts*, 50 Ind. 1, 8; *Longworth v. Higham*, 89 Ind. 352.

² *Indiana, etc., Co. v. Adams*, 112

Ind. 302; *Alley v. State*, 76 Ind. 94; *Cincinnati, etc., Co. v. McFarland*, 22 Ind. 459; *Carmichael v. Shiel*, 21 Ind. 66; *Doe v. Smith*, 1 Ind. 451; *State v. Flemons*, 6 Ind. 279. In the case last named it was said, in speaking of a variance between order book entries and the bill, that: "The bill of exceptions will be taken as true, and will correct the other portions of the record, for the reason that the minutes are kept by the clerk, but the bill of exceptions brings the facts distinctly to the attention of the judge who signs it."

dicial. Where there is not enough in the bill to justify the inference that the ruling or decision complained of was injurious, or probably injurious, error is not made apparent.¹ It is not always necessary to incorporate all the evidence in the bill of exceptions in order to supply grounds for the inference, or presumption, that the wrong ruling was probably harmful, but, as will hereafter be shown, it is frequently necessary to do so.

§ 813. Rulings made in the Formation of Issues—Rulings made in the formation of issues can not be regarded as rulings concerning the conduct of the trial. As this is true such rulings can not be considered as included in leave given for time to reduce to writing exceptions taken during the trial, so that exceptions should be taken to such rulings at the time they are made, and at that time leave to put the exceptions in writing should be obtained.² Leave given upon overruling a motion for a new trial can not reach back and take up rulings made in the formation of issues. This doctrine does not trench upon the rule that a bill of exceptions taken under leave granted at the time of overruling a motion for a new trial embraces exceptions taken during the trial, for the reason that a trial may with propriety be regarded as one entire proceeding,³ whereas

¹ In *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. Rep. 749, it was said: "Exceptions to a question to a witness can not be considered which do not show how the question was answered, and that the answer was in some way unfavorable to the party excepting." The cases of *Kershaw v. Wright*, 115 Mass. 361, and *Pennock v. McCormick*, 120 Mass. 275, were cited. See, also, *Taylor v. Flint*, 35 Ga. 124; *Hoyt v. Williams*, 41 Mo. 270; *State v. Cowan*, 7 Iredell L. 239; *Armstrong v. Clark*, 17 Ohio, 495; *Webster v. Calden*, 55 Me. 165; *State v. Bennett*, 75 Me. 590; *Tipper v. Commonwealth*, 1 Metcf. (Ky.) 6; *Jones v. Doe*, 1 Ind. 109; *Holmes v. Gayle*, 1 Ala. 517; *McDougal v. Fleming*, 4 Ohio, 388; *Richardson v. Denison*, 1 Aik. (Vt.) 210; *Stearns v.*

Warner, 2 Aik. (Vt.) 26; *Knox v. Noble*, 25 Kan. 449, 451; *Eastman v. Godfrey*, 15 Kan. 341; *Gray v. Thomas*, 18 La. Ann. 412.

² *Smith v. Flack*, 95 Ind. 116, 126; *Boyce v. Graham*, 91 Ind. 420; *Thomas v. Griffin*, 1 Ind. App. 457, citing *Rhine v. Morris*, 96 Ind. 81; *Sohn v. Marion*, etc., 73 Ind. 77; *City of Seymour v. Cummins*, 119 Ind. 148. See *Wabash*, etc., *Co. v. People*, 106 Ill. 652; *Mullany v. First National Bank*, 89 Ind. 424, 425; *Caldwell v. Gilmore*, 86 Ind. 428; *Stribling v. Tripp*, 86 Ind. 166, 169.

³ *Jenks v. State*, 39 Ind. 1; *Barnaby v. State*, 106 Ind. 539, 541; *Bruce v. State*, 87 Ind. 450. In *Rynan v. Crawford*, 86 Ind. 262, the difference between the two classes of cases is shown.

the formation of the issues is not part of the trial in any just sense.

§ 814. **Collateral Motions**—Collateral motions, such as motions to make more specific, to separate, and the like, must be brought into the record by a bill of exceptions, or by a special order of the court making them a part of the record.¹ To this class of motions belong motions to dismiss.² It is necessary that the grounds of such motions and the specific relief prayed should be appropriately specified inasmuch as there is no other mode of bringing such matters into the record, and without them, as we have repeatedly said, no rulings are properly presented for review.³

§ 815. **Recitals in Direct Motions**—Recitals of facts in direct motions or appendant exhibits do not go into the record as part of the motion. Such recitals and exhibits can only be

¹ *McDonald v. Geisendorff*, 128 Ind. 153; *Thomas v. Griffin*, 1 Ind. App. 457; *Balue v. Richardson*, 124 Ind. 480; *Boyce v. Graham*, 91 Ind. 420; *Manhattan Life Ins. Co. v. Doll*, 80 Ind. 113; *State v. Krug*, 82 Ind. 58; *Rhine v. Morris*, 96 Ind. 81; *Stanton v. State*, 74 Ind. 503; *Nichols v. State*, 65 Ind. 512; *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Myers v. Conway*, 62 Ind. 474; *Greensburgh, etc., Co. v. Sidener*, 40 Ind. 424; *Wilson v. Piper*, 77 Ind. 437; *McIlvain v. Emery*, 88 Ind. 298; *Clodfelter v. Hulett*, 92 Ind. 426; *Lynch v. Jennings*, 43 Ind. 276.

² *Sites v. Miller*, 120 Ind. 19; *Board v. Small*, 61 Ind. 318; *Burntrager v. McDonald*, 34 Ind. 277; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Board v. Montgomery*, 109 Ind. 69; *Crumley v. Hickman*, 92 Ind. 388; *Yost v. Conroy*, 92 Ind. 464; *S. C. 47 Am. Rep.* 156; *Wilson v. Piper*, 77 Ind. 437; *Long v. Town of Brookston*, 79 Ind. 183; *Hicks v. State*, 83 Ind. 483; *Evans v. Shafer*, 88 Ind. 92; *Louisville, etc., Co. v. Head*,

80 Ind. 117; *Ferrier v. Deutchman*, 51 Ind. 21; *Conoway v. Weaver*, 1 Ind. 263; *Aspinwall v. Board*, 18 Ind. 372; *Carr v. Thomas*, 34 Ind. 292; *Dritt v. Dodds*, 35 Ind. 63.

³ In *Walker v. Steele*, 121 Ind. 436, 438, the court said: "The grounds of the motion to strike out the disclaimer do not appear in the bill of exceptions or elsewhere in the record, therefore if the motion had been one which the court could have properly entertained we can not say that the court erred in overruling it. If no reasons were assigned, or if reasons were given, if they were insufficient, then the court committed no error in overruling the motion." It may, without going far out of the direct path, be proper to say that motions to strike out must clearly designate the part to which objection is made, and that this can not be done by referring to pages and lines, for the transcript on appeal ordinarily makes the pages and lines different from what they are in the original pleading.

brought into the record by a bill of exceptions.¹ The motion itself may be in the record without a bill and yet its statements of facts or exhibits not be part of the record. Thus, matters of evidence, affidavits, or instructions can not be made part of the record by embodying them in the motion.² The direct motion with its specifications of reasons, causes or objections is, however, part of the record proper.

§ 816. **Rejected Pleadings**—Pleadings rejected on motion must be brought back into the record by a bill of exceptions. In bringing them back the motion and the ruling must be brought with them. Without the motion and ruling the facts upon which the exceptions are founded can not be regarded as in the record.³

§ 817. **Instruments that may be brought into the Record by a Bill of Exceptions**—We have said that all matters not exhibited by the record proper must be brought in by a bill of exceptions, or, in cases within the statute, by a special order of the court,⁴

¹ *Ante*, §§ 190, 191, 194.

² In *Clouser v. Ruckman*, 104 Ind. 588, the doctrine was thus stated: "Recitals in a motion for a new trial can not perform the office of a statement required to be incorporated in a bill of exceptions, nor can the recital of the clerk take the place of such a statement." *Chambers v. Butcher*, 87 Ind. 508; *Powers v. State*, 87 Ind. 144; *Compton v. State*, 89 Ind. 338; *Horton v. Wilson*, 25 Ind. 316; *Marks v. Jacobs*, 76 Ind. 216; *Taylor v. Fletcher*, 15 Ind. 80; *Indianapolis, etc., Co. v. Wyatt*, 16 Ind. 204; *Round v. State*, 14 Ind. 493; *Thompson v. White*, 18 Ind. 373; *Whiteside v. Adams*, 26 Ind. 250; *Herring v. State*, 1 Iowa, 205; *Pharo v. Johnson*, 15 Iowa, 560; *Hart v. Foley*, 67 Iowa, 407; *Board v. Montgomery*, 109 Ind. 69; *Holt v. Simons*, 14 Mo. App. 450; *Robinson v. Suter*, 15 Mo. App. 599; *Kohn v. Lucas*, 17 Mo. App. 29; *Berkley v. Kobes*, 13 Mo.

App. 502; *Shaughnessy v. St. Louis, etc., Co.*, 7 Mo. App. 591; *Indianapolis, etc., Co. v. Christian*, 93 Ind. 360.

³ *Carrothers v. Carrothers*, 107 Ind. 530; *Scott v. Board*, 101 Ind. 42; *Stott v. Smith*, 70 Ind. 298; *Berlin v. Oglesbee*, 65 Ind. 308; *Ammerman v. Crosby*, 26 Ind. 451; *Hill v. Jamieson*, 16 Ind. 125; *Schmidt v. Colley*, 29 Ind. 120; *Stanton v. State*, 74 Ind. 503; *Ward v. Angevine*, 46 Ind. 415; *Meyer v. Yesser*, 32 Ind. 294; *Klingensmith v. Reed*, 31 Ind. 389; *Searl v. Smith*, 15 Ind. 23; *Saunders v. Heaton*, 12 Ind. 20; *Chrisman v. Melne*, 6 Ind. 487; *Henderson v. Reed*, 1 Blackf. 347.

⁴ *Ante*, §§ 190, 191, 194. We do not here speak of making pleadings or instruments part of the record by a special order, nor do we mean to say that some of the instruments mentioned in this paragraph may not be brought up by special order.

and nothing can be added that will more clearly express the rule, but its practical operation and the mode of its application may be shown more clearly by referring to the adjudged cases. Affidavits and applications for a change of venue with the ruling and exceptions are properly brought into the record by a bill of exceptions.¹ Affidavits for a continuance may be, and usually are, brought into the record in like manner,² and so may affidavits in support of a motion to compel a party to give security for costs.³ Motions for judgment for costs⁴ and motions to tax costs are effectively and appropriately brought into the record by a bill of exceptions.⁵ Affidavits in support of motions to amend and all motions of like character a bill of exceptions will effectively bring into the record.⁶ A motion to modify a judgment,⁷ for judgment on the pleadings⁸ and similar motions may be brought into the record in the same mode, and so may motions to strike out interrogatories.⁹ Affidavits in support of a motion for a new trial must be made part of the record by bill,¹⁰ and this is true of all affidavits of the same general class. The cases referred to show that almost all instruments, whether motions or affidavits, which are not part of the pleadings may be brought into the record by a bill of exceptions. The notable exception to the rule that motions must be made part of the

¹ *Smith v. Smith*, 77 Ind. 80; *Sidener v. Davis*, 87 Ind. 342; *Board v. Benson*, 83 Ind. 469; *Lawless v. Harrington*, 75 Ind. 379; *Compton v. State*, 89 Ind. 338; *Siebert v. State*, 95 Ind. 471; *Baker v. Simmons*, 40 Ind. 442.

² *Long v. State*, 46 Ind. 582; *Beard v. State*, 54 Ind. 413; *Colle v. State*, 75 Ind. 511.

³ *Hadley v. Hadley*, 82 Ind. 95.

⁴ *Beard v. Hand*, 88 Ind. 183; *Leffel v. Obenchain*, 90 Ind. 50; *Nutting v. Losance*, 27 Ind. 37.

⁵ *Gallimore v. Blankenship*, 99 Ind. 390; *Jamieson v. Board*, 56 Ind. 466; *Conner v. Winton*, 10 Ind. 25; *Smawley v. Stark*, 9 Ind. 386; *Urton v. Luckey*, 17 Ind. 213; *State v. Saxon*, 42 Ind. 484; *Tilman v. Harter*, 38 Ind. 1.

⁶ *Swan v. Clark*, 80 Ind. 57; *Lewis v. Ewing*, 70 Ind. 282.

⁷ *Quill v. Gallivan*, 108 Ind. 235; *Ex parte Hayes*, 88 Ind. 1; *Adams v. La Rose*, 75 Ind. 471; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Forsythe v. Kreuter*, 100 Ind. 27; *Whipple v. Shewalter*, 91 Ind. 114; *Evansville, etc., Co. Frank (Ind. App.)* 29 N. E. Rep. 419.

⁸ *Hill v. Jamieson*, 16 Ind. 125. See generally, *Fairbanks v. Loring (Ind. App.)*, 29 N. E. Rep. 452.

⁹ *Borchus v. Huntington, etc., Assn.*, 97 Ind. 180; *Stott v. Smith*, 70 Ind. 298.

¹⁰ *Elbert v. Hobby*, 73 Ind. 111; *Beck v. State*, 72 Ind. 250; *McDaniel v. Mattingly*, 72 Ind. 349; *Williams v. Potter*, 72 Ind. 354; *Gandolpho v. State*, 33 Ind. 439.

record by a bill or special order, is a motion for a new trial, that motion, as we have seen, is a direct motion and, under our decisions, is part of the record proper.¹

§ 818. **Making Written Instruments part of the Bill by Reference—General Rule**—Under the provisions of the code written instruments offered in evidence may be brought into a bill of exceptions by reference.² But the statutory requirements must

¹ As the office of a bill of exceptions is an important one it may not be profitless to refer to other cases. A bill of exceptions is necessary to show such proceedings and instruments as those below enumerated. Answers of jurors when polled. *Medler v. State*, 26 Ind. 171. Affidavits in support of a motion and in opposition. *Veneman v. McCurtain* (Neb.), 50 N. W. Rep. a 955; *McCann v. Cooley*, 30 Neb. 552, 46 N. W. Rep. 715; *Whiteside v. Adams*, 26 Ind. 250; *Murphy v. Tilly*, 11 Ind. 511; *Kennedy v. State*, 37 Ind. 355; *Whaley v. Gleason*, 40 Ind. 405; *Kellenberger v. Perrin*, 46 Ind. 282; *Bingham v. Stumph*, 48 Ind. 97; *Round v. State*, 14 Ind. 493; *Taylor v. Fletcher*, 15 Ind. 80; *Bell v. Rinker*, 29 Ind. 267; *Blizzard v. Phebus*, 35 Ind. 284; *Turnbull v. Ellis*, 35 Ind. 422; *Cleland v. Walbridge*, 78 Cal. 358, 20 Pac. Rep. 730; *Olds Wagon Co. v. Benedict*, 25 Neb. 372, 41 N. W. Rep. 254. Depositions and motions. *Roberts v. Parrish*, 17 Ore. 583, 22 Pac. Rep. 136; *Mills v. Simmonds*, 10 Ind. 464; *Trout v. Small*, 10 Ind. 380; *Harvey v. Sinker*, 35 Ind. 341; *Smith v. Kyler*, 74 Ind. 575; *Mendenhall v. Treadway*, 44 Ind. 131; *Gardner v. Haynie*, 42 Ill. 291; *Pittsburgh, etc., Co. v. Probst*, 30 Ohio St. 104; *Davidson v. Peck*, 4 Mo. 438. Rules of the trial court. *Packet Co. v. Sickles*, 19 Wall. 611; *Rout v. Ninde*, 111 Ind. 597. Agreed statement of facts. *Acheson v. Sutliff*, 18 Ohio, 122; *Citizens, etc., Co. v. Harris*, 108 Ind. 392. Motions to transfer causes from one court to another. *Merchants,*

etc., Co. v. Joesting, 89 Ill. 152; *Cairo, etc., Co. v. Easterly*, 89 Ill. 156. Grounds of objection that a cause was called for trial out of its order. *Lomax v. Mitchell*, 93 Ill. 579. Vacating an order granting a new trial. *Davis v. Binford*, 58 Ind. 457. Motion to compel an attorney to show authority for entering an appearance. *Murphy v. Tilly*, 11 Ind. 511. Motion to strike from the docket. *Carr v. Thomas*, 34 Ind. 292. A summons and the return in a case where all the parties appear.

Instructions may be made part of the record by a bill of exceptions, but, as we have elsewhere shown, that is not the only mode of bringing them into the record. *Landers v. Beck*, 92 Ind. 49, 52; *Plank v. Jackson*, 128 Ind. 424, 430. It is probably true that some of the instruments above enumerated may be made part of the record by a special order of court, but as it is difficult to determine the scope and effect of the statutory provision concerning such special orders, the safe course is to employ the bill of exceptions.

² *Clay v. Clark*, 76 Ind. 161; *Stratton v. Kennard*, 74 Ind. 302; *State v. President, etc.*, 44 Ind. 350; *Kessler v. Myers*, 41 Ind. 543; *Harman v. State*, 22 Ind. 331; *Burdick v. Hunt*, 43 Ind. 381; *Aurora, etc., Co. v. Johnson*, 46 Ind. 315; *Sidener v. Davis*, 69 Ind. 336; *Goodwine v. Crane*, 41 Ind. 335; *Endsley v. State*, 76 Ind. 467, 469; *Sanders v. Ferrell*, 83 Ind. 28; *Cosgrove v. Cosby*, 86 Ind. 511.

be strictly followed. The instrument must be so clearly identified that nothing remains for the clerk to do but copy it into the bill at the place indicated.¹ The place for the insertion of the instrument should be indicated by the words "here insert." Instruments can not be brought into the bill by referring to them as exhibits,² nor, indeed, in any other mode than by designating the place for their insertion and their insertion in the place designated, or by copying them into the bill before it is signed, except as indicated in the next paragraph.

§ 819. Instruments once properly in the Record need not be Copied in the Bill—An exception to the general rule stated in the preceding paragraph is this: Where an instrument is once rightfully in the record proper, it need not be copied into the bill of exceptions, but may be referred to at the appropriate place without copying.³ But it is to be remembered that an instrument not part of the record proper can not be thus

¹ Seymour, etc., Co. v. Brodhecker (Ind.), 30 N. E. Rep. —, Feb. 26, 1892; Wagar v. Peak, 22 Mich. 368; Humphrey v. Ball, 4 Greene (Iowa), 204; Sands v. Woods, 1 Iowa, 263; Bryan v. State, 4 Iowa, 349; Smith v. Taylor, 11 Iowa, 214. In Harmon v. Chandler, 3 Iowa, 150, 152, the court said: "In order to bring before this court as a part of the record any paper used or proceeding had in the district court not made part of the record, it must be embodied in the bill of exceptions, or so plainly identified that there can not possibly be any mistake as to what is referred to. To refer to a motion or instruction 'as marked and here insert it, is not sufficiently certain for the ends of justice, and this court has heretofore expressed its decided condemnation of such a practice." Reed v. Hubbard, 1 G. Greene, 153; Atchison, etc., Co. v. Wagner, 19 Kan. 335; Leftwich v. Leftwich, 4 Wall. 187; Hill v. Holloway, 52 Iowa, 678; Wells v. Burlington,

etc., Co., 56 Iowa, 520; Looney v. Bush, Minor (Ala.), 413; Tuskalooza Co. v. Logan, 50 Ala. 503; Lesser v. Banks, 46 Ark. 482. See, generally, Morrison v. Lehigh, 17 Mo. App. 633; St. Louis etc., Co. v. Godly, 45 Ark. 485; Ober v. Indianapolis, etc., Co., 13 Mo. App. 81.

² Irwin v. Smith, 72 Ind. 482; Burdick v. Hunt, 43 Ind. 381; Cincinnati, etc., Co. v. Clifford, 113 Ind. 460; Baltimore, etc., Co. v. Barnum, 79 Ind. 391; Hurst v. Lehman, 35 Ill. App. 489; Chicago, etc., Co. v. Harper, 128 Ill. 384; Sidener v. Davis, 69 Ind. 336; Branch Bank, etc., v. Moseley, 19 Ala. 222.

³ Kessler v. Myers, 41 Ind. 543; Smith v. Lisher, 23 Ind. 500; Stewart v. Rankin, 39 Ind. 161; McFadden v. Wilson, 96 Ind. 253, 255; Colee v. State, 75 Ind. 511, 513; Henry v. Thomas, 118 Ind. 23, 20 N. E. Rep. 519. The proper reference must be made. Sanders v. Farrell, 83 Ind. 28; Blizzard v. Riley, 83 Ind. 300.

brought into the bill of exceptions.¹ As an example of an instrument not part of the record proper we may take an affidavit attached to a motion for a new trial, and as an example of what is part of the record proper we may take a promissory note upon which a complaint is founded and which is filed as a part of the pleading. An instrument not part of the record can not be brought into the bill by any reference or recital of the clerk.²

§ 820. **Oral Evidence**—Oral evidence must be embodied in the bill of exceptions before it is signed by the judge. It can not be brought into the record, in an ordinary case, in any other mode. It can not be stated in exhibits nor by way of reference.³

§ 821. **Stenographer's Report of the Evidence**—The principle that the settling of a bill of exceptions is a judicial duty forbids the conclusion that the stenographer's report of the evidence can become a part of the bill in any other mode than by incorporation. The long-hand report need not be copied by the clerk, but it must get into the bill by the act of the judge and it can not get there in any other way.⁴ It must appear in a bill signed by the judge.⁵ Where the long-hand report is incorporated in the

¹ *Douglass v. State*, 72 Ind. 385; *Colee v. State*, 75 Ind. 511; *Carver v. Carver*, 44 Ind. 265; *Kimball v. Loomis*, 62 Ind. 201; *Aurora, etc., Co. v. Johnson*, 46 Ind. 315; *Board v. Karp*, 90 Ind. 236; *Crumley v. Hlickman*, 92 Ind. 388.

² *Garber v. Morrison*, 5 Iowa, 476; *Jordan v. Quick*, 11 Iowa, 9; *State v. Jones*, 11 Iowa, 11; *Haddon v. Haddon*, 42 Ind. 378; *Aurora, etc., Co. v. Johnson*, 46 Ind. 315.

³ *Harrell v. Seal*, 121 Ind. 193; *Stratton v. Kennard*, 74 Ind. 302; *Kesler v. Myers*, 41 Ind. 543; *Stewart v. Rankin*, 39 Ind. 161; *Cincinnati, etc., Co. v. Calvert*, 13 Ind. 489; *Irwin v. Smith*, 72 Ind. 482, 488, and cases cited; *State v. Hemrick*, 62 Ia. 414; *Shugart v. Miles*, 125 Ind. 445.

⁴ *Stone v. Brown*, 116 Ind. 78; *Colt v. McConnell*, 116 Ind. 249; *Dick v. Mullins*, 128 Ind. 365; *Clark v. State*, 125 Ind. 1; *Fiscus v. Turner*, 125 Ind. 46; *Ohio, etc., Co. v. Voight*, 122 Ind. 288; *Doyal v. Landes*, 119 Ind. 479; *Patterson v. Churchman*, 122 Ind. 379; *Stevens v. Stevens*, 127 Ind. 560; *Butler v. Roberts*, 118 Ind. 481; *Fahlor v. State*, 108 Ind. 387; *Brehm v. State*, 90 Ind. 140; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Marshall v. State*, 107 Ind. 173; *Woollen v. Wishmier*, 70 Ind. 108; *Lowery v. Carver*, 104 Ind. 447; *Flint v. Burnell*, 116 Ind. 481.

⁵ *Louisville, etc., Co. v. Kane*, 120 Ind. 140.

bill of exceptions signed by the judge it is properly in the record. The fact that the evidence was taken down and certified by the stenographer does not affect the question, for if the judge incorporates the evidence in a bill he adopts the report and thereby makes its statements and recitals his own.¹

§ 822. **Making the Stenographer's Report part of the Bill**—The mode of making the stenographer's long-hand report a part of the bill of exceptions is by incorporating it in the form of a bill and procuring the signature of the judge. Counsel can readily do this by preparing the formal caption and introductory recital of a bill, prefixing it to the report and writing at the end of the report the clause necessary to show that all the evidence is set forth and, also, the appropriate conclusion. When this is done and the judge affixes his signature the bill is complete and effective.² It has been held that when the long-hand manuscript is incorporated into a bill of exceptions it need not be copied by the clerk but the original may be taken from the bill and certified up.³ We can see no reason why the

¹ McCormick, etc., Co. v. Gray, 114 Ind. 340, modifying Lyon v. Davis, 111 Ind. 384; L'Hommedieu, etc., Co. v. Cincinnati, etc., Co., 120 Ind. 435, 436.

² In Wagoner v. Wilson, 108 Ind. 210, 215, it was said: "All that is necessary in order to prepare a bill of exceptions which shall incorporate the long-hand manuscript is to prepare the usual formula for the beginning of an ordinary bill of exceptions with a recital that the following oral evidence was delivered, and the rulings of the court with respect to the admission and rejection of evidence, and the objections thereto, were made and taken as noted, and that a verbatim report of such evidence, and the rulings, objections and exceptions thereon and thereto was made by an official reporter, naming him, of which rulings, objections and exceptions so made and taken, the following is the original long-hand manuscript as the same was made and filed. Some-

thing similar to the foregoing, attached as a preface to the long-hand manuscript, with the usual formal ending of a bill of exceptions, not omitting at the appropriate place the usual statement that 'this was all the evidence given in said cause,' incorporates the manuscript into a bill ready for presentation to the judge for examination and signature."

³ In Hull v. Louth, 109 Ind. 315, 387, the court said: "But, in our judgment, if the long-hand manuscript is filed with, and as part of the bill of exceptions, that is sufficient, and when thus filed it may be taken from the bill of exceptions and be made part of the record on appeal to this court without being copied." As indicated in the text we can see neither propriety nor utility in severing the report from the statements and recitals that give it effect, and we think that the better practice is to certify up the original bill as an entirety.

original bill may not be certified up without extracting from it the long-hand manuscript. There is certainly no necessity for detaching the manuscript from the other parts of the bill and no good is accomplished by doing so.¹ We are, of course, speaking only of bills containing the evidence, for the doctrine declared by the decided cases does not extend to bills bringing motions made during the formation of issues, or the like, into the record. When the report of the stenographer is properly incorporated in the bill of exceptions its statements of objections, exceptions and rulings on the admission and exclusion of evidence are part of the record.

§ 823. The Rule where all the Evidence must be in the Record—
In many cases the errors sought to be made available can not be regarded unless the whole evidence is in the record by a bill of exceptions.² We are not speaking of special cases as "reserved questions of law," or the like, but of cases appealed in the ordinary mode. We do not say that the entire evidence is always necessary even in cases appealed in the usual mode, for there are cases where it is not necessary that the entire evidence should be brought in by a bill of exceptions,³ but we do say that where the whole evidence is required, as it is in most cases, it must be brought into the record. Where the entire evidence must be in the record there must be a clear affirmative

¹ Since the text was written it has been expressly decided that the original bill containing the report of the evidence may be certified up without copying. *McCoy v. Able* (Ind.), 30 N. E. Rep. —. The case referred to fully considers the subject of making the reporter's notes part of the record.

² *Fellenzer v. Van Valzah*, 95 Ind. 128; *Ohio, etc., Co. v. Nickless*, 73 Ind. 382; *Miller v. Voss*, 40 Ind. 307; *Lorton v. Carson*, 2 Blackf. 464; *Bates v. Bulkley*, 7 Ill. 389; *Hall v. Reed*, 17 Ohio, 498.

³ *Wiley v. Johnson*, 74 Ind. 233; *Sutherland v. Hankins*, 56 Ind. 343; *Shorff v. Kinzie*, 80 Ind. 500; *Pavey v. Win-*

trode, 87 Ind. 379; *Conden v. Morningstar*, 94 Ind. 150; *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143; *Pedigo v. Grimes*, 113 Ind. 148; *Estate of Wells v. Wells*, 71 Ind. 509; *Douns v. Opp*, 82 Ind. 166. It is true, as a general rule, that questions arising on a motion for a new trial require that all the evidence should be brought into the record. *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Smith v. Stanford*, 62 Ind. 392; *Walser v. Kerrigan*, 56 Ind. 301. But the rule, although not subject to very many exceptions, is, nevertheless, subject to some important ones.

showing of that fact. The usual formula in this jurisdiction is: "And this was all the evidence given in the cause," but it has been held that words of equivalent meaning are sufficient,¹ although it has also been held that it is not sufficient to use the term "offered"² in place of the term "given," or the word "testimony"³ in place of the word "evidence." It has been said, we may incidentally remark, that the adherence to a rigid rule is unwise because too technical, but this is only a partial view of the question. One great virtue of a rule is to secure certainty and to prevent a consumption of the time of the court in determining whether the evidence is or is not in the record. It is no great hardship to require parties to obey a settled rule, but there is hardship and uncertainty in a practice that leaves each case to be determined as a single and isolated instance.

§ 824. **The General Recital not always Controlling**—The general statement that "this was all the evidence given in the cause," effective as it is, does not always control. If the bill shows that it does not contain all the evidence, the recital will be unavailing.⁴ But it is effective and controlling

¹ Beatty v. O'Conner, 106 Ind. 81; Brock v. State, 85 Ind. 397.

² Goodwine v. Crane, 41 Ind. 335; Peck v. Louisville, etc., Co., 101 Ind. 366; American Ins. Co. v. Gallahan, 75 Ind. 168; Woollen v. Wishmier, 70 Ind. 108; Lyon v. Davis, 111 Ind. 384.

³ Central Union, etc., Co. v. State, 110 Ind. 203, 207; Gazette, etc., Co. v. Morss, 60 Ind. 153; McDonald v. Elfes, 61 Ind. 279; Sassengut v. Posey, 67 Ind. 408; Brickley v. Weghorn, 71 Ind. 497; Kleyla v. State, 112 Ind. 146; Longworth v. Higham, 89 Ind. 352; Ingel v. Scott, 86 Ind. 518; Baltimore, etc., Co. v. Barnum, 79 Ind. 261; Garrison v. State, 110 Ind. 145; Bender v. Wampler, 84 Ind. 172; Barley v. Dunn, 85 Ind. 338. The older cases, which required a rigid adherence to the accepted formula, were based upon a rule of court which is not now in force. This will in part account for the apparent

conflict in our decisions. The word "introduced" has been held equivalent to the word "given." Jones v. Layman, 123 Ind. 569, 24 N. E. Rep. 363; Kennedy v. Divine, 77 Ind. 490; Stair v. Richardson, 108 Ind. 429; Brock v. State, 85 Ind. 397.

⁴ Oberfelder v. Kavanaugh, 29 Neb. 427, 45 N.W. Rep. 471; Missouri Pacific Ry. Co. v. Hays, 15 Neb. 224, 18 N.W. Rep. 51; Taylor v. Davis (Tex.), 13 S.W. Rep. 642; Jennings v. Durham, 101 Ind. 391; Stout v. Turner, 102 Ind. 418; Louisville, etc., Co. v. Grantham, 104 Ind. 353; Reineke v. Wurgler, 77 Ind. 468; Collins v. Collins, 100 Ind. 266; Fasnacht v. German, etc., Association, 99 Ind. 133; Lee v. State, 88 Ind. 256; French v. State, 81 Ind. 151; Pavey v. Wintrobe, 87 Ind. 379; Eigenman v. Rockport, etc., Association, 79 Ind. 41; Huston v. McCloskey, 76 Ind. 38; Shimer v. Butler University, 87 Ind. 218;

unless the bill itself reveals the fact that some evidence is omitted.¹

§ 825. **Amendment of Bills of Exceptions**—It is quite well settled that amendments and corrections may be made in a bill of exceptions by order of the trial court,² but amendments and corrections are allowed only in clear cases. It is obvious that where so much depends upon the memory of the judge by whom the cause was tried, the courts should proceed with care and caution.³ Promptness is exacted, and rightly exacted, of parties who ask that a bill of exceptions be altered or amended.

§ 826. **Application for the Order to Amend**—The rule respecting the amendment or correction of bills of exceptions, so far as concerns matters of procedure, is much the same as that which prevails in other cases where the amendment or correction of a record is sought, but, as said in the preceding paragraph, the courts are rather more cautious and careful in ordering amendments of bills of exceptions than they are in ordering the correction of other parts of the record. We have considered the general subject at another place, and it is unnecessary to again discuss it.⁴ All that we deem it necessary to say here is that notice of an application, when made after the close of the term, must be given, and that while parol evidence is admissible to aid in determining whether an amendment is proper, an amendment can not, as a general rule, be made upon parol evidence alone.⁵

Hockett v. Johnson, 87 Ind. 251; Ward v. Bateman, 34 Ind. 110; Morrow v. State, 48 Ind. 432; Powers v. Evans, 72 Ind. 23; Thames, etc., Co. v. Beville, 100 Ind. 309; Lyon v. Davis, 111 Ind. 384; State v. Marsh, 119 Ind. 394; Lawrenceburgh, etc., Co. v. Hinkle, 119 Ind. 47; Saxson v. State, 116 Ind. 6.

¹ Vermillion v. Nelson, 87 Ind. 194.

² *Ante*, § 209, p. 178, note 2. Harris v. Tomlinson (Ind.), 30 N. E. Rep. —; Lefferts v. State, 49 N. J. L. 26; 6 Atl. Rep. 521; Martin v. St. Louis, etc., Co., 53 Ark. 250, 13 S. W. Rep. 765; People v. Teague, 106 N. C. 571; Runnells v. Moffat, 73 Mich. 188; Morse v. Woodworth (Mass.), 27 N. E. Rep. 1010; Giv-

ins v. Bradley, 3 Bibb. (Ky.), 192; Marley v. Hornaday, 69 Ind. 106; Hannah v. Dorrell, 73 Ind. 465; Morgan v. Hays, 91 Ind. 132.

³ Roblin v. Yaggy, 35 Ill. App. 537.

⁴ *Ante*, §§ 212, 213, 214, 219. See, also, Harris v. Tomlinson, *supra*, and authorities cited; St. Louis, etc., Co. v. Godby, 45 Ark. 485, 491; Seig v. Long, 72 Ind. 18; Hamilton v. Burch, 28 Ind. 233.

⁵ Where the application is made during the term the rule is somewhat different. See, Longworth v. Higham, 89 Ind. 352; Beavers v. State, 58 Ind. 530; Jeffersonville, etc., Co. v. Bowen, 49 Ind. 154.

CHAPTER XIV.

PRESENTING AN OPPORTUNITY FOR REVIEW.

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| § 827. The theoretical doctrine. | § 845. The motion should be complete in itself. |
| 828. The practical doctrine. | 846. Rulings on the pleadings and objections to the form of the judgment not assignable as causes for a new trial. |
| 829. The mode of presenting questions for review. | 847. Inconsistency between the answers of the jury to interrogatories and the general verdict. |
| 830. The office of a motion for a new trial. | 848. Irregularity in the proceedings of the court. |
| 831. The office of the motion on appeal. | 849. Irregularity of the jury or prevailing party. |
| 832. The motion can not precede the decision. | 850. Abuse of discretion. |
| 833. The motion not cut off by entry of judgment. | 851. Misconduct of the jury or prevailing party. |
| 834. Motion in arrest of judgment cuts off a motion for a new trial. | 852. Accident or surprise. |
| 835. All causes must be embraced in one motion. | 853. Errors of law occurring on the trial. |
| 836. Successive motions. | 854. Verdict or finding contrary to law or not sustained by sufficient evidence. |
| 837. Exceptions to the rule forbidding successive motions. | 855. Damages — Questioning the amount of recovery. |
| 838. Different classes of motions. | 856. Damages in actions in tort and damages in actions on contract. |
| 839. Joint motions. | 857. Newly discovered evidence. |
| 840. Requisites of the motion—Generally. | 858. Counter-affidavits. |
| 841. Time of filing. | 859. Verification of the motion. |
| 842. Where filed. | |
| 843. The motion ordinarily goes to the whole case. | |
| 844. Exceptions to the general rule. | |

§ 827. **The Theoretical Doctrine**—In theory all rulings must be presented to the trial court for review or they will not be available as error on appeal, although wrong. This doctrine is hardly correct in fact. A ruling on demurrer, or the like, is not, in fact, ever brought before the trial court for review. The earlier cases asserted that an exception gave the court an

opportunity for review,¹ but this is rather a fancied office of an exception than an actual one. The exception follows the ruling so quickly that it is not easy to conceive how it can afford an opportunity to the court of original jurisdiction for reviewing the ruling.

§ 828. **The Practical Doctrine**—The practical doctrine is that rulings connected with the trial or made during its progress must be brought before the trial court for review.² The rule is settled, and is easily understood. The difficulty is in determining what rulings are so connected with, or related to, the trial as to make it necessary to bring them before the court for review.

§ 829. **The Mode of Presenting Questions for Review**—We regard it as the office of an exception to give notice that a party intends to stand by his objection and make it available,³ and as this is its office, or, at all events, its chief purpose, it must precede the motion which brings up the ruling in order to have it reviewed. The motion which presents the rulings for review is ineffective, unless proper exceptions have been reserved. The

¹ In *Stump v. Frarley*, 7 Ind. 679, it was said: "One important office of an exception is to direct the attention of the court particularly to the objection and the grounds of it, so that if erroneous it may be re-examined and corrected." *Leyner v. State*, 8 Ind. 490; *Jolly v. Terre Haute, etc., Co.*, 9 Ind. 417.

² *Danks v. Rodeheaver*, 26 W. Va. 274; *State v. Phares*, 24 W. Va. 657; *Johnson v. State*, 43 Ark. 391; *Garver v. Daubenspeck*, 22 Ind. 238; *Lures v. Botte*, 26 Ind. 343; *Taylor v. Shelkett*, 66 Ind. 297; *Hyatt v. Clements*, 65 Ind. 12; *Starnes v. State*, 61 Ind. 360; *Chaplin v. Sullivan*, 128 Ind. 50; *Louisville, etc., Co. v. Hart*, 119 Ind. 273; *Marshall v. Lewark*, 117 Ind. 377; *Racer v. Baker*, 113 Ind. 177; *Rousseau v. Corey*, 62 Ind. 250; *Kent v. Lawson*, 12 Ind.

675, S. C. 74 Am. Dec. 233, and note; *Lichty v. Clark*, 10 Neb. 472. The failure to make the proper motion for a new trial is a waiver of exceptions. In *Nave v. Nave*, 12 Ind. 1, it was said: "And it would seem to have been the intent of the legislature in enacting the new code, that points of law raised during the trial should be treated as waived unless they were again brought under review before the court below, upon a specification in writing, on a motion for a new trial." It was also said: "The rule would be a reasonable one, that the court below should have an opportunity after the hurry of trial was over, to hear full argument and consult with authorities upon points ruled during its progress, and to correct any error it might conclude it had committed."

³ *Ante*, § 769.

ruling on the motion requires an exception,¹ so that where there is a reviewing motion there is a double exception. The motion for a new trial is the one which in the great majority of cases presents the opportunity for review, and it is of that motion that we shall speak.

§ 830. **The Office of a Motion for a New Trial**—It is said in some of the cases that the objections made during the progress of a trial must be repeated in the motion for a new trial, but this we think is hardly accurate, insomuch as objections once well and seasonably stated need not be repeated. But while it is not, as we believe, the office of a motion for a new trial to repeat objections, it is its office to bring before the court of original jurisdiction its rulings in order that it may review them, and, if need be, correct errors into which it may have fallen. If it should be held to be the office of a motion for a new trial to repeat objections, then it would necessarily result that objections must be restated, not simply referred to and specified, but we are not aware of any case in which such strictness in the specifications of the motion is required. The motion is, we think, the vehicle by which rulings concerning the trial or rulings forming part of the trial procedure are conveyed to the attention of the court after a finding or verdict. While it is true, as a general rule, that the office of a motion for a new trial is to present rulings for review, it is, nevertheless, true that it does present for original consideration by the court the correctness of the finding of the jury upon the issues of fact in a case where the assault is upon the verdict for the reason that it is contrary to the evidence or is not supported by the evidence. It is also true that in some other instances it presents an original question as, for instance, the misconduct of jurors, but its principal function is to bring forward rulings for review.

§ 831. **The Office of the Motion on Appeal**—The principal office of the motion on appeal is to present for the consideration of the appellate tribunal the same questions presented to the court of original jurisdiction, and in order to do this it must specify

¹ *Ante.* § 794.

with reasonable certainty the rulings which the party seeks to make available for the reversal of the judgment. The motion is the basis of the specification in the assignment of errors relating to trial procedure, and, as we have seen,¹ no ruling that is properly embraced in the motion for a new trial can be dependently specified as error. The proper specification of error is the ruling on the motion itself and not the causes or reasons properly forming part of the motion, so that it is necessary that all rulings connected with the trial should be specified in the motion.²

§ 832. **The Motion can not Precede the Decision**—Until there is an authoritative decision or finding, the motion can not be properly filed. Thus, in a case where the court in a suit in equity submits particular questions of fact to a jury, the motion filed before the court acts upon the answers or verdict of the jury will be ineffective.³ A verdict, or a finding, in an action at law may be followed by a motion for a new trial, and so may the finding of the court in a suit in equity, for it is proper to file the motion upon the return of the verdict or the announcement of the finding of the court.

§ 833. **Motion not Cut off by Entry of Judgment**—A motion for a new trial is not cut off by the entry of judgment. It may be made after the judgment is entered.⁴ The entry of judgment is, however, a final disposition of the case in such a sense as to start the time for appealing to running from the date of entry, so that the time for appealing does not begin to run until the motion is disposed of by final action.⁵

§ 834. **Motion in Arrest of Judgment Cuts off a Motion for New Trial**—It is a settled general rule that a motion in arrest of judgment

¹ *Inte.*, §§ 347, 348. In many cases it has been judged that reasons not stated in the motion will not be considered on appeal. *Kernodle v. Gibson*, 114 Ind. 483.

² *Pence v. Garrison*, 93 Ind. 345; *Duff v. Duff*, 71 Cal. 513. ³ *Cox v. Baker*, 113 Ind. 62; *Beals v. Beals*, 20 Ind. 163; *Hinkle v. Margerum*, 50 Ind. 240.

⁴ *Inte.*, § 351. ⁵ *New York, etc., Ry. Co. v. Doane*, 105 Ind. 92; *Sinclair v. Washington, etc., Co.*, 4 MacArthur (D. C.), 13.

ment cuts off a motion for a new trial.¹ But it is only a motion in arrest proper that has this effect. A motion for judgment upon the answers of the jury to interrogatories does not preclude a party from moving for a new trial.²

§ 835. **All Causes must be Embraced in One Motion**—In strictness all the reasons for a new trial must be embodied in one motion.³ A party can not, as a matter of right, file separate motions containing different reasons. The court may, in the exercise of a reasonable discretion, permit amended or supplemental motions to be filed, but a party can not, as of strict right, file more than one motion.

§ 836. **Successive Motions**—The rule is that motions for a new trial can not be repeated, for one motion must present all the rulings which the party desires reviewed, but the rule is not without exceptions. A decision upon a motion is ordinarily a conclusive adjudication. As such a decision is an adjudication of a conclusive character it necessarily results that the party is, as a general rule, precluded from repeating his motion.⁴

§ 837. **Exceptions to the Rule forbidding Successive Motions**—It is manifest, as already indicated, that there are exceptions to the general rule prohibiting the filing of a second or subsequent motion. A party may not be aware of the cause entitling him to a new trial, and if his ignorance is not attributable to any

¹ Cincinnati, etc., Co. v. Case, 122 Ind. 310, 23 N. E. Rep. 797. There is an exception to the general rule, and that is: where the grounds of the motion for a new trial are unknown at the time the motion in arrest is made.

² Indianapolis, etc., Co. v. McCaffrey, 62 Ind. 552; Brannon v. Hay, 42 Ind. 92.

³ Moon v. Jennings, 119 Ind. 130. In the case cited it was said: "Parties filing a motion for a new trial for errors occurring on the trial must include all the grounds in one motion; they can not separate them and file a motion for each cause assigned, and we do not con-

sider the error assigned on the overruling of the second motion for a new trial. There might be a case where a second motion for a new trial would be proper, but this is not such a case."

⁴ People v. Center, 61 Cal. 191; Thompson v. Lynch, 43 Cal. 482; Coombs v. Hilberd, 43 Cal. 453; Wright v. Boynton, 40 N. H. 353; Branger v. Buttrick, 28 Wis. 450; Moll v. Benckler, 28 Wis. 611; Rodgers v. Hoenig, 46 Wis. 361; Kabe v. The Vessel Eagle, 25 Wis. 108; Cothren v. Connaughton, 24 Wis. 134; Cross v. State, 55 Wis. 261.

fault of his, he is in fairness and justice entitled to file a second motion, or to amend one previously filed.¹ A party who asks leave to file a second or subsequent motion must show that he was not guilty of negligence in not embodying all the causes in one motion.

§ 838. **Different Classes of Motions**—It seems necessary in order to avoid confusion to say that in the last three preceding paragraphs we have treated of the ordinary motion for a new trial, that is, the motion calling in review errors in the rulings of the court made in cases where the facts were known to the party, and that we did not refer to a motion for a new trial as matter of right, nor to a complaint for a new trial for matters discovered after the close of the term. The classes of motions are essentially different, and are governed, in many respects, by different rules. We have already referred to a complaint for a new trial, and we need do no more than say of a motion for a new trial as of right that it is not within the scope of our subject.²

§ 839. **Joint Motions**—A joint motion by two or more parties must be well taken as to all or there will be no error in overruling it.³ The doctrine that parties who unite in a motion must all have a right to insist upon it is nothing more than the application of a general principle to particular instances. The

¹ *White v. Perkins*, 16 Ind. 358; *Harris v. Rupel*, 14 Ind. 209; *Harrington v. State*, 76 Ind. 112; *Hughes v. M'Kee*, 1 A. K. Marsh. 28; *Malone v. Hopkins*, 49 Ga. 221; *Bryorly v. Clark*, 48 Texas, 345; *Hayes v. Kenyon*, 7 R. I. 531. See *Andis v. Richie*, 120 Ind. 138.

² As to the general rules applicable to a new trial as of right, see *Anderson v. Anderson*, 128 Ind. 254; *Stafford v. Cronkhite*, 114 Ind. 220; *Warburton v. Crouch*, 108 Ind. 83; *Adams v. Wilson*, 60 Ind. 560; *Wilson v. Brookshire*, 126 Ind. 497; *Hawkins v. Heinzman*, 126 Ind. 551; *Liggett v. Hinkley*, 120 Ind. 387; *Gullett v. Miller*, 106 Ind. 75; *Kreitline v. Franz*, 106 Ind. 359; *Will-*

iams v. Thames, etc., Co., 105 Ind. 420; *Voss v. Eller*, 109 Ind. 260, and cases cited; *Powers v. Nesbit*, 127 Ind. 497; *Robertson v. Van Cleave (Ind.)*, 26 N. E. Rep. 899; *Wafer v. Hamill*, 44 Kan. 447, 24 Pac. Rep. 950.

³ *Dorsey v. McGee*, 30 Neb. 637, 46 N.W. Rep. 1018; *Miller v. Adamson*, 45 Minn. 99, 47 N.W. Rep. 452; *First Nat. Bank v. Colter*, 61 Ind. 153; *Feeney v. Mazelin*, 87 Ind. 226; *Kendel v. Judah*, 63 Ind. 291; *Boyd v. Anderson*, 102 Ind. 217; *Wolfe v. Kable*, 107 Ind. 565; *Carnahan v. Chenoweth*, 1 Ind. App. 178; *Carver v. Carver*, 97 Ind. 497; *Robertson v. Garshwiler*, 81 Ind. 463.

principle runs through all procedure, trial court and appellate. It has been held that where there is a joint verdict against several persons and a right of recovery as to two and no right to a recovery as to a third, a motion for a new trial should be sustained as to all of the defendants.¹ Where the rights of the parties are several and distinct the motions should be several, and the motion of one of such parties may be granted and that of the other denied, although both are addressed to the same decision.²

§ 840. **The Requisites of the Motion—Generally**—The motion for a new trial is required to be in writing and the causes must be specifically assigned.³ Each ruling upon which a cause, or reason, is based should be specified with reasonable certainty. The court will not consider any other causes or reasons than such as are so specified. The rule that the rulings must be particularly specified is well illustrated by the cases which hold that instructions must be specifically designated.⁴

§ 841. **Time of Filing**—Where there is no statutory provision authorizing the filing of the motion at a time beyond the term

¹ *Graham v. Henderson*, 35 Ind. 195; *Sperry v. Dickinson*, 82 Ind. 132. See *Murray v. Ebright*, 50 Ind. 362.

² *First National Bank v. Williams*, 126 Ind. 423, 26 N. E. Rep. 75; *Hayden v. Woods*, 16 Neb. 306. But the moving party can not make errors available which only affect other parties. *Flood v. Joyner*, 96 Ind. 459.

³ *Addleman v. Erwin*, 6 Ind. 494; *Madison, etc., Co. v. Trustees*, 8 Ind. 528; *Nutter v. State*, 9 Ind. 178; *Howes v. Halliday*, 10 Ind. 339; *Lagro, etc., Co. v. Eriston*, 10 Ind. 342; *Stevens v. Nevitt*, 15 Ind. 224; *Hubbell v. Skiles*, 16 Ind. 138; *Zimmerman v. Marchland*, 23 Ind. 474; *Whaley v. Gleason*, 40 Ind. 405; *Krutz v. Craig*, 53 Ind. 561; *Harris v. Boone*, 69 Ind. 300.

⁴ *Phelps v. Tilton*, 17 Ind. 423; *Elliott v. Woodward*, 18 Ind. 183; *Marsh v. Terrell*, 63 Ind. 363; *Marley v. Noble*, 63 Ind. 363; *Marley v. Noble*, 63 Ind. 363.

42 Ind. 85; *Horton v. Wilson*, 25 Ind. 316; *Coryell v. Stone*, 62 Ind. 377; *Evans v. State*, 67 Ind. 68; *Watt v. De Haven*, 55 Ind. 128; *Schlicht v. State*, 56 Ind. 173; *Lamance v. Byrnes*, 17 Nev. 197; *Dawson v. Baum*, 3 Wash. T. 464, 19 Pac. Rep. 46; *Hershey v. Knees*, 75 Cal. 115, 16 Pac. Rep. 548; *Lowrie v. Salz*, 75 Cal. 349, 17 Pac. Rep. 232; *Poullain v. Poullain*, 79 Ga. 11, 4 S. E. Rep. 81; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. Rep. 911.

⁵ *Ohio, etc., v. McCartney*, 121 Ind. 385; *Wallace v. Exchange Bank*, 120 Ind. 265; *Jones v. Layman*, 123 Ind. 569. The cases cited deny the doctrine of *Dawson v. Coffman*, 28 Ind. 220; *Bartholomew v. Langsdale*, 35 Ind. 277, and assert the sounder doctrine of such cases as *Estep v. Larsh*, 21 Ind. 183; *Reeves v. Plough*, 41 Ind. 204, and *Grant v. Westfall*, 57 Ind. 121.

at which the verdict, finding, or decision it seeks to call in review was returned or made, the motion must be filed during the term.¹ Our code provides that in cases where a verdict is rendered on the last day of the term the motion may be filed on the first day of the next term "whether general, special, or adjourned."² The motion must be filed within the time prescribed by law unless the time is extended by agreement,³ and it has been said that it is doubtful whether the time can be extended by agreement.⁴

§ 842. **Where Filed**—As the motion is one addressed to the court and requires a direct ruling by the court it must be brought before the court in due form. The only safe course is to file the motion in open court. It will avail nothing to merely file it with the clerk in vacation.⁵

§ 843. **The Motion Ordinarily goes to the Whole Case**—The general rule is that a party must direct his motion to the entire case.⁶ It is not, as a rule, proper to permit a party to select isolated issues and assail them by a motion for a new trial. This is in accordance with the general principle that a case can not be reviewed piecemeal.⁷

¹ We are not here speaking of complaints for a new trial filed after the term, for such cases are independent ones not falling within the scope of the subject of motions for new trial. *Sanders v. Loy*, 45 Ind. 229; *Hines v. Durer*, 89 Ind. 339; *Mercer v. Mercer*, 114 Ind. 558. A complaint for a new trial does not call up rulings for review, but presents original questions.

² R. S. 1881, § 561. The word decision employed in the statute means finding. *Herkimer v. McGregor*, 126 Ind. 247, 260. The statute extends the time beyond the term to the first day of a succeeding term, but no longer. *Colchen v. Ninde*, 120 Ind. 88.

³ *City of Evansville v. Martin*, 103 Ind. 206; *Krutz v. Craig*, 53 Ind. 561. In cases where a new trial is granted

an objection after the order granting it is too late to be available. *Geiss v. Franklin Ins. Co.*, 123 Ind. 172.

⁴ *American White Bronze Co. v. Clark*, 123 Ind. 230.

⁵ In *Emison v. Shepard*, 121 Ind. 184, it was said: "An application for a new trial is made to the court, and it must be made during term time. The statute expressly provides that the application shall be by motion, and a motion is an application to the court."

⁶ *Johnson v. McCulloch*, 89 Ind. 270; *State v. Templin*, 122 Ind. 235; *Mills v. State*, 52 Ind. 187; *Veatch v. State*, 60 Ind. 291; *Morris v. State*, 1 Blackf. 37; *Ex parte Bradley*, 48 Ind. 548; *Richter v. Koster*, 45 Ind. 440.

⁷ *Champ v. Kendrick* (Ind.), 30 N. E. Rep. —, and cases cited.

§ 844. **Exceptions to the General Rule**—There are exceptions to the general rule stated in the preceding paragraph, but they are not numerous.¹ It is only where the rights of the party are several and distinct or the issues different and independent that a new trial can be awarded as to part of a case. Cases in our own reports supply illustration of the award of new trial as to a single issue, and enforce the doctrine stated.² As an illustration of a case where there is an independent issue may be taken one wherein there is an issue formed upon an affidavit for attachment and one upon the complaint. In such a case there may be a new trial as to the issue upon the affidavit.³

§ 845. **The Motion should be Complete in Itself**—In strictness the causes stated in a motion for a new trial should be so certain and specific as to enable the court to identify the rulings assailed without resorting to any other part of the record. This general doctrine is enforced by the cases which hold that the motion can not be made sufficient by referring to matters contained in a bill of exceptions not on file at the time of the filing of the motion.⁴ But it has been held that where a bill of exceptions is on file at the time the motion is filed it may be resorted to for the purpose of supplying defects in the motion.⁵ We think that the true rule is that the motion itself must identify the ruling complained of with such certainty as to recall to the mind of the trial court the particular ruling, and thus make it appear to the appellate tribunal that the ruling was fairly presented to the court of original jurisdiction for review.

¹ Woodward v. Horst, 10 Iowa, 120; Bond v. Wabash, etc., Co., 67 Iowa, 712; Schmitt v. Schmitt, 32 Minn. 130; Lake v. Bender, 18 Nev. 361.

² Houston v. Bruner, 39 Ind. 376; First National Bank v. Williams, 126 Ind. 423.

³ Parsons v. Stockbridge, 42 Ind. 121.

⁴ Sim v. Hurst, 44 Ind. 579; Rogers v. Rogers, 46 Ind. 1; Shore v. Taylor, 46 Ind. 345; Noble v. Dickson, 48 Ind. 171; Dawson v. Hemphill, 50 Ind. 422; Sutherland v. Hankins, 56 Ind. 343; McCammack v. McCammack, 86 Ind. 387; Northwestern, etc., Co. v. Haze-

lett, 105 Ind. 212; Cheek v. State, 37 Ind. 533; Call v. Byram, 39 Ind. 499; De Armond v. Glasscock, 40 Ind. 418; Morklar v. Lewis, 40 Ind. 1; Cobble v. Tomlinson, 50 Ind. 550.

⁵ Elliott v. Russell, 92 Ind. 526, 529. The doctrine of the case cited does not seem to have been followed in any other case, and it is doubtful whether it is sound, inasmuch as it seems to leave out of consideration the important offices of a reviewing motion which are to clearly present the ruling to the trial court for re-examination and to make it appear

§ 846. **Rulings on the Pleadings and Objections to the form of the Judgment not Assignable as Causes for a New Trial**—The general rule is that rulings made in the formation of issues can not be properly assigned as causes in the motion for a new trial, inasmuch as the motion only reaches matters relating to the trial or matters connected with it.¹ Nor do objections to the form of a judgment or decree form proper causes for a new trial.² As we have seen, a judgment is to be questioned in a very different mode.³ A motion for a new trial assails a finding, decision or verdict, not the judgment.⁴ Rulings on motions to dismiss, and the like, are not properly assignable as causes for a new trial.⁵

§ 847. **Inconsistency between the Answers of the Jury to Interrogatories and the General Verdict**—The question as to the right to a judgment in a case where the answers of the jury to interrogatories are in conflict with the verdict can not be raised by a motion for a new trial.⁶ That question is properly presented by a motion for a judgment on the answers to interrogatories. The refusal of the court to submit interrogatories or to require definite answers is, however, properly presented by a motion for a new trial.⁷

to the appellate tribunal that the ruling was so presented as well as to present to the appellate tribunal the same questions as those presented to the lower court.

¹ *Chase v. Arctic Ditchers*, 43 Ind. 74; *Daubenspeck v. Daubenspeck*, 14 Ind. 320; *Tucker v. Call*, 45 Ind. 31; *Hamilton v. Elkins*, 46 Ind. 213; *Bowman v. Phillips*, 47 Ind. 341; *Ward v. Bateman*, 34 Ind. 110; *Cates v. Thayer*, 93 Ind. 156; *Reed v. Spayde*, 56 Ind. 394; *Ringgenberg v. Hartman*, 102 Ind. 537; *State v. Cady*, 47 Conn. 44; *Crowley v. Pendleton*, 46 Conn. 62; *Davis v. Pool*, 67 Ind. 425; *Glendy v. Lanning*, 68 Ind. 142; *Line v. Huber*, 57 Ind. 261; *Marks v. Trustees, etc.*, 56 Ind. 288; *Marshall v. Beeber*, 53 Ind. 83; *Hunter v. Fitzmaurice*, 102 Ind. 449;

Wabash, etc., Co. v. Nice, 99 Ind. 152.

² *Creech v. Richards*, 76 Ga. 36.

³ *Ante*, § 796.

⁴ *Sawyer v. Sargent*, 65 Cal. 259; *Martin v. Matfield*, 49 Cal. 42; *Rosenweig v. Frazer*, 82 Ind. 342; *Rodefer v. Fletcher*, 89 Ind. 563.

⁵ *Tyler v. Bowlus*, 54 Ind. 333; *Tibbetts v. O'Connell*, 66 Ind. 171; *Vawter v. Gilliland*, 55 Ind. 278.

⁶ *Byram v. Galbraith*, 75 Ind. 134; *Brickley v. Weghorn*, 71 Ind. 497; *Northwestern, etc., Co. v. Blankenship*, 94 Ind. 535, 548; *Tucker v. Conrad*, 103 Ind. 349; *Baltimore, etc., Co. v. Rowan*, 104 Ind. 88, 96; *Louisville, etc., Co. v. Kane*, 120 Ind. 140; *Stockton v. Stockton*, 40 Ind. 225, 228.

⁷ *Astley v. Capron*, 89 Ind. 167; *Stockwell v. Thomas*, 76 Ind. 506;

§ 848. **Irregularity in the Proceedings of the Court**—If the court in matters pertaining to the trial violates settled rules of law or procedure, and harm results to the complaining party, he is entitled to a new trial. But it is necessary that it should appear, inferentially or directly, that the irregularities were of such materiality as to prejudice his substantial rights.¹ The particular irregularities must be specified; it is not sufficient to employ the general words of the statute.² Error in granting, or in refusing to grant, a change of venue, is an irregularity properly assignable as a reason for a new trial.³ A like rule applies to rulings respecting applications for continuance.⁴ Denying a trial by jury where a party is entitled to it is cause for a new trial and must be assigned in the motion.⁵ Cases are numerous wherein it is held that errors in impaneling the jury must be particularly specified as causes for a new trial. It has been held that the failure of the court to interfere upon request to prevent or correct the misconduct of counsel in argument is an irregularity, and if that court refuses to interfere and the misconduct is material and influential, the irregularity will be cause for a new trial.⁶

Louisville, etc., Co. v. Thompson, 107 Ind. 442; Berghoff v. McDonald, 87 Ind. 549. See, also, Deatty v. Shirley, 83 Ind. 218. As to the remedy where interrogatories are not answered, see Bedford, etc., Co. v. Rainbolt, 99 Ind. 551, where Peters v. Lane, 55 Ind. 391, and Carpenter v. Galloway, 73 Ind. 418, are in part overruled. See, also, Pittsburgh, etc., Co. v. Hixon, 110 Ind. 225; Jones v. Angell, 95 Ind. 376; McElfresh v. Guard, 32 Ind. 408; West v. Cavins, 74 Ind. 265.

¹ Telford v. Wilson, 71 Ind. 555; Musselman v. Musselman, 44 Ind. 106.

² Tomer v. Densmore, 8 Neb. 384; Lowrie v. France, 7 Neb. 191; Phelps v. Tilton, 17 Ind. 423; Scoville v. Chapman, 17 Ind. 470.

³ Berlin v. Oglesbee, 65 Ind. 308; Walker v. Heller, 73 Ind. 46; Knarr v. Conaway, 53 Ind. 120; Horton v. Wilson, 25 Ind. 316; Dawson v. Coffman,

28 Ind. 220; Krutz v. Howard, 70 Ind. 174.

⁴ Kent v. Lawson, 12 Ind. 675; Hughes v. Ainslee, 28 Ind. 346; Yater v. Mullen, 23 Ind. 562; Pence v. Christman, 15 Ind. 257; Carr v. Eaton, 42 Ind. 385; Westerfield v. Spencer, 61 Ind. 339; Nichols v. State, 65 Ind. 512; Arbuckle v. McCoy, 53 Ind. 63; Davis v. Hardy, 76 Ind. 272.

⁵ Alley v. State, 76 Ind. 94; Griffin v. Pate, 63 Ind. 273; Ketcham v. Brazil, etc. Co., 88 Ind. 515.

⁶ Richie v. State, 59 Ind. 121; Huber v. State, 57 Ind. 341; Gillooley v. State, 58 Ind. 182; Kinnaman v. Kinnaman, 71 Ind. 417; Porter v. Choen, 60 Ind. 338; Combs v. State, 75 Ind. 215; School Town of Rochester v. Shaw, 100 Ind. 268; Campbell v. Maher, 105 Ind. 583; Nelson v. Welch, 115 Ind. 270; Troyer v. State, 115 Ind. 331; Coble v. Eltzroth, 125 Ind. 429; Carter v. Carter, 101 Ind.

§ 849. **Irregularity of the Jury or Prevailing Party**—The code seems to make a distinction between “irregularity” and “misconduct,”¹ and it is probable that it was intended that where there was intentional wrong the case should be treated as one of misconduct, and where there was error but no bad intention, the case should be regarded as one of irregularity. It is really of no great importance to which class a case is assigned, for if there is a proper specification, the court will act upon it. The material thing is that the error or wrong should be particularly specified and should appear to be influential and prejudicial.

§ 850. **Abuse of Discretion**—Where the court by an order or ruling relating to the trial abuses its discretion to the injury of a party, the ruling or order is properly specified as a cause for new trial. It is obvious that the order or ruling must be stated with particularity, since it is incumbent upon a party who seeks a reversal because of an abuse of discretion to clearly point out the particular wrong. The case must be a clear and strong one or a reversal will not be adjudged.

§ 851. **Misconduct of the Jury or Prevailing Party**—We have elsewhere shown that misconduct of parties, counsel or jurors may be sufficient ground for the reversal of a judgment. To make the misconduct available as error the particular wrongful acts must be specified in the motion for a new trial.² General statements will be of no avail.

450. See, generally, *Territory v. Ely*, 6 Dak. 128; *Halloran v. Halloran* (Ill.), 27 N. E. Rep. 82; *Johnson v. Slappey*, 85 Ga. 576, 11 S. E. Rep. 862.

¹ R. S. 1881, § 559, subdivisions 1 and 2.

² *Lennox v. Knox, etc., Co.*, 62 Me. 322. See, generally, *Newton v. Whitney*, 77 Wis. 515, 46 N. W. Rep. 882; *Louisville, etc., Co. v. Hendricks*, 128 Ind. 462, 28 N. E. Rep. 58; *People v. Schad*, 58 Hun. 571; *People v. Kennedy*, 57 Hun. 532; *State v. Garig* (La.), 8 So. Rep. 934; *New Albany, etc., v. McCul-*

loch, 127 Ind. 500; *People v. Wheatley*, 88 Cal. 114, 26 Pac. Rep. 95; *Pracht v. Whittridge*, 44 Kan. 710, 25 Pac. Rep. 192; *Morley v. Liverpool, etc., Co.*, 85 Mich. 210, 48 N. W. Rep. 502; *Randolph v. Lampkin* (Ky.), 14 S. W. Rep. 538; *Houk v. Allen*, 126 Ind. 568; *Cheek v. State*, 35 Ind. 492; *Hodges v. Bales*, 102 Ind. 494; *De Priest v. State*, 68 Ind. 569. Affidavits of jurors not admissible to impeach verdict. *Glaspeil v. Northern, etc., Co.*, 43 Fed. Rep. 900; *Wray v. Carpenter* (Col.), 27 Pac. Rep. 248; and cases cited; *Jones v. State*,

§ 852. **Accident or Surprise**—The motion must particularly specify "the grounds of the accident or surprise."¹ It is essential to bring into the record such matters as show the character and influence of the surprise or accident. Where the ground of the motion is that there was an accident the complaining party must show, by the record, that the occurrence relied upon as showing an accident, was one against which ordinary prudence, diligence, and vigilance could not have provided, and this is substantially true where the ground of the motion is surprise. A party must expect, and use diligence and prudence to provide against, such acts and measures as usually occur or are taken in forensic contests.² The surprise must be as to a matter of fact and not of law.³ Where one party wrongfully misleads another by violating an agreement, a new trial is demandable upon the ground of surprise, provided the complaining party is without fault.⁴

§ 853. **Errors of Law Occurring on the Trial**—Errors of law committed by the court on the trial are grounds for a new trial.

89 Ind. 82; *Harding v. Whitney*, 40 Ind. 379; *McKinley v. First National Bank*, 118 Ind. 375, and cases cited.

¹ In *Snodgrass v. Hunt*, 15 Ind. 274, it was said: "The grounds upon which the defendants were surprised should have been distinctly pointed out in the circuit court. And it is equally essential that each error of law relied on in support of the motion should have been definitely presented to the court for its consideration." *Schellhaus v. Ball*, 29 Cal. 605; *Howe v. Briggs*, 17 Cal. 385.

² *Dodge v. Strong*, 2 Johns. Ch. 228; *Green v. Robinson*, 5 How. (Miss.) 80; *Ames v. Howard*, 1 Sumn. 482; *Carr v. Gale*, 1 Curt. C. C. 384; *Alger v. Merritt*, 16 Iowa, 121; *Turner v. Morrison*, 11 Cal. 21; *Stout v. Calver*, 6 Mo. 254; *Jackson v. Roe*, 9 Johns. 77; *Loomie v. Burt*, 16 S. W. Rep. 439; *Crowell v. Harvey*, 30 Neb. 570, 46 N. W. Rep. 709; *Cole v. Fall Brook Coal Co.*, 57 Hun. 585, 10 N. Y. Supp. 417; *Gaines v. White* (S. Dak.), 47 N. W.

Rep. 524; *Tripp, etc., Co. v. Martin* (Kan.), 26 Pac. Rep. 424; *Shotwell v. McElhiney*, 101 Mo. 677, 14 S. W. Rep. 754; *Crawford v. Georgia, etc., Co.*, 80 Ga. 5, 12 S. E. Rep. 176; *Louisville, etc., v. Hendricks*, 128 Ind. 462, and cases cited; *Lockwood v. Rose*, 125 Ind. 588; *Scheible v. Slagle*, 89 Ind. 323; *Ruger v. Bungan*, 10 Ind. 451; *Helm v. First Nat. Bank*, 91 Ind. 44; *Gardner v. State*, 94 Ind. 489; *Sullivan v. O'Conner*, 77 Ind. 149; *Pittsburgh, etc., Co. v. Sponier*, 85 Ind. 165; *Brownlee v. Kenneipp*, 41 Ind. 216; *Chamberlain v. Reid*, 49 Ind. 332; *Peck v. Hensley*, 21 Ind. 344; *Guard v. Risk*, 11 Ind. 156; *Cox v. Harvey*, 53 Ind. 174.

³ *Craig v. Fanning*, 6 How. Pr. 336; *Hite v. Lenhart*, 7 Mo. 22; *Robbins v. Alton, etc., Co.*, 12 Mo. 380; *McLennan v. Prentice*, 79 Wis. 488, 48 N. W. Rep. 487; *Beals v. Beals*, 27 Ind. 77.

⁴ *McBride v. Settles* (Texas), 16 S. W. Rep. 422; *Haynes v. State*, 45 Ind. 424.

but to be available they must be specified with particularity. It is not sufficient to employ general terms, although they are such as the statute supplies. Each ruling is required to be specified.¹ Errors of law occurring on the trial are such as are committed respecting the opening and closing of the case, the admission and exclusion of evidence, the instructing of the jury and like matters, but if the particular ruling is appropriately specified it is not important whether the general term "errors of law" is or is not employed, although it is proper to employ it and to follow it by particular specifications.

§ 854. Verdict or Finding Contrary to Law or not Sustained by Sufficient Evidence—Under our decisions an assignment of a cause for a new trial that the "verdict or finding is not sustained by sufficient evidence" is sufficient without further specification.² The assignment that the finding or verdict is contrary to law may also be made in general terms.³ It has been held in a very great number of cases that the appellate tribunal will not weigh the evidence in cases where there is a conflict, but will accept and act upon that which the court or jury trying the case deemed trustworthy. The cases in which a judgment

¹ *Meaux v. Meaux*, 81 Ky. 475; *Cummings v. Ross*, 90 Cal. 68, 27 Pac. Rep. 62; *Coleman v. Gilmore*, 49 Cal. 340; *Danley v. Robbins*, 3 Ark. 144; *Putnam v. Hannibal, etc., Co.*, 22 Mo. App. 589; *Raymond v. Thexton*, 7 Mont. 299; *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587, 44 N. W. Rep. 864; *Street v. Lemon, etc., Co.*, 9 Nev. 251; *Dawson v. Baum*, 3 Wash. Ter. 464, 19 Pac. Rep. 46; *State v. Gallagher*, 16 La. Ann. 388; *Beal v. Stone*, 22 Iowa, 447; *Seifrath v. State*, 35 Ark. 412; *Kimball v. Whitney*, 15 Ind. 280; *Burt v. Hoettinger*, 28 Ind. 214; *Spurrier v. Briggs*, 17 Ind. 529; *Elliott v. Woodward*, 18 Ind. 183; *Snodgrass v. Hunt*, 15 Ind. 274; *Barnard v. Graham*, 14 Ind. 322; *Patterson v. Jack*, 59 Iowa, 632; *Brooker v. Weber*, 41 Ind. 426; *Stone v. State*, 42 Ind. 418. See, also, *Kelley v. Burnell*, 14 Ind. 328;

Foster v. State, 59 Ind. 481; *Wilds v. Bogan*, 55 Ind. 331; *Marsh v. Terrell*, 63 Ind. 363.

² *Collins v. Maghee*, 32 Ind. 268; *Weston v. Johnson*, 48 Ind. 1. See *Edmonds v. State*, 34 Ark. 720. Some of the courts require a much more definite statement. *Hill v. Weisler*, 49 Cal. 146; *Parker v. Reay*, 76 Cal. 103; *Coleman v. Gilmore*, 49 Cal. 340; *Fitch v. Bunch*, 30 Cal. 208. It is not sufficient to assign that the "verdict is against the weight of the evidence." *Waggoner v. Liston*, 37 Ind. 357.

³ As to when a verdict can be said to be contrary to law, see *Robinson, etc., Works v. Chandler*, 56 Ind. 575, 583; *Bosseker v. Cramer*, 18 Ind. 44; *Garst v. State*, 68 Ind. 101; *Potts v. Felton*, 70 Ind. 166.

has been reversed upon the ground that the finding or verdict is not sustained by the evidence are very rare. Many appellate courts refuse to consider such a cause at all.

§ 855. **Damages—Questioning the Amount of Recovery**—In order to make an error in the assessment of damages available, the specification in the motion for a new trial must be directly addressed to the amount of the recovery. A party can not attack the assessment of damages unless he assigns as a cause for a new trial the specific reason that the amount awarded is erroneous.¹ Thus, a party can not make available an error in the assessment of damages under a specification that the verdict is contrary to the evidence. It is sufficient to employ the general terms of the statute in assailing the amount of the recovery without particularly specifying the error in the assessment.²

§ 856. **Damages in Actions in Tort and Damages in Actions on Contract**—It is an established general rule that a party can not assign one cause for a new trial and succeed upon another. In accordance with this general principle, it is held that a cause challenging the assessment of damages in actions for a tort is ineffective in actions upon contract. The rule in this state is that in order to question the amount of damages assessed in actions *ex delicto*, the fourth statutory cause for a new trial must be assigned,³ and in order to question the assessment of dam-

¹ *Davis v. Montgomery*, 123 Ind. 587; 26 Mo. App. 431; *Menk v. Home, etc., Co.* 76 Cal. 50, 14 Pac. Rep. 837; *Mazeheitz v. Pimentel*, 83 Cal. 450; *Allgro v. Duncan*, 24 Howard Pr. (N. Y.), 210. In *McGrime v. State*, 30 Ind. 140, it was held that the specification, "the court erred in finding any sum against the defendant," was insufficient.

² *McCormick, etc., Co. v. Gray*, 114 Ind. 340, 16 N. E. Rep. 787. In *Clark Civil Township v. Brookshire*, 114 Ind. 437, it was said: "It is assigned as a cause for new trial that the damages are excessive. This is not an action for tort, and hence that assignment raises no question as to the amount of the recovery." This doctrine is asserted in

³ *Lake Erie, etc., Co. v. Acres*, 108 Ind. 548. See, also, *Ray v. Thompson*,

ages in actions *ex contractu*, the fifth statutory cause must be specified.¹

§ 857. **Newly Discovered Evidence**—A motion for a new trial upon the ground of newly discovered evidence is not regarded with favor. The policy of the law is to require of parties care, diligence and vigilance in securing and presenting evidence.² It is indispensably necessary that the moving party should clearly show that he exercised diligence in his efforts to discover and produce the evidence on the trial.³ The facts constituting the diligence must be stated; it is not enough to aver diligence in general terms.⁴ The record must make it clearly appear that the newly discovered evidence is of such a character as that it would probably change the result in the event that a new trial should be granted.⁵ It is held in a great num-

other cases. *Thomas v. Merry*, 113 Ind. 83; *Lake Erie, etc., Co. v. Acres*, 108 Ind. 548; *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, 30 Ind. 8; *McKinney v. State*, 117 Ind. 26; *Smith v. State*, 117 Ind. 167; *Hogshead v. State*, 120 Ind. 327; *Western, etc., Co. v. Studebaker, etc., Co.*, 124 Ind. 176.

¹ *Moore v. State*, 114 Ind. 414, 422.

² *Hines v. Driver*, 100 Ind. 315; *Moore v. Philadelphia Bank*, 5 S. & R. (Pa.) 41; *Baker v. Joseph*, 16 Cal. 173; *Coe v. Givan*, 1 Blackf. 367.

³ *Harrington v. Witherow*, 2 Blackf. 37; *Cooper v. State*, 120 Ind. 377; *State v. Clark*, 16 Ind. 97; *Martin v. Garver*, 40 Ind. 351; *Bissot v. State*, 53 Ind. 408; *Clouser v. Clapper*, 59 Ind. 548; *Test v. Larsh*, 100 Ind. 562; *Skaggs v. State*, 108 Ind. 53; *Blackburn v. Crowder*, 110 Ind. 127; *Allen v. Bond*, 112 Ind. 523; *McCauley v. Murdock*, 97 Ind. 229; *Ragsdale v. Matthews*, 93 Ind. 589; *Du Souchet v. Dutcher*, 113 Ind. 249; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *Marks v. State*, 101 Ind. 353; *Pemberton v. Johnson*, 113 Ind. 538; *Bartley v. Phillips*, 114 Ind. 189; *Shewalter v. Williamson*, 125 Ind. 373; *First Nat.*

Bank v. Murdough, 40 Iowa, 26; *Carson v. Henderson*, 34 Kan. 404; *Evans v. Christopherson*, 24 Minn. 330; *Moses v. Vroman*, 5 Wis. 147, 149; *Howland v. Reeves*, 25 Mo. App. 458; *Peterson v. Gresham*, 25 Ark. 380.

⁴ *Keisling v. Readle*, 1 Ind. App. 240, 243; *Toney v. Toney*, 73 Ind. 34; *Hines v. Driver*, 100 Ind. 315; *Wall v. State*, 80 Ind. 146; *Ragsdale v. Matthews*, 93 Ind. 589; *Schnurr v. Stuts*, 119 Ind. 429; *Ward v. Voris*, 117 Ind. 368; *Skaggs v. State*, 108 Ind. 53, and cases cited; *Anderson v. Hathway* (Ind.), 30 N. E. Rep. —; *Smith v. Williams*, 11 Kan. 104. See *Pemberton v. Johnson*, 113 Ind. 538; *Blackburn v. Crowder*, 110 Ind. 127.

⁵ *Oneal v. State*, 47 Ga. 229; *State v. Stain*, 82 Me. 472; *Tull v. Pope*, 69 N. C. 183; *Travelers, etc., Co. v. Harvey*, 82 Va. 949; *Windham, etc., Bank v. Kendall*, 7 R. I. 77; *Briggs v. Gleason*, 27 Vt. 114; *Bixby v. State*, 15 Ark. 395; *Petefish v. Watkins*, 124 Ill. 384; *McCormick v. Central R. R. Co.*, 75 Cal. 506; *Grace v. McArthur*, 76 Wis. 641; *Gallup v. Henderson*, 6 N. Y. Supp. 914; *Hall v. Lyons*, 29 W. Va. 410;

ber of cases, and by many courts, that a new trial will not be granted where the new evidence is merely cumulative.¹ The general rule that a new trial will not be granted to let in purely impeaching evidence is declared by cases too numerous to cite.² The motion is required to give the names of the newly discovered witnesses, if the new matter consists of oral testimony, or if it consists of a writing, the writing must be produced if it can be done; if it is not in the power of the party to produce it, a statement of its substance should be given. The affidavit of the newly discovered witness must accompany the motion.³ The party must show by his own affidavit the truth of the testimony,⁴ the probability of procuring the evidence in

Morgan v. Bell, 41 Kan. 345; *McDonald v. Early*, 24 Neb. 818; *People v. Sackett*, 14 Mich. 320; *State v. Burge*, 7 Iowa, 255; *Parsons v. Platt*, 37 Conn. 563; *Culbertson v. Hill*, 87 Mo. 553; *Byrne v. Reed*, 75 Cal. 277; *Mechanics, etc., Co. v. Nichols*, 16 N. J. L. 410; *Leschi v. Territory*, 1 Wash. Ter. 13; *Anderson v. Market, etc., Bank*, 66 How. Pr. 8; *Brady v. Mayor of New York*, 22 J. & S. (N. Y.) 457; *Rainey v. State*, 53 Ind. 278; *Simpson v. Wilson*, 6 Ind. 474; *Hines v. Driver*, 100 Ind. 315, and cases cited; *Suman v. Cornelius*, 78 Ind. 506.

¹ We cite a few of the many cases. *Sutherlin v. State*, 108 Ind. 389; *De Hart v. Aper*, 107 Ind. 460; *Marshall v. Mathers*, 103 Ind. 458; *Harper v. State*, 101 Ind. 109; *Dodds v. Vannoy*, 61 Ind. 89; *Winsett v. State*, 57 Ind. 26; *Martin v. Garver*, 40 Ind. 351; *State v. Clark*, 16 Ind. 97; *Simpson v. Wilson*, 6 Ind. 474; *Kaul v. Brown* (R. I.), 20 Atl. Rep. 10; *Jones v. Chicago, etc., Co.*, 42 Minn. 183, 43 N.W. Rep. 1114; *Erskine v. Duffy*, 76 Ga. 602; *Marcum v. Commonwealth* (Ky.), 1 S. W. Rep. 727; *State v. Oeder*, 80 Iowa, 72, 45 N. W. Rep. 543; *Dollman v. Munson*, 90 Mo. 85, 2 S. W. Rep. 134; *Fay v. Richards*, 30 Ill. App. 477; *Baker v. Moor*, 84 Ga. 186, 10 S. E. Rep. 737;

Wieting v. Millston, 77 Wis. 523, 46 N. W. Rep. 879; *Brazil v. Peterson*, 44 Minn. 212, 46 N. W. Rep. 331; *Roberts v. Johnstown Bank*, 60 Hun. 576, 14 N. Y. Supp. 432.

² Of the great number of cases we cite, *McDermott v. Iowa, etc., Co.* (Iowa), 47 N. W. Rep. 1037; *Russell v. Nall*, 79 Texas, 664, 15 S. W. Rep. 635; *State v. Garig* (La.), 8 So. Rep. 934; *Shotwell v. McElhinney*, 101 Mo. 677, 14 S. W. Rep. 754; *Husted v. Mead*, 58 Conn. 55, 19 Atl. Rep. 233; *State v. Smith*, 35 Kan. 618, 11 Pac. Rep. 908; *Evans v. State*, 67 Ind. 68; *M'Intire v. Young*, 6 Blackf. 496; *Humphreys v. State*, 75 Ind. 469; *O'Dea v. State*, 57 Ind. 31; *Bland v. State*, 2 Ind. 608; *Keck v. Umphries*, 4 Ind. 492; *Fleming v. State*, 11 Ind. 234; *Jackson v. Sharpe*, 29 Ind. 167; *Brown v. Grove*, 116 Ind. 84.

³ *McQueen v. Steward*, 7 Ind. 535; *Gibson v. State*, 9 Ind. 264; *Harris v. Rupel*, 14 Ind. 209; *Shipman v. State*, 38 Ind. 549; *Harper v. State*, 101 Ind. 109; *Gardner v. State*, 94 Ind. 489; *Hill v. Roach*, 72 Ind. 57.

⁴ *Harrison School Township v. McGregor*, 96 Ind. 185; *Hatton v. Jones*, 78 Ind. 466; *McCammack v. McCammack*, 86 Ind. 387.

the event that a new trial is awarded and the facts constituting diligence. It is implied in our statement that the evidence must be such as would probably change the result, that the newly discovered evidence must be competent, material and relevant.¹ The rule that a clear and full showing must be made is enforced with strictness,² and for the reason given in the opening sentence of this paragraph. It is not a sufficient excuse for failing to produce the affidavit of the newly discovered witness to aver that he refuses to make an affidavit, for the reason that the court will, upon proper application, compel the witness to make the necessary affidavit.³

§ 858. **Counter Affidavits**—Counter affidavits upon the question of diligence are admissible.⁴ If there is a conflict of evidence upon the disputed question of fact the appellate tribunal will not disturb the finding of the trial court.⁵ As we have elsewhere shown, affidavits and like matters must be properly brought into the record. It is not sufficient to incorporate or recite them in the motion.⁶

§ 859. **Verification of the Motion**—A motion presenting for review rulings of the court such as those made in admitting and excluding evidence and the like is not required to be verified. Motions assigning as causes, misconduct of the jury or the prevailing party, accident or surprise, and newly discovered evi-

¹ *Marks v. State*, 101 Ind. 353; *Moon v. Kinsey*, 90 Ind. 33; *Hamm v. Roine*, 98 Ind. 77; *Knox v. Work*, 2 inn. (Pa.) 582; *Lisher v. Pratt*, 9 Ia. 1; *Howard v. Winters*, 3 Nev. 539; *ate v. Ray*, 53 Mo. 345; *Hupp v. McCurturf*, 4 Ill. App. 449; *Bond v. Cutler*, Mass. 205; *Drayton v. Thompson*, 1 y. (So. Car.) 263; *Pike v. Evans*, 15 hns. 210; *Wynne v. Newman*, 75 Va. 1; *Hobler v. Cole*, 49 Cal. 250; *Waller v. Tumlin*, 42 Ga. 462; *Parker v. tates*, 29 Kan. 597; *Meyer v. Fiegel*, How. Pr. 424; *Sharpe v. Traver*, 8 nn. 273; *Devot v. Marx*, 19 La. Ann.

² *Lister v. Boker*, 6 Blackf. 439; *Duignan v. Wyatt*, 3 Blackf. 385; *Humphreys v. Klick*, 49 Ind. 189.

³ *Rater v. State*, 49 Ind. 507. As to what is a sufficient excuse for a failure to produce the witness, see *Gibson v. State*, 9 Ind. 264.

⁴ *Zeller v. Griffith*, 89 Ind. 80.

⁵ *De Hart v. Aper*, 107 Ind. 460.

⁶ *Ante*, §§ 814, 815. *Kitch v. Oatis*, 79 Ind. 96; *Harper v. State*, 101 Ind. 109; *Allen v. Gillum*, 16 Ind. 234; *McKee v. McDonald*, 17 Ind. 518; *Freeman v. Bowman*, 25 Ind. 236.

dence must be supported by affidavit.¹ As appears from what has been said the affidavits must present substantive and material facts. Mere general statements or mere averments of conclusions will not supply the place of facts, nor will mere outlines be sufficient, for the facts must be so stated that the court can perceive their materiality and competency and estimate their probable influence.²

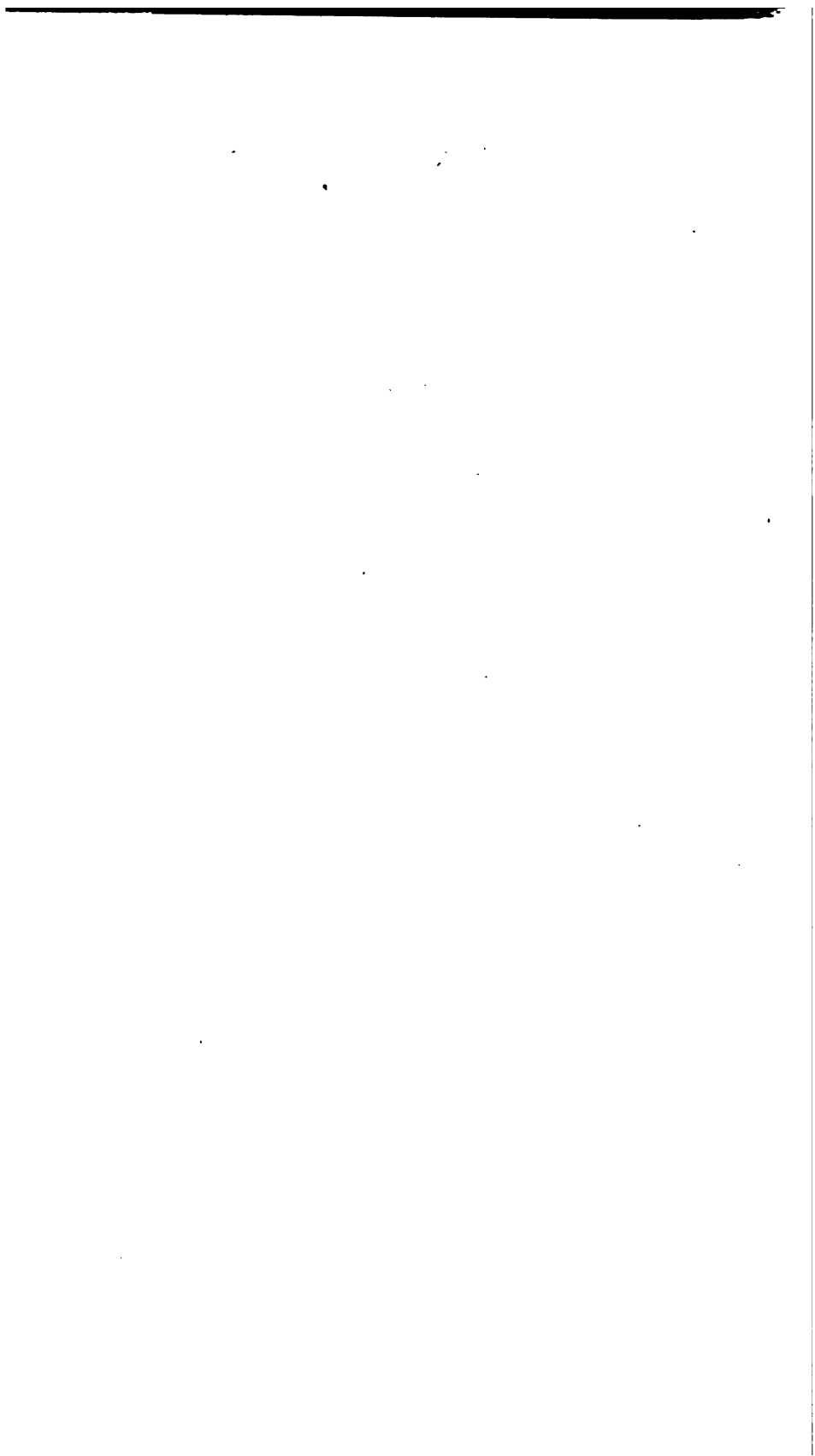
¹ R. S. 1881, §§ 559, 562.

² The subject of new trials is admirably discussed in an article in the American and English Encyclopedia of Law, vol. 16, p. 500. An excellent and ex-

haustive collection of authorities is made by the writer of the article to which we have referred upon all branches of the subject.

PART III.

FORMS.



CHAPTER I.

FORMS USED IN TRIAL PRACTICE INCIDENT TO APPEALS.

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| § 860. Caption—Title of cause—Signature—nature. | § 868. Misconduct of jurors—Bill of exceptions. |
| 861. Agreed case. | 869. Appeal in term—Record entry. |
| 862. Reserved questions of law—Bill of exceptions. | 870. Appeal bond. |
| 863. Questions of law arising on the instructions—Bill of exceptions. | 871. Appeal after term—Notice below to party. |
| 864. Motion to dismiss appeal—Bill of exceptions. | 872. Appeal after term—Notice to the clerk. |
| 865. Motion to make more specific—Bill of exceptions. | 873. Præcipe for transcript. |
| 866. Challenge of juror—Bill of exceptions. | 874. Notice to co-party. |
| 867. Bill of exceptions on the overruling of a motion for a new trial. | 875. Transcript—Formal parts. |
| | 876. Transcript—Certificate of clerk where entire record is ordered. |
| | 877. Transcript—Certificate where special directions are given. |

§ 860. **Caption—Title of Cause—Signature**—In order to economize space we say, once for all, that motions, pleadings, and instruments must be properly entitled. The names of the parties should be given and the title of the court. The papers filed in the trial court should, of course, be entitled according to the title of the case in that court and the parties designated as plaintiffs and defendants. The transcript and all papers filed on appeal should give the title of the court to which the appeal is prosecuted. As is well known the parties on appeal are designated as appellants and appellees. We do not give the titles in the forms that follow, but it is to be understood that all papers are to contain the proper title of court and parties in the caption. It is also to be understood that the pleadings, motions and the like must be appropriately signed, and that bills of exceptions must be properly signed and attested.

§ 861. Agreed Case.

The plaintiff (*naming him*) and the defendant (*naming him*) do agree that the controversy between them shall be and is hereby submitted to the court as an agreed case. The aforesaid parties do agree that the facts in the case are as follows: (*Here state the facts fully.*¹)

The demand of the plaintiff is that he is entitled to recover of the defendant (*here set forth the nature of the plaintiff's demand*). The demand of the defendant is (*here set forth the defendant's demand*).

If the law is with the plaintiff the court is authorized to award him judgment upon the facts here submitted as an agreed case; if the law, upon the facts stated, is with the defendant the court is authorized to award him judgment.²

(*Affidavit.*) The plaintiff (*naming him*) and the defendant (*naming him*) being each duly sworn,³ say upon oath, that the controversy stated in the foregoing agreed case "is real, and the proceedings are in good faith to determine the rights of the parties."

Subscribed and sworn to before me this — day of —.

(*Record Entry.*) Come now the plaintiff (*naming him*) and the defendant (*naming him*) and file an agreed case and affidavit which reads thus (*here copy statement and affidavit*), and the said parties submit the said agreed case to the court for hearing and judgment. And now on this — day of — the court finds for the plaintiff that he is entitled to recover (*here give the finding*). Wherefore it is considered and adjudged by the court that (*here give the judgment or decree*). To which finding and judgment the defendant at the time excepts,⁴ and prays an appeal to the Supreme Court of the State and asks for sixty days in which to file a bond, and the court fixes the penalty of the bond at — dollars, and grants sixty days time in which to file it.

¹ The facts, not the evidence, must be stated. *Ante*, §§ 228, 229.

² The agreed statement must, of course, be properly signed. Both parties should sign it.

³ It is sufficient if the affidavit is

made by the one of the parties. *Booth v. Cottingham*, 126 Ind. 431. *Ante*, § 223. The affidavit can not be made by an attorney. *Ante*, § 227.

⁴ *Ante*, § 232.

§ 862. Reserved Questions of Law—Bill of Exceptions.

Be it remembered, that the above entitled cause came on for trial on the — day of —, being the — judicial day of said court, and, before the commencement of the argument, the plaintiff, in writing, requested the court to instruct the jury in writing and to give to the jury the following instruction :

“ If the jury believe, from the evidence, that the plaintiff bought the promissory note described in the complaint from John Jones, the payee, that Jones indorsed the note to the plaintiff, that the plaintiff gave full value for it, bought it before maturity, in good faith, and without notice of any fraud on the part of the payee, or of any other defense, your verdict should be for the plaintiff.” But the court refused to give the jury the said instruction to which the plaintiff at the time excepted, and gave the jury, in writing, the following instructions. (*Here insert.*) That the said instructions were all that were given in the case. That the plaintiff gave in evidence the note described in the complaint. (*Here insert.*) That the defendant executed the said note upon the faith and in reliance on the fraudulent representation of the payee Jones, that (*set forth the representation*). That the defendant received no consideration whatever for said note. That the plaintiff did buy said note, in good faith, before maturity, that he paid therefor — dollars, that Jones indorsed the same to the plaintiff, and that the plaintiff bought said note in the usual course of business and without notice of any fraud on the part of Jones and without notice of any defense. That the foregoing statement covers and embraces all the facts of the case.

That the jury returned a verdict for the defendant in the words and figures following, to wit, (*here insert*) whereupon the plaintiff filed a motion for a new trial in the words and figures following, to wit, (*here insert*) and the court overruled said motion to which the plaintiff at the time excepted. The plaintiff thereupon notified the court that he intended to take the case to the Supreme Court upon a reserved question of law, and upon a bill of exceptions, and filed the following motion,¹ to

¹ It is probably not necessary to file a written motion, but it is the safer and better practice. *Ante*, § 235.

wit, (*here insert*¹), and at the time requested the court to cause the record to be so made as to enable the Supreme Court to apprehend the particular question involved, and the court so directs. That the court rendered and caused to be entered the following judgment, to wit, (*here insert*). That the court in order to present the question of law reserved by the plaintiff so as to enable the Supreme Court to apprehend the particular question involved does sign and seal this bill of exceptions, and orders that it be made part of the record.

§ 863. Questions of Law arising on the Instructions—Bill of Exceptions.

Be it remembered that on the — day of —, 18—, the above entitled cause was submitted to a jury for trial and the defendant, before the commencement of the argument, in writing requested the court to instruct the jury in writing and to give to the jury the following instruction (*here insert defendant's request and instruction*), but the court refused to give the said instruction, to which ruling the defendant at the time excepted. That the court of its own motion gave to the jury the following instructions (*here insert the instructions of the court*), and also gave the following instructions asked by the plaintiff (*here insert instructions given at the request of the plaintiff*). That no other instructions were given to the jury. That upon the retirement of the jury the defendant gave to the court in writing the following notice (*here insert*), thereby notifying the court that he intended to take the case to the Supreme Court, upon the questions of law arising on the refusal to give the instruction asked by him, pursuant to Rule XXX of that court. That the undersigned judge of the said court, in order to present the questions of law arising upon the refusal to give the instruction asked by the defendant, hereby states that there was competent evidence tending to prove the defendant's theory and material to the point covered by said instruction, in this,

¹ Form of motion: The plaintiff moves the court to cause the record to be so made as to present the question of law by him reserved on the ruling refusing the instruction asked by him, that the Supreme Court may be able to apprehend the particular question involved.

that the evidence tended to prove the following facts. (*Here set forth the facts.*¹)

And now to present the questions of law arising on the refusal to give the instruction asked by the defendant as aforesaid, the judge of said ——— court does sign and seal this bill of exceptions and order that it be made part of the record. Signed and sealed this ——— day of ———.

§ 864. Motion to Dismiss Appeal—Bill of Exceptions.

Be it remembered that on this the ——— day of ———, 1892, being the ——— judicial day of the ——— term of said court, the defendant filed the following written motion to dismiss the appeal of the plaintiff, to wit:² The defendant moves the court to dismiss the appeal of the plaintiff from the board of commissioners of Marion county, for the reason that the plaintiff was not a party to the proceedings before said board of commissioners, and no affidavit was filed by him, or any one in his behalf, “setting forth that he has an interest in the matter decided and that he is aggrieved by the decision of the said board,” and that as appears from the transcript of the proceedings of the board no affidavit was filed. The court overruled the said motion, to which ruling the defendant at the time excepted, and thereupon the defendant presents this his bill of exceptions,³ which is signed and sealed the day and year aforesaid by the judge of said ——— court.

§ 865. Motion to make more Specific—Bill of Exceptions.

Be it remembered that on the ——— day of ———, 18—, being the ——— judicial day of the ——— term of the said ——— court, the defendant filed a motion in writing to compel the plaintiff to make his complaint more specific, which motion is as follows, to wit: (*Here insert, motion to make more specific*

¹ It is the facts which the evidence tends to prove, and not the evidence, that should be set forth.

² It is not necessary to write the motion in the bill, but it may be brought into it by reference. *Ante*, §§ 818, 819.

³ If time is taken, the recital may be:

whereupon the defendant asks ten days time in which to reduce the exception to writing, and the court grants the request and allows ten days time to reduce the exceptions to writing, as requested.

filed on the — day of — 18—. ¹) And the court overruled the motion to which the defendant at the time excepted. The defendant thereupon asked ten days time in which to reduce his exception to writing, and the court orders that ten days time be given to reduce the exception to writing as requested. And now on the — day of —, being the — judicial day of said court and within the time heretofore granted the defendant presents to the judge of said court this, his bill of exceptions, which is this day signed and sealed by the judge of the court aforesaid.²

§ 866. Challenge of Juror—Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial on the — day of —, 1892, being the — judicial day of the term of the — court, and came also the jury called to try said cause. That each and all of said jurors were duly sworn to true answers make to such questions as might be asked them touching their competency to serve as jurors; that one of the said jurors so called and sworn was John Doe. That the plaintiff, by his counsel, propounded to John Doe the following questions to which he returned the following answers. (*Here set forth in full the questions and answers.*) That the plaintiff thereupon objected to the competency of said Doe to serve as a juror, and stated to the court, as ground of challenge, that the said Doe shows by his answers that he is interested in the said action adversely to the plaintiff,³ but the court overruled the plaintiff's challenge, to which ruling the plaintiff at the time excepted, and the said Doe was sworn and served as a juror. That the foregoing questions and answers comprise all the questions asked and all the answers made by said Doe, and that no other or further statements were made by

¹ It is the safer course to state the time of filing, as it is necessary to identify the instrument. *Ante*, §§ 817, 818, 819. But the practice does not seem to demand so much strictness.

² Entry of filing: On this — day of —, being the — judicial day of the term of the — court, the de-

fendant filed his bill of exceptions on the ruling denying his motion to make the complaint more specific.

The bill of exceptions is required to be filed within the time fixed by the court.

³ The specific ground of challenge must be stated. *Ante*, § 778.

him.¹ And now on the day and year above written the plaintiff presents to the judge of the said —— court this bill of exceptions which is signed, sealed, and made part of the record.

§ 867. Bill of Exceptions on the Overruling of a Motion for New Trial.

Be it remembered that on the trial of the above entitled cause and before the jury were examined the defendant moved the court to permit him to open and close the case, and in support of his motion stated to the court that the burden of the issue, as shown by the pleadings, was upon him, but the court refused to permit him to open and close the case, but ruled that the plaintiff was entitled to open and close, and the defendant at the time excepted to said ruling. Thereupon the plaintiff introduced as a witness one John Doe, and the said witness was asked the following question by plaintiff's counsel (*set forth the question*), to which question the defendant at the time objected and stated to the court the following grounds of objection, to wit: 1. That the question calls upon the witness to testify as to the contents of a contract which the complaint of the plaintiff shows to be in writing. 2. That the question asks for oral evidence of the contents of a written instrument constituting the contract between the parties. But the court overruled the defendant's objection, to which ruling he excepted at the time, and the said John Doe answered said question as follows: (*Here set forth the answer.*) That the plaintiff introduced as a witness Robert Roe, and propounded to him the following question (*here set forth the question*); that the witness gave the following answer (*set forth the answer*), which the defendant moved the court to strike out, and stated to the court the following reasons on support of his motion: 1. That the answer of the witness shows that he does not speak as to matters within his own knowledge, but has repeated what was said to him by Thomas Noakes, a stranger to the parties herein. 2. That the answer of the witness shows that he is giving mere hearsay testimony.

¹ The entire examination of the challenged juror must be set forth. *Indianapolis, etc., Co. v. Pitzer*, 109 Ind. 179; *Johnson v. Holliday*, 79 Ind. 151.

But the court overruled the defendant's motion to strike out the foregoing answer of said Roe, to which ruling the defendant at the time excepted. The plaintiff also gave the following evidence, the written contract set forth in the complaint (*here insert*), and also introduced the witnesses named, who testified as follows: (*Here set forth the names of the witnesses and the testimony of each.*) That the plaintiff rested, whereupon the defendant introduced the following evidence: (*Here set forth defendant's evidence.*) And this was all the evidence given in the cause. That, before the beginning of the argument, the defendant requested the court to instruct the jury in writing, and in writing requested the court to give instructions numbered one, two and three (*here insert request and instructions of the defendant*), that the court refused to give each and all of the said instructions to which the defendant at the time excepted. That the court gave to the jury the following instructions (*here insert instructions of the court*), to the giving of each of which the defendant at the time excepted. That the aforesaid instructions so given by the court were duly filed and were all the instructions given in the cause. That on the — day of —, 1892, the defendant filed a motion for new trial which was by the court overruled, to which the defendant at the time excepted. and prayed the court to grant him sixty days¹ in which to file a bill of exceptions, which request was granted by the court.

That on the — day of —, 1892, the defendant presented to the Honorable —, sole judge of the said court this, his bill of exceptions.²

And now on the — day of —, being within the time heretofore granted, this bill is signed, sealed and made part of the record.

¹ The record independently of the bill must show that time was granted in which to file it. *Ante*, §§ 800, 801. It is proper and usual, although not in itself sufficient, to state generally that the bill was presented within the time

granted, but this statement can not supply the place of a statement of the date.

² The bill on its face must show its presentation to the judge. *Ante*, § 802. The bill must be filed, but the date of its presentation to the judge is the important element. *Ante*, § 805.

§ 868. Misconduct of Jurors—Bill of Exceptions.

Be it remembered that on the — day of — the plaintiff moved the court for a new trial for the reason, as therein specified, that John Doe, one of the jurors impaneled to try said cause, was guilty of misconduct, in that he, the said juror, went in company with the plaintiff to a dram seller's shop and there drank intoxicating liquors with and at the expense of the defendant, and then and there promised the defendant to return a verdict in the defendant's favor. That the plaintiff in support of his motion filed and read to the court his own affidavit, and the affidavits of John Smith and Robert Roe (*here insert affidavits*), that the defendant filed and submitted to the court his own affidavit and the affidavit of John Doe (*here insert affidavit*). That no other affidavits were filed or submitted and that no other evidence was heard or given upon said motion. That the plaintiff's motion was overruled, to which he at the time excepted, on the — day of —, 18—.

And now on the day last named this bill of exceptions is signed, sealed and made part of the record.

§ 869. Appeal in Term—Record Entry.¹

Come now the parties by their attorneys and the court overrules the motion of the defendant for a new trial, to which ruling the defendant at the time excepts. And the said defendant prays an appeal to the Supreme Court of the State and prays that the court fix the penalty of the appeal bond, name the sureties therein and fix the time in which the appeal bond shall be filed, and the court grants the prayer of the defendant and does order that A. and B. (*naming sureties*), shall be sureties on the appeal bond, that the penalty of the bond shall be — dollars, and that the defendant be and is hereby allowed thirty days in which to file the appeal bond. And now on the — day of — comes the defendant and files his appeal bond, properly conditioned, in the penalty of —, with A. and B. (*name sureties*) as sureties therein, which bond reads thus (*here insert bona*), and the said bond is approved by the court.

¹ *Ante*, §§ 246, 247, 248. It is expressly decided in *Sweeney, Ex parte* (Sup. Ct. Ind., March 31, 1892), that a bond is essential to the appeal.

§ 870. Appeal Bond.

Know all men by these presents, That we —— are held and firmly bound unto —— in the penal sum of —— dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this —— day of ——, 18—.

The condition of the above obligation is such, that whereas, heretofore, to wit: on the —— day of ——, 18—, the said —— in the —— Court, recovered a judgment against the said —— for the sum of —— dollars, in damages and costs of suit; from which said judgment of said —— Court, the said —— has taken an appeal to the Supreme Court of Indiana.

Now if the said —— shall well and truly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against ——,¹ then the above obligation shall be null and void; otherwise to be and remain in full force and virtue in law.

—— [Seal.]

—— [Seal.]

—— [Seal.]

Approved ——, 18—

——, Clerk.

§ 871. Appeal after Term—Notice Below to Party.

The plaintiff in the above entitled cause hereby gives notice to the defendant in said cause that he, the plaintiff, will appeal to the Supreme Court of the State of Indiana, from the judgment rendered against him in said cause on the —— day of ——, 18—, by said —— Court.

¹ If the action concerns the possession of land and the appellant desires to retain possession, the following provision should be written in the bond at the place indicated by the figure 1, "and shall also pay all damages which may be sustained by the said —— for the *mesne* profits, for waste, or for damages to the land described in the pleadings in the above entitled cause during the pendency of said appeal." If the action re-

lates to the possession of personal property, the following provision should be written in the bond at the place indicated by the figure 1, "and shall also deliver or return to the said —— the personal property described in the pleadings in the above entitled cause, and shall pay the reasonable value of its use and any damages it may sustain during the pendency of the said appeal." See *Ante*, §§ 360, 383.

§ 872. Appeal after Term—Notice to the Clerk.¹

To the clerk of the ——— court. The plaintiff in the above entitled cause hereby notifies you that he will appeal to the Supreme Court of the State of Indiana from the judgment rendered against him in said cause on the ——— day of ———, 18—.

§ 873. Præcipe for Transcript.

To the clerk of ——— court: The defendant requests you to prepare and properly certify, for use on appeal to the Supreme Court of Indiana, a transcript of the following papers, orders and proceedings filed and had in the above entitled cause. 1. The complaint, answer and reply. 2. The defendant's motion for a new trial, filed on the ——— day of ———, 18—. 3. The bill of exceptions, filed on the ——— day of ———, 18—. 4. All orders, rulings and exceptions made and taken in said cause, and the judgment therein rendered.²

§ 874. Notice to Co-Party.

To (*naming him*). You are hereby notified that the undersigned ——— will appeal the above entitled cause to the Supreme Court of Indiana from the judgment therein rendered on the ——— day of ———, and you are notified to join in said appeal or to decline so to do.

§ 875. Transcript—Formal Parts—Commencement.

Be it remembered that heretofore, to wit, on the ——— day of ———, 18—, the plaintiff, by ———, his attorney, filed in the office of the clerk of ——— court the following complaint, namely.

¹ *Ante*, §§ 250, 251.

² *Ante*, § 200. If a transcript of the entire record is desired, a general direction is all that need be given, and where there is no specification it is the duty of the clerk to certify up a transcript of the entire record. If a general direc-

tion is given it may be thus expressed:

The clerk is directed to prepare and certify for use on appeal to the Supreme Court a transcript of all papers filed in said cause, all orders and rulings, and the judgment therein rendered.

§ 876. Transcript—Certificate of Clerk where Entire Record is Ordered.

I, ———, clerk of the ——— court of Indiana, do hereby certify that the above and foregoing transcript contains full, true and complete copies of all the papers and entries in said cause.¹

§ 877. Transcript—Certificate where Special Directions are Given.

I, ———, clerk of the ——— court of Indiana, do hereby certify that the above and foregoing transcript contains true, full and complete copies of the complaint, answer and reply, the motion for a new trial, the bill of exceptions, all orders and rulings, entries and exceptions made and taken in said cause, in accordance with the written request of the defendant (*nam-ing him*) hereto attached.²

¹ *Houston v. Reid*, 49 Ind. 181. It is, of course, implied that signature and seal shall be appropriately affixed.

² *Ante*, §§ 200 to 202, inclusive. The *præcipe* must be attached to the transcript.

CHAPTER II.

FORMS USED IN APPELLATE PRACTICE.

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| <p>78. The assignment of errors—Ordinary form.</p> <p>79. The assignment of errors—Appeal from the Marion Superior Court.</p> <p>80. Failure to notify co-parties—Motion to dismiss.</p> <p>81. Acceptance of payment of judgment—Motion to dismiss.</p> <p>82. Failure to perfect the appeal within the time prescribed—Motion to dismiss.</p> <p>83. Common joinder.</p> <p>84. Application for leave to amend the assignment of errors.</p> | <p>885. Assignment of cross-errors.</p> <p>886. Petition for <i>certiorari</i>—Omission of parts of record.</p> <p>887. Petition for <i>certiorari</i>—Change of record by <i>nunc pro tunc</i> entry.</p> <p>888. Petition to advance—Matter of public interest.</p> <p>889. Petition to advance—Matter of private concern.</p> <p>890. Motion to vacate supersedeas.</p> <p>891. Notice of motion.</p> <p>892. Motion to reinstate.</p> <p>893. Petition for rehearing.</p> <p>894. Motion to modify mandate.</p> |
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8. The Assignment of Errors—Ordinary Form.

Doe, Appellant,
v.
 Roe,
 Co-Defendants,
 Co-appellees.¹

} In the Supreme Court of Indiana.

The appellant avers that there is error in the proceedings and judgment in said cause, in this:

The complaint of the appellees does not state facts sufficient to constitute a cause of action.

The court erred in overruling the demurrer of the appellant to the second paragraph of the complaint.²

The court erred in sustaining the demurrer of the appellees to the second paragraph of the appellant's answer.

The court erred in overruling the appellant's motion

for a new trial, given the caption of the errors for the reason that proper arrangement of the parties, and for the purpose of directing attention to the rule that the appellants and appellees must all be named. *Ante*, §§ 322, 323.

¹ *Ante*, §§ 471, 472, 473, 474.

to compel the appellees to answer the interrogatories propounded to them.

Fifth. The court erred in the conclusions of law stated upon the special finding of facts.

Sixth. The court erred in overruling the appellant's motion for a new trial.

Seventh. The court erred in overruling the appellant's motion for a *venire de novo*.

Eighth. The court erred in overruling the appellant's motion to modify the decree and judgment.

Wherefore the appellant prays that the judgment be reversed.

§ 879. Appeal from the Marion Superior Court—Assignment of Errors.

The appellant says there is error in the proceedings and judgment in this cause, in this, to wit: The Marion Superior Court in general term erred in reversing the judgment of the court in special term.¹

§ 880. Failure to Notify Co-Parties—Motion to Dismiss.

The appellee in the above entitled cause moves to dismiss the appeal of the appellants and for cause assigns,

That John Doe is a co-party of the appellants in the judgment from which this appeal is prosecuted, and no notice has been served upon him nor has he joined in the appeal. That the action wherein the judgment appealed from was rendered was brought by the appellee to recover the possession of real estate, that the appellants and John Doe were parties to said action, that the trial court found the facts specially, that the said court stated in its finding that the defendants were in possession of the land, claiming title adversely to the appellee, that it was adjudged by said court that the defendants had no title to said land and that their possession was wrongful.²

¹ *Ante*, § 310. *Gutperle v. Koehler*, 84 Ind. 237; *Hadley v. Milligan*, 100 Ind. 249. The assignment of errors in the general term on appeal from the special term must particularly specify the rulings upon which error is alleged,

and the form of such an assignment is substantially the same as that on appeal to the Supreme Court or the Appellate Court.

² *Ante*, §§ 139, 145, inclusive.

§ 881. Acceptance of Payment of Judgment—Motion to Dismiss.

The appellee moves the court to dismiss the appeal of the appellant and, upon oath, deposeth: That heretofore, to wit, on the — day of — the appellee paid to the appellant the sum of — dollars, in satisfaction of the judgment from which the appeal is prosecuted, and the appellant accepted the said sum in full payment and satisfaction of said judgment.¹

Subscribed and sworn to before me this — day of —, 18—.

§ 882. Failure to Perfect the Appeal within the Time Prescribed—Motion to Dismiss.

The appellee moves the court to dismiss the appeal of the appellant, and for cause shows: That the final judgment from which the appeal is prosecuted was rendered and entered on the — day of —, and that the appeal was not taken until the — day of —, more than one year after the rendition and entry of judgment.²

§ 883. Common Joinder.

The appellee says there is no error in the proceedings or judgment in the above entitled cause.

§ 884. Application for Leave to Amend the Assignment of Errors.

The appellant represents to the court that at the time his counsel wrote the assignment of errors herein they omitted to name A. B. and C. D. as appellees; that the omission to name said parties was owing to the fact that counsel were misled by the mistake of the clerk of the trial court in omitting to state the names of said A. B. and C. D. in the introductory part of the transcript.

Wherefore appellant prays that he may be permitted to amend his assignment of errors.³

§ 885. Assignment of Cross-Errors.

The appellee in the above entitled cause assigns cross-errors and avers that:

¹ *Ante*, §§ 150, 151, 152, 410 to 412, inclusive.

² §§ 524, 532, 533.

³ *Ante*, § 353.

First. The court erred in overruling his demurrer to the appellant's complaint.

Second. The court erred in sustaining the appellant's demurrer to the third paragraph of the appellee's answer.

Third. The court erred in overruling the appellee's motion to modify the judgment.

§ 886. Petition for Certiorari—Omission of Parts of Record.

The appellant respectfully represents to the court that the transcript certified up by the clerk of the ——— court is incorrect and incomplete in this, to wit:

1. The demurrer of the appellant to the second paragraph of the appellee's answer is omitted from the transcript.

2. The clause, written in the bill of exceptions, "And this was all the evidence given in the cause," is omitted from the copy of the bill in the transcript.

Wherefore the appellant prays that an order be issued to the clerk of the ——— court commanding him to make and certify to this court the demurrer to the second paragraph of the appellee's answer, and the entries relating thereto, and the clause omitted from the bill of exceptions.¹

§ 887. Petition for Certiorari—Change of Record by Nunc pro tunc Entry.

The appellant shows to the court: That the record in the ——— court has been corrected by an order of said court in this, to wit, by changing the entry in the order book of said ——— court so as to show that the demurrer of the appellant to the second paragraph of the appellee's answer was overruled. Wherefore the appellant prays that the clerk of said ——— court be ordered to certify to this court a transcript of the order aforesaid and all the proceedings relating thereto.²

§ 888. Petition to Advance—Matter of Public Interest.

The appellant represents to the court that the controversy in the above entitled cause concerns the right of the town of ——— to levy and collect taxes; that the appellees resisted the right

¹ Petition should be verified. *Ante*, ² *Ante*, §§ 209 to 220, inclusive.
§ 220.

said town to collect taxes upon the ground that the act of —, under which the taxes were assessed, is invalid, and that the court below so adjudged. Your petitioner further represents that the case is one of public interest, and that many interests depend upon the decision that shall be herein given. Therefore the appellant prays that the cause be advanced.¹

189. *Petition to Advance—Matter of Private Concern.*

The appellant represents to the court that the suit wherein judgment was rendered was brought by the appellee to lose a mortgage; that the appellant filed therein a cross-complaint asserting that a judgment owned by him was a prior lien on the land described in the mortgage; that the court, upon hearing, found against the appellant, and, in the final decision, adjudged that his lien was subordinate to that of the appellee.

The appellant further represents that if this court should affirm the judgment of the trial court, he desires to redeem from the sale made upon the appellee's decree as a lien holder, and is able and ready so to do, but that if the judgment is reversed his lien will be entitled to priority. The appellant also represents that the sale was made on the day of — upon the decree, and a certificate issued by the court to the appellee; that the year allowed by law for redemption will expire on the — day of —; that unless the cause is advanced the decision can not be rendered in time for the appellant to redeem as a junior incumbrancer in that the judgment should be affirmed. Therefore he prays that the cause may be advanced.²

Motion to Vacate Supersedeas.

The appellee moves the court to vacate the order of supersedeas therein issued and for cause shows:

That the sureties in said bond are wholly and notoriously insolvent, and that neither of them is the owner of any property subject to execution.³

It must be verified. See *ante*, § 469, inclusive. Where the bond is approved below it must appear that the sureties have become insolvent since the order of the trial court approving the bond. *Ante*, §§ 366, 367.

Second. That the bond is insufficient in form and substance for the reason that it does not contain a promise to pay the judgment from which the appeal is prosecuted.¹

§ 891. Notice of Motion.

The appellee hereby notifies the appellant that he has filed a motion to dismiss the appeal, upon the ground that the appellant has received and accepted full payment of the judgment from which the appeal is prosecuted. The appellant is further notified that the motion will be heard on the — day of — or as soon thereafter as the court may deem proper.²

§ 892. Motion to Reinstate.

The appellant moves the court to vacate the order dismissing the appeal in the above entitled cause and to reinstate the same. The appellant shows that the day after said cause was submitted, his attorney, A. B., was prostrated by illness and was unable to give any attention to business for more than sixty days. That because of the illness of A. B., a brief was not filed within the time prescribed by the rules of court, and that the appellant did not know of the requirement of said rules, but relied wholly upon his attorney. The appellant further shows that he believes that there is merit in his appeal, and that it was taken and prosecuted in good faith and upon the advice and belief that he is entitled to a judgment of reversal.³

§ 893. Petition for Rehearing.

The appellant petitions the court to grant a rehearing in the above entitled cause. He respectfully represents that the court in its opinion and decision erred upon the following points,⁴ to wit:

First. In holding that the contract sued on by the appellee is not within the statute of frauds.

Second. In holding bad the answer of the appellant pleading the statute of limitations to the second paragraph of the appellee's complaint.

¹ *Ante*, §§ 365, 378, 397.

of course, be varied to conform to the particular instance.

² *Ante*, §§ 532, 533. We give one form of notice of motion. Forms must,

³ *Ante*, §§ 537 to 540, inclusive.

⁴ *Ante*, § 555.

Third. In holding that the bill of exceptions taken by the appellant is not in the record.

Fourth. In refusing to consider the appellant's motion to modify the judgment.¹

§ 894. Motion to Modify Mandate.

The appellant moves the court to modify or change the mandate, in this, to wit:

That the mandate be so changed as to direct the trial court to re-state its conclusions of law and enter judgment thereon, as re-stated, in favor of the appellant.

In support of this motion the appellant shows:

1. That upon the facts stated in the special finding the appellant is entitled to judgment.

2. That the facts contained in the special finding show that there is no ground or reason for directing a new trial, and that the appellant is entitled to have judgment pronounced upon the facts.²

¹ The form here given is proper where a full brief is filed, if no brief is filed the petition must discuss questions fully. *Ante*, Chapter XXVIII.

² Lack of space prevents us from giv-

ing a great variety of forms, and we have not attempted to do more than give such forms as will suggest those appropriate to particular cases.

INDEX.

[References are to Sections.]

A

STATEMENT,

is not caused by death of party after appeal is taken, 166, 167.
of appeal where cause of action does not survive, 169.

IDENT,

relief against, when appeal may be allowed after statutory time, 112.
may be ground for allowing assignment of errors to be filed after time, 304.
or surprise, as ground for new trial, 852.
motion for new trial on ground of, must be supported by affidavit, 859.

ADMINISTRATOR,

may appeal, 133, 137.
substitution of, 137.
should unite with heirs in appeal, when, 168.

APPEALMENT OF APPEALED CASES,

authority of court to order, 462.
good cause must be shown for, 463.
may not be had by mere agreement of parties, 464.
application for, 465.
petition must precede, 466.
notice of application for, 467.
return of motion for, 468.
provisions for decision on motion for, 469.
basis of petitions for, 888, 889.

REVIEW,

publication of notice, 183.
certiorari, 220, 221.
rehearing case, 223, 227.
support of motion in bar of appeal, 411.
support of motion to reinstate appeal, 540.
motion to trial on merits without objection waives right to require, 684.
may be filed now for then, 693.
generally be made part of record by bill of exceptions, 817, and n. 1.
769.
attachment, new trial as to issue upon, 844.

[References are to Sections.]

AFFIDAVIT—*continued*.

where new trial is sought on ground of newly discovered evidence, 857-859.
counter, admissible on question of diligence, 858.
in support of motion for new trial on ground of misconduct, accident or surprise, 859.
in agreed case, 861 and note 3.

AGREED CASE,

jurisdiction of, affidavit is essential to, 223, 227.
differs from agreed statement of facts, 224.
pleadings are not required, 224, 225.
motion for new trial is not necessary, 224, 225.
parties acting upon theory of, will be held to it on appeal, 224.
distinctive features of, 225, 226.
exception to decision is necessary, 225.
no presumption in favor of trial court, 226.
affidavit must be made by a party, 227.
ultimate facts should be fully and definitely stated, 228, 229.
statement of facts is like a special verdict, 229.
effect of statement, 230.
mistake in statement, when and how corrected, 231.
record in, 232.
form of, 861.

ALIMONY,

can not be allowed by trial court pending appeal from decree in divorce case, 543.

AMENDMENT,

of proof of notice, 185.
of record, 206-222, 281.
where leave to amend may precede assignment of errors, 302.
of assignment of errors, 353.
of defective bond, 377.
leave to amend defective bond must be promptly asked, 379.
of pleadings can not be made after case is remanded with directions to reassess damages, 576, n. 3.
of pleading takes the old pleading out of the record, and ruling thereon can not be assigned as error, 595, 683.
of pleading is largely in discretion of trial court, 607.
denying leave to amend may be abuse of discretion, 608, 609.
of pleadings after verdict, 610, 611.
of pleadings defective merely in form will be deemed to have been made on appeal, 640, 720.
of bill of exceptions, 825, 826.

AMOUNT IN CONTROVERSY,

as affecting question of jurisdiction, 53-61.

[References are to Sections.]

MOUNT IN CONTROVERSY—*continued*.

- how determined, 56, 59-61.
- effect of judgment of trial court upon the question, 60.
- interest after judgment not considered in determining, 61.
- effect of *remittitur* upon, 62.
- effect of counter-claim upon, 63, 64.

MISPLANNED,

- to assignment of error, 403-408.
- what must be specially pleaded in answer to assignment of errors, 407, 408.
- can not be attacked for first time on appeal, 476, 480.
- effect of proving a bad answer, 484-486.
- bad, is good enough for a bad complaint, 627, n.
- error in overruling demurrer to one of several paragraphs is prejudicial, 669.
- error in sustaining demurrer to one of several paragraphs may not be prejudicial, 669.
- waives demurrer, 683.

MOTION,

- definition, 15.
- not allowed piecemeal, 18, n. 3.
- exception to rule, 99.
- grant of, appellate tribunal determines, 23.
- under code, 24.
- right to jury trial on, 29, 30.
- part of remedy in which there is no vested right, 75, 76, 354, n. 1.
- it may be appealed from, 75-110.
- judicial questions can be considered on, 78.
- within which it must be taken, 111-130.
- cases, 131-169.
- cases, 170-185.
- record and transcript, 186-222.
- instructions, 193.
- ruling on application for *nunc pro tunc* entry, 214.
- involuntary actions, 245-253.
- interests connected with decedents' estates, 254-268.
- original cases, 269-298.
- trial of, 376.
- to take in time, how question is presented, 408.
- of docketing and hearing, 458-469.
- affirmance and reinstatement, 519-540.
- of, 541-549.
- on that it was prematurely taken, when waived, 684.
- form of entry, 869.

MOTION FOR REVERSAL,

- must be given, 249, 250.
- is necessary, 250.

[References are to Sections.]

APPEAL AFTER TERM—*continued*.

how notice must be issued and served, 251.
form of notice, 871, 872.

APPEAL IN CIVIL ACTIONS,

different modes of appeal, 245.
appeal in term, 246.
requisites of appeal in term, 246, 247.
bond is essential to appeal in term, 247, 248, 869, n.
ineffectual attempt to appeal in term will not prevent appeal thereafter on notice, 249.
appeal after term, notice must be given, 249, 250.
no bond is necessary to appeal after term, 250.
classes of appeal after term, 251.
how notice must be issued and served, 251.
what cases are appealable as civil actions, 252, 253.

APPEAL IN CRIMINAL CASES,

statutory mode is exclusive, 269.
can not be taken under statute governing appeals in civil actions, 270.
classes of appeals, 271.
by State, from what it lies, 272, 273, 298.
State can present only questions of law, 274, 278.
preparation of record, 275.
bill of exceptions, 276.
exceptions must be taken, 277.
motion for new trial unnecessary on part of State, 277.
how questions of law may arise, 279.
what record must show on behalf of State, 280.
defective record, where *certiorari* lies, 281.
notice of appeal by State, 282, 283.
time within which State must perfect appeal, 284.
time can not be extended by agreement, 284.
waiver of failure to appeal in time, 285.
appeal by defendant, 286.
time within which defendant must appeal, 286, n. 2.
notice of appeal by defendant, 286.
notice may be waived, 286.
what defendant must do to perfect appeal, 287.
appeal by one of several defendants, 288.
waiver of right of appeal, 289.
waiver of errors, 290.
presumptions, 291.
record must show prejudicial error, 292.
objections must be made in trial court, 293.
record must exhibit rulings complained of, 294.
bill of exceptions where defendant appeals, 295, 296.

[*References are to Sections.*]

APPEAL IN CRIMINAL CASES—continued.

appeal by defendant does not vacate the judgment, 297.
effect of appeal by State, 298.

APPEAL IN DECEDENTS' ESTATES CASES,

special statute, how far it governs, 254, 255.
cases not within the special statute, 256.
cases which are within the statute, 257.
test for determining whether case is within the statute, 258, 260.
construction of the statute, 259, 260.
must be taken within time prescribed, 261.
when time may be extended, 261, 263.
steps necessary to perfect appeal, 262.
steps necessary to secure extension of time, 263, 264.
notice of application for extension, 264, 265.
briefs on application, 266.
bond must be filed in time, 267.
appeal will generally lie only from final judgment, 268.

APPEAL IN TERM,

generally, 246.
requisites of, 246, 247.
bond is essential to, 247, 248, 869 n.
form of entry, 869.
form of bond, 870.

APPEAL BOND,

is essential to appeal in term, 246, 248, 869, n.
penalty must be fixed and surety named during term, 246.
must be filed and approved in time, 246, 247.
failure to file, waiver of, 249, 376.
is not essential to appeal after term, 250.
in cases involving matters connected with decedents' estates, 267.
power to require, 354.
nature of, 355.
is statutory, 356.
law enters into as silent factor, 356.
rule where there is no jurisdiction, 357.
is aided by statute, 358.
construction of, 359.
recovery is limited by penalty, 360, 383.
where no penalty is fixed, liability is to extent required by statute, 360, 383.
interest which accrues subsequent to execution of bond may be recovered, 361.
obligation of, 362.
what constitutes a breach, 362, n. 1.
mode of executing, 363.
form and substance of, 364.

[References are to Sections.]

APPEAL BOND—continued.

- right of appellee to require proper bond, 365.
- order of trial court fixing penalty and approving is generally conclusive, 366.
- new bond, where and how demanded, 367.
- estoppel of sureties, 368.
- approval of, 369.
- informal or irregular approval, 370.
- approval may be implied, 371.
- effect of approval, 372.
- evidence of filing and approval, 373.
- when essential to appeal, 374, 375.
- amendment of, 377, 379.
- motion to dismiss because of failure to file, 378, 527.
- enforcement of, 380.
- release of sureties, 381.
- surety's right to subrogation, 382.
- measure of recovery, 383.
- objections to are waived unless seasonably made, 684.
- form of, 870.

APPEALABLE INTEREST,

- what is, 133-135.
- how shown, 160.
- dismissal of appeal for lack of, 526.

APPEALABLE JUDGMENTS AND ORDERS,

- final judgments, 79-81.
- order directing issuance of an execution, 85, n. 1.
- order setting aside commissioner's sale, 85.
- order disbarring attorney, 85.
- order removing guardian, 85.
- judgment in action for new trial, 86.
- judgment in suit to review, 87.
- order refusing to set aside execution, 88.
- order removing cause to Federal Court, 89.
- decree in partition, 92, 93.
- judgment on demurrer, 94.
- order dismissing case, 94.
- decree on cross-complaint of intervening creditor, 94.
- judgment allowing claim against receiver, 99.
- order authorizing receiver to borrow money, 99.
- order appointing receiver, 100.
- order refusing change of judge, 100.
- order for payment of money, 101.
- order directing execution of written instrument, 102, 105.
- order for delivery of property, 103.
- order requiring assignment of instrument, 104.

[References are to Sections.]

APPEALABLE JUDGMENTS AND ORDERS—continued.

- order granting or denying injunction, 106.
- order in *habeas corpus* case, 107.
- void judgments, 110.
- what are not, 81-83, 84 n. 2, 88 n. 3, 91, 104.

See INTERLOCUTORY ORDERS.

APPEARANCE,

- without objection operates as a waiver of bond, 376.
- may operate as waiver of motion to dismiss appeal, 519.
- general, after a discontinuance, operates as a waiver, 677.
- general, waives objections to jurisdiction of person, 677.
- general, when it may be withdrawn, 677.
- what is general and what special, 677.
- special does not waive objections to jurisdiction, 678.

APPELLANT,

See PARTIES

APPELLATE COURT,

- has appellate jurisdiction over prosecutions for misdemeanors, 41.
- inherent powers of, 45.
- has only jurisdiction taken from Supreme Court, 47.
- has no jurisdiction over constitutional questions, 49, 50, n. 2.
- classes of cases over which it has jurisdiction, 50.
- jurisdiction over actions originating before a justice of the peace, 51-56.
- when amount in controversy determines jurisdiction, 53-64, 55, n. 1.
- jurisdiction in cases for recovery of money only, 57-64.
- amount in controversy, how determined, 59-64.
- interest not considered in determining amount, 61.
- remittitur, effect of, 62.
- counter-claim as affecting jurisdiction, 63, 64.
- appellate jurisdiction over actions for recovery of personal property, 65, 67.
- value of property not material, 66.
- actions between landlord and tenant, when appellate court has jurisdiction, 40, 68, 69.
- appellate jurisdiction over claims against decedents' estates, 70.
- rules and practice of, 71.
- is bound by decisions of Supreme Court, 72.
- transfer of cases to, 73.
- disqualification of one judge does not oust jurisdiction, 74.

APPELLATE JURISDICTION,

- ultimate is in Supreme Court, 5, 26.
- definition, 16, 20, n. 2, 21, n. 1.
- criterion of, 16, n. 4.
- one of review, 17.
- appellate courts decide on their own, 17, n. 1, 23.
- obtained for one purpose is retained for all, 18.

[*References are to Sections.*]

APPELLATE JURISDICTION—continued.

- incidents of, 20, 22.
- legal and equitable are blended into one system, 24.
- territorial jurisdiction of Supreme Court, 31.
- constitutional questions, 32, 49.
- cases in which Supreme Court has, 35-44.
- cases in which appellate court has, 35, 42, 43, 47-70.
- must be given by law and not merely by consent, 77.
- assignment of errors is essential to, 303.
- bond is not generally essential to, 375.

APPELLATE TRIBUNALS,

- decide on their own jurisdiction, 17, n. 1.
- power to frame judgments, 21.
- power to enforce their orders and writs, 22.
- inherent powers of, 45.
- authority of decisions of, 562.
- effect of their decisions, 563.

See APPELLATE COURT; SUPREME COURT.

APPELLEE,

See PARTIES.

ARGUMENT,

- application for oral, 454.
- limitation of, 455.
- statement of points for, 456.
- interchange of points for, 457.
- limitation of time allowed for, 616.
- misconduct of counsel in, 671, 672.
- extent and limits of what counsel may state, 671, 672.
- presumption that court properly limited and restrained, 725.

ARREST OF JUDGMENT,

- motion in cuts off motion for new trial, 834.

ASSIGNEE,

- may be substituted as party to appeal, 133, n. 6, 137.
- of judgment, rights and liabilities of, 582, n. 2.

ASSIGNMENT OF ERRORS,

- office and form of, 299.
- is the appellant's complaint, 300.
- presents questions of law, 301.
- should generally precede petition to amend record, 302.
- is essential to complete jurisdiction, 303, 458.
- must be filed within time limited for taking appeal, 303, 304, n. 2.
- leave to file after time may be granted in case of fraud or accident, 304.
- exceptional cases in which preliminary steps may precede assignment, 305.
- specifications of error, 306, 401.

[References are to Sections.]

ASSIGNMENT OF ERRORS—*continued.*

- specific error must be clearly designated, 306, n. 2, 308.
- statutory provisions, 307.
- each specification must be complete in itself, 309.
- in cases appealed from Marion Superior Court, 310.
- by whom error must be assigned, 311.
- intervenors, 312.
- incidental and collateral issues, 313.
- only injured parties can assign error, 314.
- privies may assign error, 315.
- can not contradict record, 316.
- favorable ruling can not be assigned as error, 317.
- joint assignment must generally be good as to all, 318, 401.
- exception to rule as to joint assignment in case of husband and wife, 319.
- curing defects in, 320.
- correcting as to parties, 321.
- parties must be named, 322, 401.
- exceptions to rule requiring names of parties, 323.
- groundwork of assignment, 324.
- when it may be amended, 325.
- appellant is confined to the specific objections set forth, 325.
- specifications may be defective because too general, 326.
- meaning of rule requiring specific assignment, 327.
- errors respecting jurisdiction of person, how assigned, 328.
- defective trial court process, 329.
- application to trial court where process or service is defective, 330.
- distinction between cases where there is no jurisdiction and where notice is defective, 331.
- where there is no service, 332.
- writs running beyond term, 333.
- where judgment is rendered by default, 334.
- where judgment is rendered for failure to plead, 335.
- rulings on pleadings generally, 336.
- rulings on demurrer, 337.
- interrogatories to parties, 338.
- habeas corpus* cases, 339.
- identifying rulings complained of, 340.
- objections to mode of impaneling jury, 341.
- rulings on verdicts, 342, 343.
- rulings on judgments, 344.
- mode of objecting to judgments, 345, 346.
- causes for new trial not assignable, 347, 348.
- independent specifications, 349, 350.
- specifications as to ruling on motion for new trial, 351.
- trial where issues of law are undecided, 352.
- amendment of, 353.
- ill-assigned errors are disregarded and demurrer is unnecessary, 401, 402.

[*References are to Sections.*]

ASSIGNMENT OF ERRORS—continued.

cross-errors, 415-424.
 attacking complaint for first time on appeal, 471-475.
 must be to entire complaint, 474.
 form of, 878, 879.
 form of application to amend, 884.
 form of assignment of cross-errors, 885.

ATTACHMENT,

appeal will not lie from order dissolving or refusing to dissolve, 81, 88, n. 3.
 can not be discharged by trial court after appeal, 543.
 new trial as to issue formed upon affidavit for, 844.

AUXILIARY PROCEEDINGS,

jurisdiction of appellate tribunal over, 504, 505.
 classes of, 506.
 appeal must generally be pending to authorize, 507.
 where no transcript has been filed, 508.
 application for assistance in perfecting appeal, 509.
 injunctions, 510, 512, 513.
 mandamus, 511, 514-517.
 prohibition, 511, 518.

See CERTIORARI.

B

BILL OF EXCEPTIONS,

is necessary to appeal upon instructions, 193.
 what it should contain in such case, 193.
 not necessary in agreed case, 232.
 is necessary in case of reserved questions of law, 240.
 office of, in such case, 241.
 what it should contain in such case, 240, 241.
 in criminal cases, 276, 296.
 mandamus will lie to compel judge to settle and sign but not to determine
 just what he shall put in it, 516.
 trial court may grant time to file, 622.
 definition and office of, 797.
 duty of settling is judicial, 798, 810.
 who must sign it where judge dies or goes out of office, 799.
 when special judge should sign it, 799.
 time within which it must be signed, 800.
 time may be extended, but record must show it, 801.
 time of presentation to judge, 802.
 time can not usually be extended by vacation order after term, 803.
 filed in term, what record must show, 804.
 filed after term, what record must show, 805.

[References are to Sections.]

BILL OF EXCEPTIONS—continued.

form is of little importance if it is sufficient in substance, 806.
 what it should contain, generally, 807.
 several exceptions may be stated in one bill, 808.
 must state facts on which exceptions are based, 809.
 imports absolute verity, 811.
 how it may show error, 812.
 rulings made in formation of issues, 813.
 collateral motions must be brought into record by bill of exceptions, 814.
 recitals in direct motions and exhibits therewith must be brought into
 record by bill of exceptions, 815.
 rejected pleadings must be brought in by bill of exceptions, 816.
 instruments generally, which are not pleadings, may be brought in by bill
 of exceptions, 817.
 making instruments part of bill by reference, 818.
 instruments once properly in record need not be copied in bill, 819.
 oral evidence must be embodied in the bill, 820.
 stenographer's report of evidence, how made part of bill, 821, 822.
 where all the evidence is necessary, bill must show that it contains all the
 evidence given in the cause, 823.
 general recital as to evidence does not always control, 824.
 amendment of, 825, 826.
 forms of, 862-868.

BONA FIDE PURCHASERS,

who are, 582.
 effect of judgment of reversal on rights of, 582.

BOND,

is generally required to secure stay of proceedings, 374, 384, 386.
 securing stay for one appellant gives no rights to others, 390.
 for supersedeas, 374, 386, 396, 397.
 for supersedeas, objections to may be waived, 684.
 presumption of approval, 725.

See APPEAL BOND ; SUPERSEDEAS.

BRIEFS,

upon application for extension of time to appeal, 266.
 upon application for supersedeas, 388.
 definition of, 438.
 general frame of, 439.
 showing the manner in which the questions arise, 440.
 should refer to the record where rulings are shown, 440.
 stating the facts, 441, 442.
 correcting erroneous statements of opposite party, 443.
 making the points, 444.
 showing rulings to be wrong, 445.
 stating propositions of law, 446.

[*References are to Sections.*]

BRIEFS—continued.

- citing authorities, 447.
- waiver of preliminary motions by filing, 448.
- time within which appellant must file, 449.
- on cross-errors, time for filing, 450.
- appellee's brief, time for filing, 451.
- extension of time for filing, 452.
- interchange of, 453, n. 2.
- on motion to reinstate appeal, 540.

C

CERTIFICATE,

- of clerk to transcript, forms of, 876, 877.

CERTIORARI,

- when required to correct record, 216.
- duty of counsel to apply for, but court may order it of its own motion, 217.
- who may obtain, 218.
- time of making application for, 219.
- requisites of application, 220.
- notice of application, 221.
- submission and hearing of application, 222.
- to correct defective record in criminal case, 281.
- jurisdiction of appellate tribunals over, 506.
- substituted pleadings may be brought into record on appeal by, 596.

CHALLENGING JURORS,

- discretionary power of trial court, 613.
- objections must be promptly made, 613, n. 2.
- where challenge for cause is sustained the presumption is that the juror was disqualified, 613, 723.
- presumption as to disqualification of person challenged and excused may be rebutted, 613, n.
- examination to determine cause for challenge and expediency of peremptory challenge, 613.
- disqualification from knowledge by rumors, newspaper reports and by prejudice, 614, n. 2.
- presumption that court allowed full number of peremptory challenges, 723.
- objections must be specific, 778.
- form of bill of exceptions, 866.

CHANGE OF VENUE,

- where improperly obtained by a party he can not avail himself of the error, 627.
- error in refusing may be cured by subsequently granting it, 708.
- when presumed to have been waived, 725.
- presumed to have been rightfully granted or denied, 725.

[References are to Sections.]

CHANGE OF VENUE—continued.

- application and affidavit for, with ruling and exception, are brought into record by bill of exceptions, 817.
- error in granting or refusing is assignable as cause for new trial, 848.

CIVIL ACTION,

- definition, 252.
- modes of appeal in, 245-253.
- what may be appealed as, 253.

COLLATERAL ATTACK,

- when it may be made upon a judgment, 330, n. 1, 332.

COLLATERAL MATTERS,

- when not covered by appeal, 545.

COLLATERAL MOTIONS,

- are not part of record proper, 190, 191.
- must be brought into record by bill of exceptions or special order, 814.

COMPLAINT,

- may be attacked for first time on appeal, 471.
- assignment of errors questions its sufficiency, 472, 473, n. 1.
- what defects are fatal, 473.
- one good paragraph will save it where it is first attacked on appeal, 474.
- assignment of errors on appeal can only question complaint as a whole, 474.
- in case of default, 475.

CONCLUSIONS OF LAW,

- when defects in special finding can not be reached by exceptions to, 766.
- exceptions to, when proper, 767.
- should be excepted to at time, 793.
- can not be questioned by motion for new trial, 793.
- how error should be specified, 794.

CONSTITUTIONAL QUESTIONS,

- supreme court has exclusive appellate jurisdiction over, 32, 49.
- how they must appear, 33.
- when they can be first made on appeal, 492, 493.

CONTEST OF ELECTIONS,

- appellate jurisdiction is in Supreme Court, 44.

CONTEST OF WILLS,

- appellate jurisdiction is in Supreme Court, 44.

CONTINUANCE,

- change in ruling may entitle party to, 696, 697.
- party entitled to it should make the necessary request, 696.
- error in refusing is cured by subsequently granting it, 708.

[References are to Sections.]

CONTINUANCE—*continued.*

presumption that order granting or denying was proper, 725.
affidavits for are brought into record by bill of exceptions, 817.
error in granting or refusing is assignable as cause for new trial, 848.

CO-PARTIES,

notice to, effects a severance, 138, n. 1.
meaning of term, 139.
declining to appeal, when they must be notified, 139.
notice to, is jurisdictional, 144.
failure to notify, waiver of objection, 145, 146.
may become adversaries, how, 156.
who refuse to join, effect of appeal upon, 163.
service of notice on, 181.
form of notice to, 874.

COSTS,

can not be retaxed after appeal involving question of, 543.
generally go against party who enters *remittitur*, 573.
reversal generally carries costs from the first error, 581.
stenographer's fees are part of, 581, n. 3.
cost of transcript is part of costs of appeal, 581, n. 3.
presumed to have been properly taxed, 725.
affidavits and motions in regard to are brought into record by bill of exceptions, 817.

COUNSEL,

what he may state in argument, 671, 672.
his misconduct is, in effect, the misconduct of his client, 672.
improper remarks by, 672.
when his misconduct is cause for reversal, 672.
can not read from legal treatises, 672.
presumption that court did its duty in restraining argument and preventing misconduct of, 725.
refusal of court to prevent or correct misconduct of, cause for new trial, 848.

COUNTER-CLAIM,

as affecting jurisdiction, 63, 64.
may be first attacked on appeal, 477, 478.
gives defendant who pleads it the right to open and close, 671, n. 1, on p. 616.

COURTS,

can not be deprived of constitutional jurisdiction, 2.
only judicial duties can be imposed, 3.
not required to give opinions to legislature, 4.
inferior, legislature may establish, 2, n. 3.
inherent powers of, 6, 45.
power to frame rules, 7.

[References are to Sections.]

COURTS—*continued.*

- power to amplify jurisdiction, 9.
- power to supply statutory omissions, 11.
- presumption as to organization, 714.

CRIMINAL CASES,

- appeals in, 269-298.

See APPEAL IN CRIMINAL CASES.

ROSS-COMPLAINT,

- may be first attacked on appeal, 477.

LOSS-ERRORS,

- may be assigned, 415.
- when necessary to assign, 416.
- nature of assignment of, 417.
- object of assignment of, 418.
- effect of assignment of, 419.
- foundation for assignment must be laid in trial court, 420.
- transcript in case of, 421.
- notice of assignment of, 422.
- time within which they must be assigned, 423.
- answer to assignment is unnecessary, 424.
- briefs on, time for filing, 450.
- form of assignment of, 885.

S-EXAMINATION,

- mit of is largely discretionary with court, 618.
- titude should be allowed upon, 618, n. 1.
- fer of evidence that witness is expected to give after objection is sustained is unnecessary, 747.

3 ERROR,

- ure of the power to cure error, 693.
- itations upon the power, 694.
- er to cure error can not be arbitrarily exercised, 695.
- cise of the power may entitle party to a postponement, 696, 697.
- gs on motions or demurrers may be corrected any time before issues e closed, 697.
- error in ruling on motions or demurrers may be cured, 697.
- in admitting evidence may be cured by other evidence making it apotent, 698.
- ng same facts by competent evidence may cure error in admitting ompetent evidence, 699.
- in admitting incompetent evidence may be cured by its withdrawal.
- n admitting incompetent evidence may be cured by instruction to gard it, 701.

[*References are to Sections.*]

CURING ERROR—continued.

- exceptional cases, in which error is not cured by instruction to disregard evidence, 702.
- error in admitting evidence is cured by sustaining motion to strike it out, 703.
- voluntary withdrawal of evidence will not always cure error in admitting it, 703, 704.
- errors in instructions may be cured by withdrawing or correcting them, 705.
- erroneous instruction is not cured by merely giving another contradicting it, 705.
- error in refusing a specific instruction is not cured by merely giving a general abstract instruction on the subject, 706.
- subsequently admitting evidence wrongly excluded cures the error, 707.
- error in excluding evidence is not cured by admitting evidence of less probative force, 707.
- error in refusing continuance is cured by subsequently granting it, 708.
- error in refusing change of venue is cured by subsequently granting it, 708.
- error in refusing order of examination of party is cured by subsequently ordering it, 708.
- error in directing general and special verdict instead of special only is cured where judgment is on special alone, 708.

D

DAMAGES,

- when appellate tribunal can direct the amount to be awarded, 571, 572.
- amount of is generally a question for the jury, 572, n. 1.
- failure to award nominal, when harmless, 636.
- error in assessment of, how questioned, 855, 856.

DEATH,

- of party, substitution of heirs or legal representative, 137.
- of party before appeal, effect of, 165.
- of party after appeal, effect of, 166.
- of one of several appellants, effect of, 167.
- abatement by, 169.

DECEDENTS' ESTATES,

- appellate court has jurisdiction over appeals in cases of claims against, 70.
- appeals in matters connected with, 245-268.

DEFAULT,

- record in case of, 193.
- relief must be first sought in trial court where process has been served, 329-334.
- when question may be first made on appeal, 330-332, 334, 784.
- for failure to plead, objections must be made in trial court, 335.

[*References are to Sections.*]

DEFAULT—*continued.*

- rule as to sufficiency of complaint first attacked on appeal in case of default, 475.
- no presumption of jurisdiction in case of, 716, 784.
- presumption that judgment was properly entered in open court, 725.

DEMURRER,

- assignment of errors as to rulings on, 327, 337.
- ruling on, is not cause for new trial, 348.
- to assignment of errors, 401, 402.
- to special plea, 413.
- erroneous rulings on, when harmless, 637, 666, 669.
- resorting to evidence to determine whether ruling on is harmless, 638.
- when error in ruling upon is prejudicial, 666-669.
- record will be examined to determine whether error in ruling upon is prejudicial, 666, 667.
- where ruling upon is excepted to and error is effectively saved, no further steps need be taken to make it available, 668.
- failure to demur, waiver of objections, 681.
- failure to demand a ruling waives it, 682.
- is waived by answering before ruling on, 682.
- answering or amending pleading after ruling on demurrer waives it, 683.

OBJECTION TO THE EVIDENCE,

- when it lies, 685.
- who may demur, 685 and n.
- what evidence can be considered upon, 685, n.
- what it admits, 685, n., 686, n. 2.
- practice upon, 685, n.
- mode of saving question as to ruling on, 685, n.
- waiver in, waives jury trial, 685.
- ruling on, is waived by introducing evidence thereafter, 686.
- that objections to pleadings are waived by, 688.
- objections to competency of evidence are waived by, 689.
- motion for new trial, when not prevented by, 689.

EXEMPTIONS,

- assumptions as to, 721.
- not to be brought into record by bill of exceptions, 817, n. 1 on p. 769.

DISCOVERY,

- required of party who seeks to appeal after statutory period, 115.
- to be shown by party who seeks new trial on ground of newly discovered evidence, 857.

EXEMPTIONS,

- not to be brought into record by bill of exceptions, 817, n. 1 on p. 769.

[*References are to Sections.*]

DISCRETIONARY POWER OF APPELLATE TRIBUNAL,

- to grant leave to withdraw transcript, 536.
- to reinstate appeal, 537.
- to direct a specific judgment or order a new trial, 567-569.
- to compel a party to enter a *remittitur* or suffer a reversal, 570-573.
- as to costs, 581.

DISCRETIONARY POWER OF TRIAL COURT,

- definition of judicial discretion, 597.
- its exercise is not subject to review, 598, 600.
- its scope, 599.
- its abuse may be prejudicial error, 600.
- absolute and limited discretion, 601.
- proceedings may be reviewed where it is abused or its limits are transcended, 602, 603.
- how abuse of must be shown, 604.
- burden is upon complaining party to show abuse, 604.
- failure to exercise may be available error, 605.
- court may designate time for filing pleadings, 606.
- court may allow amendments, 607.
- denying amendment may be available error, 608.
- denying negligent party leave to amend is not error, 609.
- when court can allow amendments after verdict, 610.
- amendment can not be made to remedy entire failure of proof, 611.
- as to calling a jury, 612.
- as to impaneling a jury and determining the qualifications of jurors, 613, 614.
- as to mode of trial in equity cases, 615.
- as to time and conduct of trial, 616.
- as to order of introducing evidence, 617.
- as to recalling witnesses, 617.
- as to examination of witnesses, 618.
- as to ordering a view, 619.
- as to ordering examination of the person, 620.
- as to discharge of jury before verdict, 621.
- as to granting time to file bill of exceptions, 622.
- its abuse may be cause for new trial, 850.

DISMISSAL,

- of appeal, motion and notice are necessary, 376, 533.
- motion for because of defective bond, 378.
- of appeal, when failure to file bond is cause for, 400, 527.
- of appeal, motion for is waived by common joinder, 406, 519.
- of appeal, motion for because of failure to appeal in time, 408, 524.
- motion to dismiss is generally a preliminary motion to be made before general appearance, 519.
- court may dismiss appeal on its own motion, 520.
- second motion to dismiss not generally entertained, 521.

[References are to Sections.]

DISMISSAL—continued.

merits not considered on motion to dismiss, 522.
 for failure to comply with rules of court, 523.
 for failure to give notice, 525.
 for lack of appealable interest, 526.
 for attempting to prosecute two appeals at same time, 528.
 of appeal from judgment rendered in obedience to mandate of appellate tribunal, 529.
 because appellant has brought suit to review, 530.
 parties to motion for dismissal of appeal, 531.
 requisites of motion for, 532.
 appeal may be dismissed as to one party without affecting rights of others, 532, n. 2.
 notice of motion to dismiss appeal, 533.
 by appellant, 534.
 effect of, 535.
 leave may be given to withdraw transcript after dismissal, 536.
 form of bill of exceptions on motion to dismiss appeal, 864.

DIVORCE,

alimony can not be allowed pending appeal from decree in divorce case, 543.

DOCKETING APPEALS,

order of, 458.
 transcript and assignment of errors must be filed first, 458-460.
 exceptions to rule requiring assignment of errors before cause will be docketed, 459.

E

EFFECT OF APPEAL,

appeal removes case from jurisdiction of trial court, 541, 543.
 where appeal operates as supersedeas, it prevents enforcement of trial court judgment, 541.
 appeal from interlocutory order does not entirely oust jurisdiction of trial court, 542.
 appeal generally brings up entire case, 544.
 collateral and independent matters are not affected by appeal, 545.
 judgment of trial court remains unaffected except that it may be stayed, 546.
 action on judgment is not barred by appeal, 547.
 appeal does not prevent trial court from amending and correcting record, 548.
 appeal prevents trial court from making an entirely new record, 549.

[References are to Sections.]

ELECTION,

- parties are bound by, 149, 496.
- may bar appeal, 149, 409, 496.
- to enter *remittitur* or suffer reversal, 570, 572.
- of remedies, prejudicial error in, 654-658.

EQUITY CASES,

- jurisdiction of Supreme Court over, 37.
- what are, 38, 39.

ERROR,

- waiver of, in criminal cases, 290.
- prejudicial, must be shown by record, 292.
- joinder in, 404, 406.
- release of must be specially pleaded, 408.
- cross errors, 415.
- assignment of cross-errors, 416-424.
- definition, 587, 589, n. 1.
- erroneous rulings may be sufficient to overthrow judgment on direct attack, but not on collateral attack, 588.
- ruling right when made does not constitute, 589.
- ultimate ruling may correct intermediate mistakes, 590, 633.
- in ruling asserting a wrong theory, 590, 591.
- must be shown by record, 592, 632.
- ruling not probably prejudicial is not available, 593, 632.
- when presumed to be prejudicial, 594, 632.
- rulings upon pleadings afterwards amended can not be assigned as error. 595.
- pleadings upon which it is alleged must be in the record, 596.
- in the exercise of discretionary powers, 603-622.
- distinction between error and procedure necessary to make it available, 623.
- steps necessary to make it available, 624.
- conduct of party may preclude him from making it available, 625.
- invited error, 626-630.
- harmless error, 631-652.
- prejudicial error, 631, 632, 653-673.
- available error does not exist where there is a waiver, 674.
- when and how cured, 693-708.
- how it must be made to appear in bill of exceptions, 812.
- of law occurring on the trial is cause for new trial, 853.

See ASSIGNMENT OF ERRORS ; CROSS-ERRORS.

ESTOPPEL,

- suit for review may estop party from appealing, 149.
- acceptance of benefit of judgment may estop party from appealing, 150.
- voluntary release will estop party from appealing, 150.
- collecting by execution may estop party from appealing, 150, n. 2.

[*References are to Sections.*]

ESTOPPEL—*continued.*

exceptions to rule, 151.
 payment by defendant does not estop him from appealing, 152.
 of sureties on appeal bond, 368.
 is foundation of doctrine of invited error, 630.

See **THEORY OF THE CASE.**

EVIDENCE,

order of introduction is largely in discretion of trial court, 617.
 manner of eliciting is largely in discretion of trial court, 618.
 of fact admitted in pleadings is unnecessary, 627.
 opening the door to incompetent, 628.
 effect of introducing incompetent, 627, 629.
 a party can not gain any advantage from the rejection of competent evidence at his own procurement, 630.
 admission of incompetent, court can not say that error was harmless, 632.
 when it may be resorted to in order to determine whether erroneous ruling on demurrer was harmless, 638.
 when rulings admitting or excluding are harmless, 641.
 errors in instructions may be harmless where verdict is right on, 643.
 when rulings admitting or excluding are prejudicial, 670.
 effect of introducing after ruling on demurrer to evidence, 686.
 effect of introducing after motion for verdict in favor of moving party, 687.
 waiver of objections to by demurrer to evidence, 689.
 error in admitting may be cured by supplementary evidence making it competent, 698.
 proving same facts by competent evidence may cure error in admitting incompetent, 699.
 error in admitting may be cured by withdrawing it, 700.
 error in admitting may sometimes be cured by instruction to disregard it, 700-702, and notes.
 sustaining motion to strike out may cure error in admitting incompetent, 703.
 when party can not withdraw over objection, 704.
 subsequently admitting evidence may cure error in excluding it, 707.
 presumption that rulings on were correct, 721.
 inspection of documentary, notice to produce, 740, 741.
 offers of oral, 742-746.
 offer not required on cross-examination, 747.
 offer of documentary evidence, 748.
 objections to, how made, 774, 775, 779-781.
 written, may be brought into bill of exceptions by reference, 818.
 oral, must be embodied in bill of exceptions, 820.
 stenographer's notes of, how made part of bill of exceptions, 821, 822.
 bill of exceptions must show that it contains all the evidence given in the cause, 823.
 verdict or finding not sustained by, cause for new trial, 854.
 newly discovered, cause for new trial, 857.

[References are to Sections.]

EXAMINATION,

- of witnesses, 618, 743-749, 812, n. 1.
- of person, 620.
- of party, error in refusing may be cured by subsequently granting it, 708.

EXCEPTION,

- to decision in agreed case is necessary, 225.
- to ruling in case of reserved questions of law is necessary, 239.
- to specific ruling is necessary in criminal cases, 277, 293, 296.
- record must show, 293.
- is necessary to make error available, 624.
- to conclusions of law, 766, 767.
- definition and office of, 783.
- when required, generally, 784.
- must be taken at time ruling is made, 785, 786.
- time may be given to reduce it to writing, 785.
- must be addressed to specific ruling, 787.
- joint, must be well taken as to all or it will be unavailing, 788.
- should not be taken to several rulings in gross, 789.
- party must rely on his own, 790.
- to instructions, how taken, 791, 792.
- to conclusions of law, when and how taken, 793, 794.
- to ruling on motion for new trial, 795.
- to judgment, not proper as a rule, 796.
- how stated and shown in bill, 807, 808.

See BILL OF EXCEPTIONS.

EXTENSION OF TIME FOR APPEAL,

- when granted, 112-117.
- in cases involving matters connected with decedents' estates, 261, 263-266.
- in criminal cases, 284, 285.

F

FELONY, PROSECUTIONS FOR,

- appellate jurisdiction is in Supreme Court, 41.

FINAL JUDGMENT,

- what is, 81-83, 85-95.
- requisites of, 85.
- time for appealing begins to run after, 119.
- duration of stay upon appeal from, 394.
- judgment on appeal is, 585.

See JUDGMENTS.

FORECLOSURE,

- cases are equity cases, for Supreme Court, 39.
- sale, right of purchaser to appeal, 137.

[References are to Sections.]

FORMS,

agreed case, 861.
 appeal bond, 870.
 appeal in term, entry, 869.
 application for leave to amend the assignment of errors, 884.
 assignment of errors, ordinary form, 878.
 assignment of errors, appeal from Marion Superior Court, 879.
 assignment of cross-errors, 885.
 bill of exceptions, challenge of juror, 866.
 bill of exceptions, misconduct of juror, 868.
 bill of exceptions, motion to dismiss, 864.
 bill of exceptions, motion to make specific, 865.
 bill of exceptions, overruling motion for new trial, 867.
 bill of exceptions, questions of law arising on instructions, 863.
 bill of exceptions, reserved questions of law, 862.
 caption, title of cause, signature, 860.
 common joinder, 883.
 joinder in error, 883.
 motion to dismiss, acceptance of payment, 881.
 motion to dismiss, failure to notice co-parties, 890.
 motion to dismiss, failure to perfect appeal in time, 882.
 motion to modify mandate, 894.
 motion to reinstate, 892.
 motion to vacate supersedeas, 890.
 notice, to clerk, 872.
 notice, of motion, 892.
 notice, to co-party, 874.
 notice, to party, 871.
 petition to advance, matter of private concern, 888.
 petition to advance, matter of public interest, 889.
 petition for *certiorari*, omission of part of record, 886.
 petition for *certiorari*, change of record *nunc pro tunc*, 887.
 petition for rehearing, 893.
 praecipe for transcript, 873.
 transcript, certificate where entire record is ordered, 876.
 transcript, certificate where part of record is ordered, 877.
 transcript, formal parts, 875.

FRAUD,

relief against, when party may be allowed to appeal after statutory time,
 112.
 as cause for permitting assignment of errors to be filed after time, 304.
 may be cause for setting aside a supersedeas, 399.
 may be cause for permitting party to withdraw general appearance, 678.

[References are to Sections.]

H

HABEAS CORPUS,

appellate jurisdiction is in Supreme Court, 41.
appeal lies from interlocutory orders, 107.
specifications of error in cases of, 339.

HARMLESS ERROR,

meaning of the term, 631.
is generally one concerning procedure and not affecting primary rights, 631.
error not shown to be probably prejudicial is harmless, 632.
wrong mode of procedure which reaches right result is generally harmless, 633.
limitations of rule that errors are harmless where right result is reached, 634.
uninfluential errors are harmless, 635.
failure to assess nominal damages is generally harmless error, 636.
when failure to assess nominal damages is not harmless, 636.
error in overruling a demurrer to a bad paragraph of complaint may be harmless where the judgment rests on good paragraphs, 637.
error in sustaining demurrer to one of several paragraphs of answer may be harmless, 637.
other harmless rulings on demurrer, 637.
when evidence may be resorted to in order to determine whether ruling on demurrer is harmless, 638.
when rulings on motions to strike out or reject pleadings are harmless, 638.
pleadings defective merely in form will be deemed on appeal to have been amended, 640.
when rulings admitting or excluding evidence are harmless, 641.
when errors in instructions are harmless, 642-648.
when rulings in selecting and impaneling jury are harmless, 649.
when misconduct of juror is harmless, 650.
when rulings in regard to special interrogatories are harmless, 651.
when rulings upon verdicts are harmless, 652.

HEARING APPEALS,

order of, 461.
court may change order of, 462.
advancement, 463.
can not be advanced by mere agreement of parties, 464.
application for advancement, 465.
appeal must be submitted before advancement, 466.
notice of application to advance, 467.
motion to advance, hearing and question for decisions on, 468, 469.
forms of petition to advance, 888, 889.

[*References are to Sections.*]

HEIRS,

- may be substituted as parties to appeal, 137.
- should unite with personal representative in appeal, when, 168.
- appealable interest of, 168.

HUSBAND AND WIFE,

- joint assignment of errors good as to wife is good as to both, 319.

I

INCIDENTS,

- go with the principal, 36, 40, 48.

INDEPENDENT SPECIFICATIONS OF ERROR,

- when proper, 338, 349, 350.

INTERMENT,

- when it may be first attacked on appeal, 488.

INHERENT POWERS,

- of constitutional courts, 6.
- of Supreme and Appellate Court, 45.
- of appellate tribunals to control inferior courts, 514, n. 1.
- of appellate tribunal to reinstate appeal, 537.

INJECTION,

- appellate tribunal may grant in aid of its appellate jurisdiction, 506, 510, 512.
- verified petition, notice and bond are required, 513.
- can not be granted by trial court after final judgment refusing it and appeal therefrom, 543.

INJECTION,

- discretionary with court, 619.
- instructions, request for, 734.
- documentary evidence, 740.
- reasonable notice must generally be given to produce document for, 740.
- no notice is not required, 741.

INSTRUCTIONS,

- oral upon, 193.
- should be clearly designated and specified, 401.
- that at request of party can not be complained of by him, 626.
- party who asks oral instructions can not complain because they were written, 627.
- party who asks instructions on a certain theory can not complain because the court gave similar instructions at request of his adversary, 627.
- party who asks instructions that certain facts are immaterial invites the court to so treat them, 627.
- in, when harmless, 642-648.

[References are to Sections.]

INSTRUCTIONS—*continued.*

irrelevant, are generally harmless, 642.
 verbal inaccuracies in, when harmless, 644.
 are generally unnecessary in equity cases, 646.
 incomplete, when harmless, 647.
 construction on appeal, 648.
 to disregard evidence may cure error in admitting it, 701.
 to disregard evidence will not always cure error in admitting it, 702.
 errors in may be cured by withdrawing or correcting them, 705.
 erroneous are not cured by merely giving others contradicting them, 705.
 when error in refusing is cured by giving others, 706.
 presumption that correct were given on all material points, 722.
 presumption that they were written, 725.
 request for should be made in writing before argument, 733, 735, 736.
 request for inspection of, 734.
 may be read to jury by counsel, when, 734, n. 5.
 should be prepared and submitted to court before argument, 735, 736.
 exceptions to, 791.
 how made part of record, 792, 817, n. 1, on p. 769.
 noting exceptions to, 792.
 form of bill of exceptions where questions of law arises on, 863.

INTEREST,

after judgment not considered on question of jurisdiction, 61.
 may be recovered in suit on appeal bond, 361.

INTERLOCUTORY ORDERS,

appeal will not generally lie from, 80, 81.
 ruling on demurrer, 81.
 ruling on motion to quash, 81.
 ruling suppressing depositions, 81.
 conclusions of law on special finding, 81.
 orders setting aside former orders, 81.
 orders as to admission of parties, 81, 84, n. 2, 88, n. 3.
 orders dissolving or refusing to dissolve attachment, 81, 88, n. 3.
 orders for guardian to report, 84, n. 2.
 orders respecting time of trial and place on calendar, 81, 84, n. 2.
 order disposing of part of case, 84, n. 2.
 order for inspection of books or papers, 104.
 when appeal will lie from, 100-107.
 effect of appeal from, 108.
 mode of appealing from, 109.
 in matters connected with decedents' estates, 229.
 stay upon appeals from, 395.
 appeal from does not completely oust jurisdiction of trial court, 542.

INTERROGATORIES,

special, motion for judgment on, 327.

[References are to Sections.]

INTERROGATORIES—*continued*.

- to parties, rulings on should be specified as independent errors, 338.
- special, when refusal to submit is harmless error, 651.
- special, when immaterial are submitted the error is harmless, 651.
- refusal to submit to jury, when prejudicial error, 673.
- when they may be withdrawn, 673, 730.
- when jury can answer that there is no evidence, 673.
- when answers are not specific party should move to recommit, 691.
- must be expressly requested by party who desires their submission, 737.
- motion for judgment on, 752.
- question as to right to judgment on answers of jury to, can not be raised by motion for a new trial, 847.
- refusal of court to submit is cause for new trial, 847.

INTERVENORS,

- when they may appeal and assign error, 312.

INVITED ERROR, *

- distinction between error and procedure necessary to make it available, 623.
- steps necessary to make error available, 624.
- conduct of party may affect right to make error available, 625.
- party who procures erroneous ruling can not make it available, 626.
- implied invitation to rule erroneously, 627.
- opening door to incompetent evidence, 628.
- effect of incompetent evidence upon party who introduces it, 629.
- doctrine of, is founded on estoppel, 630.

ISSUE,

- trial without, 352, 682.
- trial upon immaterial, party who tenders it can not complain, 627.
- wrong ruling on immaterial issue is generally harmless, 635.
- presumption that judgment is within, 719.
- rulings made in formation of are not rulings concerning conduct of trial, and leave should be obtained at the time to reduce to writing exceptions thereto, 813.

J

JOINDER IN ERROR,

- form and substance of, 404.
- common joinder admits record, 405.
- waiver by common joinder, 406.
- form of, 883.

JOINT PARTIES,

- should all be parties to appeal where judgment is joint, 138.

See PARTIES.

JUDGE,

- presumptions in favor of, 714.
- pro tempore*, 714.

[*References are to Sections.*]

JUDGE—*continued.*

change of, 714.
must rule when properly requested, 727.
duty to sign and settle bill of exceptions, 798, 799, 810.

See PRESUMPTIONS; TRIAL COURT.

JUDGMENTS,

power of appellate courts to frame, 21.
appeal lies, as a general rule, only from final, 79, 80.
what are final, 81-95.
difference between intermediate decisions and final judgment, 82.
final judgment disposes of entire case, 83.
requisites of a final judgment, 85.
in actions for new trial, appeal from, 86.
in suits for review, appeal from, 87.
setting aside executions are final, 88.
ordering or refusing to order removal of case to Federal Court, 89.
final, must determine material issues, 90.
final, must determine entire case before court, 91.
exceptions to rule requiring determination of entire case, 95, 99
may be final although orders are required for their enforcement, 92.
in partition proceedings, appeal from, 92, 93.
form of, not important, in determining whether final or not, 94.
record must show final judgment or appeal will be dismissed, 96.
void, appeals will lie from, 110, 588, n. 1.
are not vacated by defendant appealing in criminal cases, 297.
objections to, when and how presented, 344-346.
effect of supersedeas upon self-executing, 392, 393.
duration of stay upon appeals from, 394, 395.
on pleadings, 482.
mandamus will lie to compel signing and entry of, 516, n. 2.
are effective notwithstanding appeal, 546.
actions upon are not barred by appeal, 547.
void and voidable, 588, n. 1.
presumptions in favor of, 709, 712, 718, 719, 725.
on pleadings, motion for, 751.
on answers to special interrogatories, motion for, 752.
on special verdict, motion for, 753-756.
where special finding is entirely outside the issues, motion for, 767.
motions to modify or correct, where judgment does not follow finding or
verdict, 768.
how questioned, 796, 846.
motions for may be brought into record by bill of exceptions, 817.
motions to modify may be brought into record by bill of exceptions, 817.

JUDGMENT ON APPEAL,

is binding upon lower courts, 562.

[References are to Sections.]

JUDGMENT ON APPEAL—*continued.*

- effect and characteristics of, 563.
- remanding case to trial court, 564.
- directing a specific judgment, limits of appellate tribunal's power, 565.
- when it may determine original questions of fact, 566.
- directing a specific judgment, 567.
- directing a new trial, 568.
- remanding with instructions, 569.
- directing a *remittitur*, 570.
- directing award of specific damages, 571.
- directing amount of recovery where facts appear in special verdict or finding, 572.
- apportioning costs, 573, 575, 581.
- affirming as to some parties and reversing as to others, 574.
- where interests are blended, 575.
- must be obeyed by trial court, 576.
- scope and effect of, 577.
- is the law of the case, 578.
- form and effect of judgment of affirmance, 579.
- form and effect of judgment of reversal, 580.
- costs upon judgment of reversal, 581.
- effect of reversal upon *bona fide* purchasers, 582.
- directing restitution, 583, 584.
- is final, 585.
- effect of petition for rehearing, 586.

JUDICIAL POWER,

- definition, 1.
- is vested in courts by the constitution, 1.
- inherent in courts, 6, 7, 45.
- where it resides, 8.
- supreme, is in Supreme Court, 25.

JURISDICTION,

- of Supreme Court, 2, 3, 5, 35-44.
- amplifying, 9.
- definition, 12, 499.
- when presumed to exist, 12, 501, n. 2, 502.
- consent can not confer, over subject, 13.
- none over fictitious cases, 14.
- appellate tribunals decide on their own, 17, n. 1.
- cases in which appellate court has, 35, 42, 43, 47-70.
- assignment of errors is essential to, 303.
- of the person, assignment of errors as to ruling upon, 328.
- of subject, question as to, may be made at any time, 408, n. 5, 470, 498.
- distinction between jurisdiction of subject and jurisdiction over subject-matter of particular case, 499-503.
- auxiliary, 504-518.

[*References are to Sections.*]

JURISDICTION—*continued.*

of trial court, when ousted by appeal, 541-543.
 of person, when appearance waives, 677, 678.
 of subject, presumption that court had, 715.
 no presumption of in case of default, 716.
 presumption of is not rebutted by silence of record, 717.
 objections to, 776.

See APPELLATE JURISDICTION.

JURY AND JURORS,

no right to trial by, on appeal, 29, 30.
 objections to mode of impaneling must be made in trial court, 341, 612, 613, 684.
 party asking must show by the record a request, refusal and exception in order to make refusal available error, 612.
 refusal to call must be assigned as cause for new trial, 612, n. 4.
 when it is discretionary with trial court to call, 612.
 extent of discretionary power of court in determining competency and excusing jurors, 613, 614.
 disqualification because of prejudice against business, 614, n. 2.
 disqualification from knowledge of rumors and newspaper reports, 614, n. 2.
 discharge before verdict, 621.
 erroneous rulings in selecting and impaneling, when harmless, 649.
 misconduct of jurors, when harmless, 650, 671.
 refusal to submit interrogatories to, is harmless, when, 651.
 trial by, denial of where right exists is prejudicial error, 654.
 misconduct of jurors, when prejudicial error, 671.
 should not take instruments of evidence with them to jury room, 671.
 refusal to submit interrogatories to, when prejudicial error, 673.
 joinder in demurrer to evidence waives right to trial by, 685.
 objections to, are waived unless seasonably made, except where party is excusably ignorant of the objection, 691.
 presumptions concerning, 723.
 objections to, should be specific, 778.
 answers of jurors, when polled, must be brought in by bill of exceptions, 817, n. 1 on p. 769.
 errors in impaneling are assignable as cause for new trial, 848.
 irregularity or misconduct of should be specifically assigned as cause for new trial, 849, 851.
 form of bill of exceptions where challenge is overruled, 866.
 form of bill of exceptions in case of misconduct of jurors, 868.

JUSTICE OF THE PEACE,

when Appellate Court has jurisdiction over appeals in actions originating before, 51-53.

[*References are to Sections.*]

L

LANDLORD AND TENANT,

Appellate Court has jurisdiction of appeals in actions between, 68.

LAW,

questions of, 274, 279, 301, 600, 627, 630, 633.

reserved questions of, 233-244.

form of bill of exceptions on reserved questions of, 862.

form of bill where questions arise on instructions, 863.

LAW OF THE CASE,

decision of appellate tribunal constitutes, 578.

what it covers, 578.

is binding at every stage, even upon second appeal, 578.

LEADING QUESTIONS,

court may permit, 618.

LEGAL REPRESENTATIVES,

See PERSONAL REPRESENTATIVES.

LEGISLATURE,

can not deprive constitutional court of jurisdiction, 2.

can impose only judicial duties on courts, 3.

can not compel Supreme Court to give opinions to it, 4.

M

MANDAMUS,

appellate jurisdiction is in Supreme Court, 44.

when appellate tribunal has power to issue writ, 511, 514.

cases in which it will not issue, 515, 798.

will issue to compel inferior tribunal to act but not to decide in any particular way, 515.

cases in which it will issue, 516, 798.

merits of case can not be determined on application for, 516, n. 3.

is an extraordinary remedy and not a writ of right, 517.

verified petition is required and strong case must be made, 517.

will not lie where action for breach of contract is the proper remedy, 657.

form of motion to modify mandate, 894.

MARGINAL NOTES,

must be made on transcript by appellant, 204.

MARION SUPERIOR COURT,

appeals from, 310.

assignment of errors on appeal from, 310.

form of assignment of errors, 879.

[References are to Sections.]

MISCONDUCT OF COUNSEL,

- is in effect the misconduct of his client, 672.
- in argument, when cause for reversal, 672.
- in making improper remarks, 672.
- objections to should be specific, 782.
- refusal of court to check or correct should be specified in motion for new trial, 849.

MISCONDUCT OF JURORS,

- when harmless, 650.
- when cause for reversal, 671.
- should be specified in motion for new trial, 851.
- form of bill of exceptions in case of, 868.

MISCONDUCT OF PARTIES,

- what is sufficient to cause a reversal, 672.
- objections to should be specific, 782.
- particular acts should be specified in motion for new trial, 851.

MISDEMEANOR,

- Appellate Court has jurisdiction over appeals in cases of prosecution for, 41.

MISTAKE,

- as to law, no excuse for not appealing in time, 114.
- when appeal may be allowed in case of, 151.
- in selecting remedy, effect of, 655, 658.
- may be cause for allowing party to withdraw general appearance, 678.

MONEY RECOVERIES,

- appellate jurisdiction over actions for, 57.

MOTIONS,

- direct are part of intrinsic record, 190, 191.
- collateral are not part of record, 190, 191, 814.
- for *nunc pro tunc* entry, 210-213.
- for *certiorari*, 216-222.
- for new trial not necessary in agreed case, 224, 225.
- for new trial are necessary in cases of reserved questions of law, 242.
- in arrest of judgment, when State can appeal from ruling on, 273.
- for new trial in criminal cases, 293.
- for *venire de novo*, 327, 343.
- for judgment on answers to interrogatories, 327.
- to modify judgments, 327.
- should specify grounds, and they need not be repeated on appeal, 336.
- for new trial, what it brings up for review, 343.
- to modify judgments, 345.
- addressed to pleading, ruling on, is not cause for new trial, 348.
- for new trial, what are causes for, 347-352.

[References are to Sections.]

MOTIONS—*continued.*

- difference between motion for new trial and motion in arrest, 352.
- to dismiss appeal for failure to file bond, 376, 400, 519, 527.
- to dismiss appeal because of defective bond, 378.
- to set aside or vacate supersedeas, 399, 400.
- to dismiss appeal for failure to appeal in time, 408, 524.
- matters in bar of appeal may be presented by, 409, 412.
- to advance case for hearing on appeal, 465-469.
- to dismiss appeal for failure to give notice, 525.
- to dismiss appeal for lack of appealable interest, 526.
- parties to motion to dismiss appeal, 531.
- requisites of motion to dismiss appeal, 532.
- notice of, to dismiss appeal, 533.
- to reinstate appeal, 539, 540.
- sustained where demurrer would be proper is harmless where right result is reached, 633.
- striking out instead of overruling is harmless error, 633.
- to strike out or reject pleadings, when erroneous rulings on are harmless, 639.
- to make more specific when it is prejudicial error to overrule, 665.
- failure to object to pleadings by, when a waiver, 680.
- to direct jury to return verdict for moving party, waived by introducing evidence, 687.
- or new trial, when proper after demurrer to evidence, 689.
- to set aside service of process, presumed properly sustained, 725.
- must be presented to court, 726, n. 1.
- course, must be taken notice of by parties in court, 726, n. 1.
- on judgment on the pleadings, 751.
- on judgment on answers to special interrogatories, 752.
- on judgment on special verdict, 753-756.
- venire de novo*, 758-763.
- to strike out part of special finding, 764-766.
- on judgment where special finding is entirely outside the issues, 767.
- to modify or correct judgment where it does not follow finding or verdict, 768.
- on new trial as a means of questioning special finding, 793.
- on new trial, ruling on must be excepted to, 794, 795.
- on bills in must be made part of record by bill of exceptions, 815.
- may be brought into record by bill of exceptions, 817 and note.
- on new trial as a means of presenting questions to trial court for review, 859.

See NEW TRIAL.

APPELLATE JURISDICTION.

- on review, appellate jurisdiction over, 43, 54, n. 2.

[References are to Sections.]

N

NEW TRIAL,

- motion for is not necessary in agreed case, 224, 225.
- motion for is necessary in case of reserved questions of law, 242.
- motion for in criminal cases, 293.
- motion for is appropriate to bring in review rulings upon matters pertaining to trial, 327, 343.
- causes for are not assignable as error on appeal, 347, 351, 352.
- that the court erred in overruling motion for, is proper assignment, 347, 351.
- rulings on demurrer or motions addressed to pleadings are not causes for, 348.
- matters not cause for, may be specified as independent error on appeal, 349, 350.
- mandamus will not lie to compel trial court to grant, 515.
- when discretionary with appellate tribunal to direct, 563, 568, 574, 575
- when directed it must be granted by trial court, 576.
- evidence adduced on former trial need not be adhered to, 577.
- refusal to call a jury must be assigned as cause for, to be considered on appeal, 612, n. 4.
- when motion for is proper after demurrer to evidence, 689.
- when motion for is proper in case of special finding, 793, 794.
- ruling on motion for must be excepted to, 795.
- affidavits in support of motion for must be brought into record by bill of exceptions, 817.
- motion for is part of record and need not be brought in by bill of exceptions, 817.
- motion for is the ordinary means of presenting questions to trial court for review, 829, 830.
- office of motion for, on appeal, 831.
- motion for can not precede the decision, 832.
- motion for is not cut off by entry of judgment, 833.
- motion for is cut off by motion in arrest of judgment, 834.
- all causes should be embraced in one motion, 835.
- successive motions, when permitted, 836, 837.
- different classes of motions for, 838.
- joint motion for, 839.
- requisites of motion for, generally, 840.
- time of filing motion for, 841.
- motion for should be filed in open court, 8
- motion usually goes to entire case, 843.
- when awarded as to part of case, 844.
- motion should be complete in itself, 845.
- rulings on pleadings and objections to form of judgment are not causes for, 846.

[References are to Sections.]

NEW TRIAL—*continued.*

refusal of court to submit interrogatories is cause for, but question as to right to judgment thereon can not be presented by motion for new trial, 847.

prejudicial irregularity in proceedings of court is cause for, 848.

particular irregularities complained of must be specified, 848.

irregularity of jury or prevailing party is cause for, 849.

abuse of discretion may be cause for, 850.

misconduct of jury or prevailing party is cause for, 851.

misconduct must be specified, 851.

accident or surprise may be cause for, 852.

surprise must be as to matter of fact and not of law, 852.

errors of law occurring on the trial are cause for, 853.

errors must be specified, 853.

where verdict or finding is contrary to law, 854.

where verdict or finding is not sustained by evidence, 854.

error in assessing damages is cause for, 855.

that damages are excessive is proper assignment of cause for, in actions *ex delicto*, but not in actions *ex contractu*, 856.

fifth statutory cause should be assigned in actions *ex contractu* where damages are erroneously assessed, 856.

newly discovered evidence as a cause for, 857.

on ground of newly discovered evidence, party asking must show diligence, 857.

newly discovered evidence merely cumulative or impeaching is not sufficient, 857.

affidavit is necessary in case of newly discovered evidence, 857.

newly discovered evidence must be competent, material and relevant, 857.

counter-affidavits are admissible upon the question of diligence, 858.

when motion must be verified or supported by affidavit, 859.

form of bill of exceptions, 867.

NOTICE,

when it must be given to co-parties, 139, 141, 144.

is necessary to constitute due process of law, 143.

is jurisdictional, 144, 173.

waiver of, 145, 146, 175, 286.

to one who is a party but not a co-party, effect of, 164.

what is sufficient, 171.

must be in writing, 172.

by publication, legislature may authorize, 173, 183.

time for which it must be given, 174.

upon whom it must be served, 176.

service on attorney of record, 177.

service on one of several attorneys, 178.

proof of service, 179.

filing of notice and proof, 180.

[References are to Sections.]

NOTICE—*continued*.

service on co-parties, 181.
 objections to, how made, 182.
 constructive, publication, 183.
 proof of publication, 184.
 amendment of proof, 185.
 of motion for *nunc pro tunc* entry, 212.
 of application for *certiorari*, 221.
 of intention to reserve questions of law, 235.
 of appeal after term, 249-251.
 of application for extension of time to appeal, 264, 265.
 of appeal by State, 282, 283.
 of appeal by defendant in criminal case, 286.
 where merely irregular or defective, there can be no collateral attack, and
 objection must be made in trial court, 331, 332.
 where there is no notice, question may be first made on appeal, 332.
 of motion to dismiss appeal, 376, 533.
 of motion in bar of appeal, 412.
 of assignment of cross-errors, 422.
 of submission of appeal in term, 431, 432.
 of submission of appeal after term, under act of 1885, 433, 435.
 of application for advancement, 467.
 dismissal of appeal for failure to give, 525.
 to produce documents for inspection, 741, 742.

NUNC PRO TUNC ENTRIES,

when made, 209.
 motions for, 210.
 by whom motion may be made, 211.
 notice of motion, 212.
 evidence on hearing motion, 213.
 may be appealed from, 214.
 presenting ruling on appeal, 215.
 cases in which they may be made, 693.

OBJECTIONS,

to process must be seasonable and specific, 182, 328, 329.
 may be waived by consent in criminal cases, 270, n. 7, 290.
 must be specific and seasonably made in trial court in criminal cases, 293.
 to mode of impaneling jury and to jurors, 341, 691, 778.
 to rulings on verdicts, 342.
 to judgments, 344-346.
 to judgments or decrees must generally be presented in trial court, 345, 346.
 to trial where issue of law remains undecided may be waived, 352.
 what are waived by common joinder, 406.

[*References are to Sections.*]

OBJECTIONS—continued.

what are waived by submission, 426, 427.
 to submission, should be in writing and verified, 436.
 should be specifically stated in briefs, 445, n. 2.
 should be presented to trial court in order to be available on appeal, 470, 674, 692.
 to jurisdiction, when and how made, 470, 502, 776.
 to complaint may be first made on appeal, 471-475.
 to answer can not be first made on appeal, 476, 480.
 to cross-complaint or counter-claim may be first made on appeal, 477-478.
 to reply can not be first made on appeal, 479, 480.
 to judgment on pleadings, 482.
 to set-off may be first made on appeal, 483.
 in cases where a bad answer is proved, 484-487.
 in anomalous cases, 487.
 in criminal cases, 488.
 to juror must be promptly and specifically made, 613, n. 2, 778.
 to remedy must be made in trial court, 658, 679, 776.
 waived in trial court are completely lost, 674, 675.
 to jurisdiction of person, waiver of, 677, 678.
 to pleadings, how waived, 680-682, 688.
 to ruling on demurrer, waiver of, 683.
 preliminary, waiver of, 684.
 that suit was prematurely brought or appeal prematurely taken, waiver of, 684.
 to appeal or supersedeas bonds, waiver of, 684.
 to ruling on demurrer to evidence, waiver of, 686.
 to competency of evidence, are waived by demurring to evidence, 689.
 to mode of trial, waiver of, 690.
 to competency of judge or jurors, waiver of, 691.
 definition and office of, distinguished from exceptions, 769.
 must be specific, 770.
 grounds of, must be stated and appear in record, 771, 775.
 must be seasonable, 772.
 must come from the proper party, 773.
 joint where good as to only one party are unavailing, 773.
 where evidence is competent against only one of several parties, 774.
 to pleadings generally, 777.
 to evidence, 779, 780.
 to evidence where question is proper but answer incompetent, 781.
 to conduct of parties or counsel, 782.

OFFERS,

general doctrine of, 742.
 of testimony on examination in chief, 742-746.
 where objection to question is sustained, 743-746.
 should not mingle competent with incompetent evidence, 745.

[References are to Sections.]

OFFERS—continued.

- are not required on cross-examination, 747.
- of documentary evidence, 748.
- need not be repeated, 749.

OPEN AND CLOSE,

- who is entitled to, 671.
- when error in refusing is prejudicial, 671.
- will be presumed to have been properly directed by trial court, 724.

OPINIONS,

- Supreme Court not required to give to legislature, 4.
- Supreme Court must write, 46.
- what questions must be considered, 46.

ORAL ARGUMENT,

- importance of, 453.
- application for, 454.
- limitation of, 455.
- statement of points for, 456.
- interchange of points for, 457.

ORDER OF DOCKETING AND HEARING APPEALS,

- appeals are docketed in order of filing, 458.
- exceptions, 459.
- cause can not be docketed until transcript is filed, 460.
- causes are heard in order in which they are docketed, 461.
- court may change order of hearing, 462.
- advancement, 463, 464.
- application for advancement, 465.
- submission is necessary before application for advancement, 466.
- notice of application to advance, 467.
- hearing on motion to advance, 468.
- questions for decision on motion to advance, 469.

ORDERS,

- appeal will not generally lie from interlocutory, 80-81.
- what are interlocutory, 80-84.
- when appeal will lie from, 100-107.
- effect of appeal from, 108.
- mode of appealing from, 109, 268.
- in matters connected with decedents' estates, 229.
- arresting judgment, State may appeal from, 272, 273.
- stay upon appeals from, 395.
- appeal from does not completely oust jurisdiction of trial court, 542.

[*References are to Sections.*]

P

PARTIES,

- under disabilities, when they may appeal, 130.
- who may appeal, 131, 132, 147.
- appealable interest, 133-135, 160.
- exceptional cases, 136.
- right of successor to appeal, substitution, 137.
- joint parties, 138.
- co-parties, 139.
- necessary parties, 140, 160.
- parties to record but not to judgment not always necessary parties, 141.
- persons not affected by appeal are not necessary parties, 142.
- notice to, 143-145.
- waiver of notice, 146, 150-152.
- successful party can not appeal, 147.
- appellees, who should be, 153, 154.
- united in interest, 155.
- how co-parties may become adversaries, 156.
- effect of change of interest, 157, 158.
- relation in trial court generally continues on appeal, 159.
- appealable interest, how shown, 160.
- change of position of parties, effect of, 161.
- time within which parties must be brought in, 162.
- co-parties who refuse to join, effect of appeal upon, 163.
- notice to one who is a party but not a co-party, effect of, 164.
- death of party before appeal, effect of, 165.
- death of party after appeal, effect of, 166, 169.
- death of one of several appellants, effect of, 167.
- legal representatives and privies, 168.
- who may assign error, 311-315, 318-321.
- must generally be named in assignment of errors, 322, 323.
- to motion to dismiss appeal, 531.
- to the action, difference between necessary and proper, 659, 660.
- who are necessary parties to an action, 659-661.
- criterion for determining who are necessary, 661.
- who should be plaintiffs, 662.
- who should be defendants, 662.
- joinder of, 663.
- right of action must exist in all who join as plaintiffs, 663.

PARTITION,

- appellate jurisdiction is in Supreme Court, 44.

PAYMENT,

- of judgment by defendant will not estop him from appealing, 152.
- form of motion to dismiss appeal on ground that appellant had accepted payment of judgment, 881.

[References are to Sections.]

PERSONAL PROPERTY,

Appellate Court has jurisdiction of appeals in actions for, 65.
value is immaterial, 66.

PERSONAL REPRESENTATIVES,

may appeal where party dies, 133, 137.
substitution of, 137.
when they should unite with heirs in appeal, 168.
common joinder admits representative character of appellant, 408.

PETITION,

for leave to appeal after expiration of time limited, 116, 264.
to advance case for hearing on appeal, 465.
for aid in perfecting appeal, 509.
for injunction on appeal, 513.
for mandamus, 517.
for rehearing, 550-561, 586.
form of petition for leave to amend assignment of errors, 884.
form of petition for *certiorari*, 886.
form of petition for change of record, *nunc pro tunc*, 887.
form of petition to advance, 888, 889.
form of petition for rehearing, 893.

PLEADINGS,

are part of record, 190-191, 202.
amended and substituted pleadings, 190, 595, 596.
effect of failure to obey rule to plead, 335.
rulings on generally, assignment of errors as to, 336.
rulings on demurrer, assignment of errors, 337.
interrogatories to parties are, 338.
can not ordinarily be attacked for first time on appeal, 480, 481.
judgment on, should be asked in trial court and not first on appeal, 482.
parties are held on appeal to theory outlined by, 494.
can not be amended after case is remanded with directions to reassess
damages, 576, n. 3.
substitution of, 596.
substituted may be brought into record by *certiorari*, 596.
on which error is alleged must be in the record, 596.
struck out on motion must be brought into record by bill of exceptions.
596, n. 3, 816.
time for filing is in discretion of trial court, 606.
amendment of is largely in discretion of trial court, 607-611.
may be amended after verdict to prevent a variance but not to remedy a
failure of proof, 610, 611.
party can not complain that his own are defective, 627.
admission of a fact in warrants assumption that evidence thereof is un-
necessary, 627.
parties are held to construction which they give the pleadings, 630.

[References are to Sections.]

PLEADINGS—continued.

when erroneous rulings on motions to strike out or reject are harmless, 639.
 defective merely in form will be deemed amended on appeal, 640.
 motion to make more specific, when it is prejudicial error to overrule, 665.
 error in overruling demurrer to, is prejudicial, 666, 669.
 when error in sustaining demurrer to one of several paragraphs is not prejudicial, 669.
 waiver of objections to, by failing to make the proper motion, 680.
 waiver of objections to, by failing to demur or demand ruling on demurrer, 681, 682.
 answering complaint or amending pleading after ruling on demurrer operates as a waiver, 683.
 waiver of objections by demurring to evidence, 688.
 error in ruling on, may be cured by decree or special verdict or finding, 697, n. 1.
 presumption that judgment is founded on proper, 719.
 presumption that rulings on were correct, 720.
 objections to, 777.
 rulings on are not assignable as causes for new trial, 846.

PLEADINGS OF THE APPELLEE,

demurrer to assignment of errors, 401, 402.
 plea for answer, 403.
 joinder in error, 404.
 common joinder admits the record, 405.
 waiver by common joinder, 406.
 special plea or answer, 407.
 what must be specially pleaded, 408.
 matters in bar may be shown either by plea or motion, 409.
 motion presenting matters in bar, 410.
 verification of motion, 411.
 notice of plea or motion, 412.
 demurrer to special plea, 413.
 reply to special plea, 414.
 assignment of cross-errors, 415-421.
 notice of assignment of cross-errors, when not required, 422.
 time within which cross-errors must be assigned, 423.
 answer to assignment of cross-errors not required, 424.

POINTS FOR ORAL ARGUMENT,

what is a "point," 444.
 must be stated in writing, 456.
 interchange of, 457.

PRÆCIPUE,

direction to clerk as to what shall be included in record, 200.
 is liberally construed, 200.
 form of, 873.

[References are to Sections.]

PREJUDICIAL ERROR,

- record must show, 592, 632.
- entire record must be examined to determine whether error is prejudicial, 653.
- when it exists, 654.
- in mistaking the remedy, 654, 655, 658.
- in election of remedies, 656.
- in seeking an extraordinary remedy where only an ordinary remedy is proper, 657.
- how error in mistaking remedy is made available, 658.
- in failing to bring in necessary parties, 659-662.
- in joinder of parties, 663, 664.
- in overruling motion to make a pleading more specific, 665.
- in rulings on demurrer, 666-669.
- in admitting and excluding evidence, 670.
- in rulings regarding the right to open and close the case, 671.
- misconduct of counsel in argument, 671, 672.
- improper remarks of the judge, 671.
- giving instructions in jury-room in absence of parties and counsel, 671.
- permitting to take instruments of evidence to jury-room, 671.
- permitting jury to communicate with parties and third persons, 671.
- allowing officer to remain in jury-room during consultation, 671.
- misconduct of parties and counsel, 672.
- in refusing to submit interrogatories to jury, 673.
- in withdrawing interrogatories, 673.

PRESENTING AN OPPORTUNITY FOR REVIEW,

- theoretically all questions should be presented to trial court for review, 827.
 - practically rulings connected with trial must be presented to trial court for review, 828.
 - mode of, 829.
 - motion for new trial the ordinary means of, 829, 830.
 - rules governing motion for new trial, 832-859.
- See NEW TRIAL.

PRESUMPTIONS,

- that jurisdiction exists, 12, 501, n. 2, 502, 715.
- in criminal cases, 291.
- that court will adhere to theory indicated by ruling, 590, 591.
- of prejudice from erroneous ruling, 594.
- that trial court properly exercised its discretionary power, 604, 606.
- that where challenge to juror was sustained the juror was disqualified, 613, 723.
- presumption which upholds the proceedings will be preferred on appeal, 709, 712.
- all reasonable presumptions will be indulged in favor of the trial court rulings, 710.
- presumption in favor of trial court is not conclusive, 711.

[*References are to Sections.*]

PRESUMPTIONS—*continued.*

- will not prevail against the record, 713.
- that judge was competent and court duly organized, 714.
- that the court had jurisdiction of subject, 715, 716.
- presumption of jurisdiction does not exist in case of default where there is no appearance or service of process, 716.
- of jurisdiction not rebutted by silence of record, 717.
- that judgment is properly supported, 718, 725.
- that judgment is within the issues and founded on the pleadings, 719.
- that rulings on pleadings were correct, 720.
- that rulings on evidence were correct, 721.
- that court gave proper instructions, 722.
- that jurors were properly summoned, impaneled and sworn, 723.
- that the court allowed the number of peremptory challenges given by law, 723.
- in aid of the verdict, 724.
- that costs were properly taxed, 725.
- that case was rightly taken up and tried out of its order, 725.
- that case sent from one court to another properly reached the latter, 725.
- that change of venue was waived, 725.
- that accused present when trial opened was present throughout, 725.
- that judgment was pronounced in open court, 725.
- that modification of judgment was properly made at proper time, 725.
- that judgment by default was entered in open court in due form, 725.
- that bond was duly approved, 725.
- that instructions were in writing, 725.
- that motion to set aside service was properly sustained, 725.
- that order of dismissal was vacated and cause reinstated, 725.
- that court gave proper directions as to open and close, 725.
- that admissions sustain the judgment, 725.
- that specific findings were duly made, 725.
- that court properly restrained counsel in argument, 725.
- that orders as to continuance, change of venue or new trial were rightfully entered, 725.
- that the rules of court were rightfully adopted, 725.

PROCESS,

- meaning of term, 170, n. 1.
- object of, 170.
- test of sufficiency, 171.
- difference between direct and collateral attack upon, 171.
- must be written, 172.
- is essential to jurisdiction, 173.
- may be by publication when authorized by legislature, 173, 183.
- time of, 174.
- not given in time, waiver, 175.
- upon whom it must be served, 176.

[References are to Sections.]

PROCESS—continued.

service on attorney of record, 177.
 service on one of several attorneys, 178.
 proof of service, 179.
 notice and proof of service must be filed, 180.
 service on co-parties, 181.
 objections to, when and how made, 182, 328, 329.
 constructive notice, 183.
 by publication, statute must be followed, 183.
 proof of publication, 184.
 amendment of proof, 185.
 in case of default, 329, 330.
 distinction between cases where there is no process or service and cases where it is defective, 331-333.
 when it may be first attacked on appeal, 332.
 writ running beyond term is void and objection may be first made on appeal, 333.

PROHIBITION,

appellate jurisdiction is in Supreme Court, 44.
 will not take place of appeal or writ of error, 518.
 when it will issue, 518.

PROSECUTIONS,

for felony, Supreme Court has jurisdiction over appeals from, 41.
 for misdemeanors, appellate court has jurisdiction over appeals from, 41.

PUBLICATION,

notice by, 173, 183.
 proof of, 184.
 amendment of proof, 185.

Q

QUESTIONS FIRST MADE ON APPEAL,

objections not presented to trial court are generally not considered on appeal, 470.
 objections to jurisdiction may be made at any time, 470.
 questions as to sufficiency of complaint, 471-475.
 one good paragraph will save complaint first attacked on appeal, 474.
 answer can not be attacked for first time on appeal, 476, 480, 481.
 cross-complaint or counter-claim may be first attacked on appeal, 477, 478.
 reply can not be first questioned on appeal, 479, 480, 481.
 judgment on pleadings can not be first asked on appeal, 482.
 set-off may be first assailed on appeal, 483.
 where evidence merely proves a bad answer, judgment may be reversed although answer was not questioned in trial court, 484-486.
 anomalous cases, 487.
 criminal cases, where indictment may be first assailed on appeal, 488.

[References are to Sections.]

QUESTIONS OF FACT,

- can not be taken up by State on appeal in criminal cases, 274.
- are not presented by assignment of errors, 301.

QUESTIONS OF LAW,

- are presented by State on appeal, 274.
- how they may arise, 279.
- are presented by assignment of errors, 301.
- questions as to discretionary power of trial court, 600.
- estoppel of party to deny that questions are, 627, 630.
- submitting to jury may be harmless where right result is reached, 633.

See RESERVED QUESTIONS OF LAW.

QUO WARRANTO,

- appellate jurisdiction is in Supreme Court, 44.
- when the proper remedy, 657.

R

RECEIVER,

- appeal lies from judgment allowing claim against, 99.
- appeal lies from order authorizing him to borrow money, 99.
- appeal lies from order appointing, 100.
- may appeal as successor, 137.
- when trial court can control his conduct after appeal, 545.

RECORD AND TRANSCRIPT,

- appeals are tried by, 186.
- record imports absolute verity, 186.
- can not be contradicted by officer's certificate, 186, n. 7.
- can not be made by agreement, 187.
- defects in transcript may be remedied by agreement, 188.
- difference between, 189.
- record may be amended by *nunc pro tunc* entry, 190, 209-215.
- what are parts of record proper, 190, 202.
- pleadings and direct motions are part of record, 190, 191, 202.
- collateral motions are not part of record proper, 190, 191.
- affidavits are not part of record, 190.
- substituted pleadings, when part of record, 190.
- special order of court or bill of exceptions necessary to add extrinsic matters to record, 192.
- special cases, 193.
- in case of default, 193.
- questions on instructions, 193.
- record on appeal distinguished from trial court record, 194, 205.
- requisites of transcript, 195.
- what transcript should contain, 196, 198.

[References are to Sections.]

RECORD AND TRANSCRIPT—*continued.*

independent cases can not be included in one transcript, 197.
 transcript should include so much of record as is embraced in appeal, 198.
 appellant may direct what shall be included in transcript, 198, 200.
 practice where transcript contains improper matter, 199.
 præcipe should direct what transcript shall include, 200.
 where transcript is defective court may affirm judgment or dismiss appeal, 200, n. 3.
 authentication of transcript, 201.
 authority of appellate tribunal over transcript, 203.
 marginal notes must be made by appellant, 204.
 amendment and correction of trial court record, 206–215.
 effect of amendment of trial court record, 207.
 amendment not allowed after decision on appeal, 208.
nunc pro tunc entries, when and how made and obtained, 209–215.
certiorari, 216–222, 281.
 in agreed case, 232.
 record in criminal cases, preparation of, 275.
 what record in criminal case must show, 280, 292, 294.
 correction of record in criminal case by *certiorari*, 281.
 when leave to amend may precede assignment of error, 302.
 common joinder admits the record, 405.
 in case of assignment of cross-errors, 421.
 mandamus will lie to compel signing and certification of, 516.
 trial court may amend after appeal, 548.
 trial court can not make entirely new record after appeal, 549.
 rehearing will not be granted to enable parties to secure correction of, 556.
 must show error, 592, 632.
 where susceptible of two constructions that which sustains judgment will be preferred, 712.
 presumptions will not prevail against, 713.
 silence or incompleteness of does not rebut presumption of jurisdiction, 717.
 must show specific grounds of objection, 771.

REHEARING,

statutory provisions concerning, 550.
 petition must be filed in time, 550.
 effect of filing petition for, 551.
 case remains in appellate tribunal undisposed of until petition is acted on, 551, 586.
 computation of time for filing petition, 552.
 all necessary acts must be done within time fixed, 553.
 who may petition for, 554.
 office of the petition, 555.
 will not be granted to enable parties to secure correction of record or transcript, 556.
 new questions can not be presented in petition for, 557.

[References are to Sections.]

REHEARING—continued.

- second petition will not be entertained, 558.
- submitting the petition, 559.
- ruling on petition, 560.
- effect of granting, 561.
- form of petition for, 793.

REINSTATEMENT OF APPEAL,

- appellate tribunal may order, 537.
- party asking must show good cause, 538.
- motion for, 539, 540.
- notice of motion for, 539.
- practice on hearing of motion, 540.
- form of motion for, 892.

RELEASE,

- will estop party from prosecuting appeal, 150.
- of sureties, 381, 382.
- of errors must be specially pleaded, 408.

REMEDY,

- election of, 149, 496, 656-658.
- mistaking, 655.
- consequences of mistaking, 658.
- how error in mistaking is made available, 658.
- objections to, may be waived, 679.

REMITTITUR,

- effect on question of jurisdiction, 62.
- appellate tribunal may direct, 570-572.
- may be voluntarily entered, 570, n. 4.
- affirmance is generally at cost of party who enters the *remittitur*, 573.

REPLY,

- to special plea, 414.
- can not be attacked for first time on appeal, 479-481.

REPRESENTATIVES,

See **PERSONAL REPRESENTATIVES.**

REQUESTS AND OFFERS,

- request is generally necessary to make failure to rule error, 726, 727.
- implied request, 728.
- time within which request must be made, 729.
- party must make his own request, 730.
- where request has been granted adverse party may insist that it be adhered to, 730.
- where request is necessary the record must show it was duly made, 731.
- request for special finding, 732.
- request for written instructions, 733.

[References are to Sections.]

REQUESTS AND OFFERS—continued.

- request to inspect instructions, 734.
- request for special instructions, 735.
- request where instructions are correct as far as they go, 736.
- request to submit interrogatories to jury, 737.
- request for special verdict, 738, 739.
- request for production and inspection of documents, 740, 741.
- offers, when and why required, 742.
- offer of evidence showing what party expects to prove is necessary on examination in chief after ruling excluding it, 743.
- where offer of evidence is made it must be shown to be material and relevant, 744.
- offer of evidence part of which is competent and part incompetent may be rejected, 745.
- offer of evidence is not good unless a question is asked calling for it, 746.
- offer of evidence is not required on cross-examination, 747.
- offer of documentary evidence, 748.
- repeating offers, 749.

RESERVED QUESTIONS OF LAW,

- object of statute providing for, 233.
- what evidence is necessary in record, 233, n. 2.
- case must be made up under statute, 234.
- notice of intention to reserve questions must be given to court, 235.
- when and how notice must be given, 235, and notes.
- only questions of law can be reserved, 236, 238.
- on what rulings questions can be reserved, 237.
- exception to ruling is necessary, 239.
- bill of exceptions, when necessary and what it must contain, 240, 241.
- office of bill of exceptions, 241.
- final judgment is necessary before appeal, 243.
- appeal does not stay proceedings, 244.
- supersedeas can be ordered only by appellate tribunal, 244.
- form of bill of exceptions, 862.

RESTITUTION,

- when it must be made, 583.
- order of, how obtained, 584.

REVERSAL OF JUDGMENT,

- form and effect of, generally, 580.
- costs in case of, 581.
- effect on *bona fide* purchasers, 582.
- when restitution will be directed, 583, 584.

REVIEW,

- appellate jurisdiction is one of, 17.
- statutory mode must be pursued, 19.

[References are to Sections.]

REVIEW—*continued*.

- suit for cuts off appeal, 149, 530.
- suit for may in some cases be prosecuted after unsuccessful appeal, 530.
- suit for, will generally lie only where there are proper objections and exceptions, 769, n. 2.
- rulings connected with trial must be brought before trial court for, 827, 828.
- mode of presenting questions for, 829.
- by motion for new trial, 832-859.

See NEW TRIAL.

RULES,

- power of court to make, 7, 616.
- of Supreme Court govern Appellate Court, 71.
- presumption that they were rightfully adopted and properly promulgated, 725.
- must be brought into record by bill of exceptions, 817, n. 1 on p. 769.

S

SET-OFF,

- may be attacked for first time on appeal, 483.

SEVERANCE,

- effect of, as to parties on appeal, 157, 158.

SERVICE,

- on attorney of record, 177, 178.
- proof of, 179.
- filing of notice and proof, 180.
- on co-parties, 181.
- objections to, how made, 182.
- by publication, 183.
- proof of publication, 184.
- amendment of proof, 185.
- presumption as to ruling on motion to set aside, 725.

SPECIAL FINDING,

- express request is necessary to secure, 732.
- when request for must be made, 732.
- request for must be shown by record, 732.
- request for, may appear in finding itself, 732.
- characteristics and incidents of, 757.
- when questions on can be raised by motion for *venire de novo*, 758-763.
- motion to strike out, 764, 765.
- wholly outside the issues, motion for judgment and exception to conclusions of law, 767.
- where judgment does not follow it, motion to correct or modify judgment will lie, 768.
- motion for new trial questions its correctness, when, 793, 854.

[References are to Sections.]

SPECIAL INTERROGATORIES,

- motion for judgment on, 327, 847.
- when refusal to submit is harmless, 651, 673.
- when immaterial are submitted the error is generally harmless, 651.
- when answers must be returned to, 673.
- when jury can answer that there is no evidence, 673.
- when they may be withdrawn, 673.
- motion to recommit for more specific answers, 691.
- can not generally be withdrawn over objection, although submitted at request of adverse party, 730.
- must be expressly requested, 737.
- motion for judgment on, 752.
- inconsistency between answers and general verdict, how taken advantage of, 847.
- error of court in refusing may be presented by motion for new trial, 847.

SPECIAL JUDGE,

- presumption as to regularity of his appointment and as to his authority, 714.
- his authority continues until case is disposed of, 714, n. 5
- when bill of exceptions should be signed by, 799.

SPECIAL VERDICT,

- general instructions need not be given in case of, and if given are generally harmless, 645.
- right to, 738.
- request for, 738.
- practice, where it is requested, 739.
- motion for judgment on, 753, 756.

STATE,

- from what it may appeal in criminal cases, 269-274.
- has no general right of appeal in criminal cases, 278.
- how it may appeal, 275-285.
- effect of appeal by, 298.

STATUTORY PENALTIES,

- actions to recover, appellate jurisdiction over, 42

STAY OF PROCEEDINGS,

- appeal does not necessarily stay proceedings, 384.
- appeal in term generally operates as a stay, 385.
- bond and order of appellate tribunal is necessary when appeal is not perfected in term, 374, 386.
- supersedeas, 387.
- application for supersedeas, 388.
- effect of supersedeas generally, 389, 541.
- stay obtained by one of several appellants, 390.
- supersedeas does not give right to do what decree forbids, 391.

[*References are to Sections.*]

STAY OF PROCEEDINGS—continued.

effect of supersedeas upon self-executing judgments, 392, 393.
duration of, 394, 395.
when and how set aside, 399, 400.

STENOGRAPHER'S REPORT,

cost of is part of costs of suit, 581, n. 3.
how made part of bill of exceptions, 798, 821, 822

SUBMISSION,

by agreement, waives irregularities in notice, 146, 426.
by agreement, waives pending motion to dismiss appeal, 146,
no particular form is required in case of such submission, but it should be
in writing, 425.
what it waives generally, 426.
what it does not waive, 427.
forced submission, 428.
on call, 429.
importance and effect of, 430.
of appeals in term, 431.
notice of, 432, 435.
under the act of 1885, 433, 435.
upon application of appellee, 434.
objecting to, 436.
setting aside, 437.

SUBROGATION,

right of sureties to, 382.

SUBSTITUTION,

of personal representatives and heirs, 137.
of pleadings, 596.

SUCCESSORS IN INTEREST,

may appeal, 133, 137.

SUMMONS,

See PROCESS.

SUNDAY,

not a judicial day, 127.
when counted in determining time for appeal, 127.

SUPERSEDEAS,

in case of reserved questions of law, 243.
bond is generally required, 374, 386.
definition, 387.
application for, 388.
effect of generally, 389, 541.
in favor of one of several appellants, 390.

[References are to Sections.]

SUPERSEDEAS—continued.

does not give right to do what decree forbids, 391.
 effect on self-executing judgments, 392, 393.
 right and liabilities of sureties on bond, 396, 397.
 can not be controlled by trial court, 398.
 when and how it may be set aside, 399, 400. "

SUPREME COURT,

is the highest constitutional court, 2, 25.
 extent of legislative power over, 2.
 not required to give opinions to legislature, 4.
 can not be turned into a *nisi prius* court, 27.
 mode of procedure in, 28.
 no right to jury, 29, 30.
 territorial jurisdiction of, 31.
 has exclusive appellate jurisdiction over constitutional questions, 32.
 statutory jurisdiction of, 34.
 cases over which it has no jurisdiction, 35-36.
 equity cases, jurisdiction over, 37, 38.
 foreclosure cases, jurisdiction over, 39.
 cases involving title to land, jurisdiction over, 40.
 prosecutions for felony, jurisdiction over, 41.
habeas corpus, jurisdiction over, 41.
 actions to recover statutory penalties, when jurisdiction is in Supreme Court, 42.
 municipal ordinances, when Supreme Court has jurisdiction over cases involving, 43.
 other cases over which it has jurisdiction, 44.
 inherent powers of, 45.
 opinions, 46.
 decisions govern Appellate Court, 72.

SURETIES,

on appeal bond, authority of trial court to approve, 366.
 are generally estopped by recitals in bond, 368.
 are concluded by judgments against principal affirmed on appeal, 368.
 are not concluded by recital in bill of exceptions that they executed the bond, 368, n. 3.
 are not released by irregularity in approval of bond, 370.
 what will release, 381, 382.
 right to subrogation, 382.
 measure of recovery against, 383.
 on supersedeas bond, rights and liabilities of, 396, 397.

SURPRISE,

as cause for new trial, 852.

[*References are to Sections.*]

T

THEORY OF THE CASE,

- parties on appeal must abide by theory adopted by them in trial court, 481, 489, 490.
- illustrative cases, 491, 492, 627, 630.
- where constitutional questions are involved, 493.
- as outlined by the pleadings, 494, 655.
- as shown in the opening statement, 495.
- doctrine of election, 496.
- limitations of the rule, 497.
- exceptions to the rule, 498.
- as affecting questions of jurisdiction, 499, 501-503.
- special cases, 500.
- ruling asserting wrong theory is erroneous, 591.
- effect upon question of right to jury trial, 612.

TIME FOR TAKING APPEAL,

- limitation as to time is jurisdictional, 111.
- time can not, ordinarily, be extended by court, 112.
- may be extended in matters affecting decedents' estates, 112, n. 1, 261-267.
- may be extended in case of fraud or accident, 112, 113.
- not extended to party in fault, 114.
- diligence required, 115.
- petition for leave to appeal after time, 116.
- may be extended where delay is caused by court, 117.
- when time begins to run, 118-120.
- when right of appeal matures, 121.
- computation of time, 122-127.
- meaning of words "years" and "months," 126.
- non-judicial days, when counted, 127.
- appeal must be perfected in time, 128.
- where some of the appellants are barred, those not barred may appeal, 129.
- parties under disabilities may appeal within one year after removal of disabilities, 130.
- in cases involving matters connected with decedents' estates, 261, 263-268.
- in criminal cases, 284, 285.
- can not be extended by agreement in criminal cases, 284.

TITLE, SUITS TO QUIET,

- jurisdiction is in Supreme Court, 44.

TITLE TO LAND,

- cases involving are for Supreme Court, 40, 51, 52.

TORT,

- waiver of, election of remedies, 656.
- how error in assessment of damages is questioned in case of, 855, 856.

[References are to Sections.]

TRANSCRIPT,

- defects in may be remedied by agreement, 188.
- distinguished from record, 189.
- requisites of, 195.
- what it should contain, 196, 198.
- independent cases can not be included, 197.
- appellant may direct what shall be included, 198, 200.
- practice where it contains improper matter, 199.
- where defective judgment may be affirmed or appeal dismissed, 200, n. 3.
- authentication of, 201.
- authority of appellate tribunal over, 203.
- marginal notes, 204.
- certiorari* to correct, 216-222, 281.
- must be filed within sixty days after bond, 246, 247, n. 2.
- in case of appeal after term, 251.
- must be filed within thirty days in case of appeals in decedents' estates matters, 259, 262.
- in case of assignment of cross-errors, 421.
- must be filed before appeal can be docketed or advanced, 460.
- when appellate tribunal will assist party before transcript is filed, 507, 508.
- mandamus will lie to compel officer to certify, 516.
- when it may be withdrawn after dismissal of appeal, 536.
- rehearing will not be granted to enable parties to secure correction of, 556.

TRANSFER OF CASES,

- from one appellate tribunal to the other, 73.

TRIAL,

- by jury, no right to on appeal, 29, 30.
- without issue, waiver, 352, 682.
- by jury, when it may be demanded, 612.
- by jury, waiver of right to, 612, 685.
- mode of, discretionary power of court, 615.
- conduct of, discretionary power of court, 616.
- by jury, denial of, where right exists is prejudicial error, 654.
- conduct of, when errors are prejudicial, 671.
- mode of, how affected by doctrine of waiver, 690.

TRIAL COURT,

- appeal generally removes case entirely from, 541, 543, 544.
- appeal from interlocutory order does not completely oust jurisdiction of, 542.
- independent and collateral matters not taken from jurisdiction of trial court by appeal, 545.
- may amend record after appeal, 548.
- can not make entirely new record after appeal, 549.
- must obey mandate of appellate tribunal, 576.
- must enter judgment or proceed as directed by appellate tribunal, 576, 577.

[References are to Sections.]

TRIAL COURT—*continued*.

- is bound by the law of the case, 578.
- its authority ends when case is removed by appeal and revives only when case is remanded, 579.
- discretionary powers of, 597-622.
- presumptions in favor of acts and proceedings of, 709-725.
- duties of judge in regard to bill of exceptions, 798, 799, 810.
- should be given an opportunity to review its rulings, 827, 828.
- questions for review are generally presented to it by motion for new trial, 829, 830.

TRIAL COURT THEORIES,

- holding parties to, 489-503, 612, 627, 630.

See THEORY OF THE CASE.

V

VACATION,

- of judgment not caused by appeal, 297.
- of supersedeas, motion for, 399, 400.
- of supersedeas, form of motion for, 890.

VARIANCE,

- may be prevented by amendment of pleadings after verdict, 610, 611.
- immaterial, may be disregarded, 610, n. 2.

VENIRE DE NOVO,

- motion for is proper to direct attention to defective verdict, 327, 343.
- does not serve purpose of motion for new trial, 343.
- only reaches defects apparent on face of record, 343.
- when motion for will lie, 758-760.
- office of motion for, 761.
- time of filing motion for, 762.
- requisites of motion for, 763.
- motion for will not lie where facts are well stated in special finding, 764-766.

VENUE,

- a party who improperly obtains change of, can not avail himself of the error, 627.
- error in refusing change may be cured by subsequently granting it, 708.
- change of, although granted may be presumed to have been waived, 725.
- presumption that order as to change was proper, 725.
- application for change of, affidavit, rulings and exceptions may be brought into record by bill of exceptions, 817.
- error in granting or refusing change is cause for new trial, 848.

VERDICT,

- defects in are reached by motion for *venire de novo*, 327.
- construction of, 342.

[References are to Sections.]

VERDICT—*continued*.

rulings on, objections to, 342.
specifications of error as to rulings on, 343.
when jury may be discharged before, 621.
clearly right on evidence may render errors in instructions harmless, 643.
special, when general instructions are harmless, 645.
when erroneous rulings upon are harmless, 652.
presumptions in aid of, 724.
special, request for, 738, 739.
special, motion for judgment on, 753-756.
contrary to law or not sustained by sufficient evidence, cause for new trial, 854.

VIEW,

court may order or deny in its discretion, 619.

W

WAIVER.

of notice, 145, 146, 286, 426.
of right to appeal, 150-152, 289.
of failure to give notice in time, 175.
of failure to file appeal bond, 249, 376.
of failure to appeal in time, 285.
of errors in criminal cases, 290.
of objections by going to trial without formation of issues, 352, 470, 482, 682.
of approval of appeal bond, 369, 370, n. 3.
by common joinder, 406.
by submission by agreement, 426, 427.
by filing brief, 448.
of motion to dismiss appeal, 519.
of jury trial by failing to appear when case is called, 612, n. 3.
of jury trial by request to submit a single question to jury, 612.
of tort by action *ex contractu*, 656.
by failing to question remedy in trial court, 658, 679.
of objection that necessary parties are not before the court, 659, n. 2.
objections waived by silence or inaction are lost, 674.
what is necessary to prevent, 675.
defects or irregularities of which a party is excusably ignorant are not waived, 676, 691.
of objections to jurisdiction of person by general appearance, 677.
of objections to pleadings, 680, 688.
by failing to demur, 681.
by failing to demand decision on demurrer, 682.
of objections to rulings on demurrer, 683.
of preliminary objections, 684.

[*References are to Sections.*]

WAIVER—continued.

- of jury trial by joinder in demurrer to evidence, 685.
- of objection to ruling on demurrer to evidence by introducing evidence thereafter, 686.
- of motion directing jury to return verdict by afterwards introducing evidence, 687.
- of objections to pleadings by demurring to evidence, 688.
- of objections to admissibility of evidence by demurring to the evidence, 689.
- of objections to mode of trial, 690.
- of objections to judge or jurors, 691.
- of objections to rulings on trial by failure to except and present opportunity for review, 692.

WITHDRAWAL OF APPEARANCE,

- when permitted, generally, 677.
- mistake may be cause for permitting, 678.

WITNESSES,

- recall of, 617.
- examination of, 618, 743-749.
- separation of, 618.
- number of may be limited, 618.

WRIT,

- running beyond term is void, and may be first attacked on appeal, 333.
- of mandate, 511-517, 798.
- of prohibition, 518.

See **INJUNCTION; PROCESS; CERTIORARI.**

WRITTEN INSTRUMENTS,

- notice to produce, 740.
- may be made part of bill of exceptions by reference, 818.

Y

YEAR,

- meaning of term in statute, 126.

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